

# **Consultation on a new approach to regulating student outcomes**

**Analysis of responses to consultation  
and decisions**

**Reference** OfS 2022.39

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The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

### **Our four regulatory objectives**

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

# Introduction

## What we consulted on and why

1. In January 2022, we published a consultation seeking views on our proposals to revise the Office for Students' (OfS's) current approach to regulating student outcomes, to better achieve our regulatory objectives. We sought views on these proposals between 20 January and 17 March 2022.
2. In making these proposals, we were seeking to ensure that students from all backgrounds can achieve positive outcomes and are protected from performance that is below our minimum expectations, whatever, wherever and however they study. We see this as a consumer protection mechanism: students are likely to be paying substantial sums for their higher education and it is the aim of the OfS as a regulator of higher education to ensure that their interests are protected, and minimum expectations are in place. It is also in the interests of taxpayers that value for money is secured for the investment made in higher education, either through direct funding or via the student finance system.
3. The proposals were as follows.

- Proposal 1: Revising condition B3 and associated guidance in the regulatory framework
- Proposal 2: Constructing indicators to assess student outcomes
- Proposal 3: Setting numerical thresholds for student outcome indicators
- Proposal 5: Making judgments about compliance with condition B3, including consideration of context
- Proposal 6: Addressing statistical uncertainty in the assessment of condition B3
- Proposal 7: Taking regulatory action when a breach is identified
- Proposal 8: Timing of implementation
- Considering regulatory burden on registered providers

## Background and analysis approach

4. This was a public consultation and stakeholders were invited to share their views on 17 questions covering eight proposals by using an online survey to submit written responses.
5. We have undertaken a qualitative analysis of the responses we received to the consultation. In this document, we identify and discuss issues raised in the responses, whether or not these have led to changes to the proposals we made.
6. In addition to and in support of the OfS's own review of responses, we commissioned Alma Economics to review responses to the consultation and produce a comprehensive summary of respondents' views. The report from Alma Economics is available to view alongside this

response document on our website.<sup>1</sup> For additional context, this report contains a quantitative analysis of responses received overall and of questions where an 'agree' or 'disagree' answer was sought.

7. Responses to the consultation were submitted on the online portal or sent via email.<sup>2</sup> All responses received were reviewed and analysed.<sup>3</sup> In total, 244 responses to the consultation were received. Around 90 per cent of respondents declared they were responding on behalf of an organisation, with the remainder declaring they were responding on behalf of an individual. In addition, around 80 per cent of respondents described themselves as employees of a higher education provider and around 6 per cent as employees of charities or third-sector organisations. We also received responses from other organisations, including student representative bodies, representative bodies of registered providers, and professional, regulatory, and statutory bodies.
8. We also held a range of online webinars and workshops to explore the views of students and registered providers.

## **Final decisions and implementation of our approach**

9. Overall, there were more proposals with which the majority of respondents agreed than those with which they disagreed. The aspects for which respondents showed the greatest support were:
  - a. The proposal to consider the context of an individual provider when assessing compliance with condition B3.
  - b. The proposal to take into account a provider's compliance history in relation to condition B3 when determining eligibility for other benefits of OfS registration.
  - c. The proposal to impose an improvement notice where a breach of condition B3 is found.
  - d. The proposed approach to using measures that show the level of statistical confidence that can be placed on an indicator when considering a provider's performance in relation to numerical thresholds.
  - e. The proposed approach to assessing compliance with condition B3.
10. Conversely, there was generally disagreement among respondents with the proposed implementation of the proposed approach to regulating student outcomes. Around three-quarters of respondents disagreed with the proposed timing of implementation, almost two-thirds disagreed with the approach to constructing the student outcomes indicators and almost half disagreed with the approach to setting numerical thresholds.

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<sup>1</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/).

<sup>2</sup> Some of the email responses did not follow the structure of the consultation (for example, some consisted of a consolidated response to the consultation rather than providing a response for each question in the consultation). In these cases, the points made have been discussed in the most relevant section of the consultation.

<sup>3</sup> This includes consideration of separate documents submitted by respondents alongside their consultation responses.

11. We have decided to adopt the proposals we consulted on, with a number of changes.
12. We have decided that the revised initial condition B3 and the ongoing condition B3 will both come into effect on 3 October 2022.
13. We have published a notice of determination, which sets out transitional arrangements, including that initial condition of registration B3 will apply to applications for registration that are live at any time between 26 July 2022 and 2 October 2022.
14. We have made some changes to the proposals on which we consulted, taking into account the feedback we received. We have set out, in the sections discussing each proposal, the changes we have made from our original proposals, and highlighted significant areas where we have decided to maintain the approach we originally proposed. A summary of the changes is as follows:
  - a. We have decided to adopt the proposed drafting of condition B3, with one minor amendment to wording.
  - b. We have made a number of changes to the proposed guidance associated with condition B3. These changes are to clarify our expectations and ensure consistency across the B conditions of registration.
  - c. We have decided to adopt the cohort tracking methodology for constructing the completion outcome measure.
  - d. We have changed the wording of our approach to reviewing numerical thresholds, to say that we will 'normally' review thresholds every four years. This is intended to provide scope for a different timing of the review if there are significant changes in the regulatory or funding landscape.
  - e. We will decide the final numerical thresholds in September 2022. These will be determined using the approach to setting numerical thresholds that we have decided to adopt. We consider that the changes that we have made to our specifications for constructing student outcome measures will not have a significant effect on the sector averages or sector distribution. We therefore expect that the numerical thresholds we will set and publish in September 2022 will not be any higher than those that we consulted on in January 2022 (which are set out in Table 2), and any adjustments we make to the numerical thresholds on this occasion will be downwards. We are taking this approach on this occasion in light of the fact that this is the first time the OfS will be introducing numerical thresholds for student outcomes under this new policy approach to assessing condition B3. However, for the avoidance of doubt, when numerical thresholds are reviewed and set in the future, they may remain at the same level, or be adjusted upwards or downwards as appropriate, having regard to the data available and other relevant considerations at the relevant time.
  - f. We have decided to set out our general approach to prioritisation in our Regulatory Advice on regulating student outcomes. This is set out in the yellow box following paragraph 511.
  - g. We have decided to determine the scope of our assessment once a provider is selected via the prioritisation process on a case-by-case basis.

- h. We have decided to change our approach to clarify that a provider's 'compliance history' means compliance with decisions made by the OfS in relation to the revised condition B3. This means that we will only take into account compliance decisions made from the date when the revised initial and ongoing condition B3 come into force. We will not take into account findings made by the OfS in relation to the original version of the initial and ongoing condition B3.
  - i. We have decided to change our approach to clarify certain matters relating to our use of compliance history in mergers and acquisitions, including when a provider will be treated as being a new entity or operating a new business.
- 15. We noted in the consultation document that we were separately consulting on our general approach to the publication of information about higher education providers and said that any approach taken in future in relation to this Proposal 4 would take account of the outcomes of that consultation. Since the student outcomes consultation was published, we have issued a supplementary consultation on the publication of information about higher education providers, and we have not yet made any decisions on the publication matters consulted upon.
- 16. Given the relevance of our publication consultation to Proposal 4, we do not intend to make any final decisions on Proposal 4 until we have considered responses to our publication consultation. This will be before condition B3 comes into effect. Nevertheless, we have reviewed responses to Proposal 4 and have set out our preliminary views on the points made. In light of the responses received, we are currently minded to proceed with Proposal 4 with some changes:
  - a. We are minded to publish a primary dashboard to simplify engagement with the indicators and split indicators included in our data dashboards.
  - b. We are not minded to publish partnership data as a separate 'view' in the dashboard for the first year of implementation.
- 17. We have published amendments to the regulatory framework, which implement a revised condition B3 and accompanying guidance. These are set out in the document 'Revised Condition B3'.<sup>4</sup> We have made some minor wording changes to the guidance (from the draft guidance in Annex C of the consultation document), to better reflect both the original policy intent and any changes to the policy that have resulted from this consultation, as well as some stylistic changes for readability. We also note that, where appropriate, we intend to update the Regulatory framework to make consequential changes in light of the policy decisions we are taking now in respect of condition B3.<sup>5</sup>
- 18. We have also published new Regulatory advice on our approach to regulating student outcomes, which includes our approach to setting minimum numerical thresholds and for assessing compliance with condition B3. We also intend to update other published guidance documents to ensure they are consistent with the outcomes of this consultation.

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<sup>4</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/).

<sup>5</sup> For the avoidance of doubt, to the extent that the policy decisions taken conflict with the Regulatory framework and no corresponding consequential changes are made, the Regulatory framework will prevail.

19. We have separately published decisions about our consultation on the Teaching Excellence Framework (TEF) and on the construction of student outcome measures.<sup>6</sup>
20. In reaching our final decisions about these matters, we have had regard to our functions set out in the Higher Education and Research Act 2017 (HERA):
- a. Section 5 requires us to determine and publish initial conditions of registration and general ongoing conditions of registration.
  - b. Section 13(1)(a) allows us to impose conditions relating to the quality of the higher education provided by registered providers. We consider the outcomes delivered for a provider's students to be an essential and integral part of the quality of a higher education course.
  - c. Section 23 allows us to assess quality for the purpose of determining whether initial and ongoing conditions of registration are satisfied. Section 23 (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows us to assess the quality of higher education by reference to student outcomes. It allows us to do this by measuring by any means (whether qualitative or quantitative) the extent to which students continue with, complete and then progress to further study of a particular description or employment of a particular description from their higher education course, and to determine and publish minimum levels of student outcomes which applicable providers are expected to meet. For the avoidance of doubt, the approach to regulating student outcomes set out in this document is one aspect of our approach to assessing quality, and it sits alongside the other aspects of our assessment of quality set out in conditions B1, B2, B4 and B7.<sup>7</sup>
21. In reaching our final decisions, we have also had regard to our general duties in section 2 of HERA (and reproduced in Annex A). In establishing an approach that requires a provider to deliver positive outcomes for its students, we have placed weight on our general duties that require us to have regard to the following: the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers (section 2.1.b); the need to promote value for money in the provision of higher education by English higher education providers (section 2.1.d); and the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers (section 2.1.e).
22. In setting out our approach to risk-based regulation of student outcomes, we have placed weight on our general duty to have regard, so far as relevant, to the principles of best regulatory practice, including the principles that regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed (section 2.1.g).
23. In deciding that we will use numerical thresholds and the context in which a provider is operating to determine whether it has delivered positive outcomes for students, we have also had regard to guidance from the Secretary of State to 'ensure that decisions on regulatory intervention and registration can be made in relation to minimum absolute standards of quality

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<sup>6</sup> Further information is available on these consultations at [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/).

<sup>7</sup> See [www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/conditions-of-registration/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/conditions-of-registration/).

which apply across the whole of higher education provision' and that 'providers delivering high quality provision and strong outcomes for students should not be adversely affected by additional unnecessary bureaucracy'.<sup>8</sup>

24. In reaching our final decisions, we have also had regard to:

- the public sector equality duty
- the Regulators' Code
- the Code of Practice for Statistics
- guidance from the Secretary of State.

25. We have set out how we have had regard to these matters in Annex D and throughout the document.

26. Where relevant, we have also had regard to responses to the TEF and data indicators consultations, which were published alongside this consultation.

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<sup>8</sup> See 'Guidance to the OfS: Secretary of State's strategic priorities (February 2021)', available at [www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/).

## Overarching themes

28. A number of overarching themes emerged in the analysis of consultation responses and are set out below. Many of these points were made in response to questions 1, 2 and 17, and often repeated in responses to other proposals. Where particular aspects of these themes are also explored in more detail elsewhere in this document (for example, where they relate to a particular proposal), we have indicated this.
29. In this section, we have set out general responses to comments made in relation to:
- length and complexity of the consultation
  - consideration of contextual factors
  - interaction across different consultations
  - definition and measures of successful outcomes and unintended consequences
  - number and complexity of split indicators and data points.

### Length and complexity of consultation

30. Many respondents reported some difficulty in engaging with the material presented in the consultation owing to its length and technicality, as well as the timeframe for the consultation. Respondents frequently mentioned the challenge of having to respond to three concurrent consultations and the timeframe given to respond to all consultations together.<sup>9</sup> These points were particularly voiced by small providers and third sector organisations. Some further education colleges that responded suggested that because they are not experienced in higher education data submissions the illustrative data provided was unfamiliar to their data teams, and this was challenging for them. A very small number of responses also highlighted the challenge for students, families and non-academic audiences in general in understanding the data. On the other hand, many respondents reported that the events organised by the OfS and the illustrative data were helpful in improving their understanding of the proposals.

### Our response

31. We considered the responses suggesting that the consultation documents were too long and complex to be easily understood. In responses to our preliminary consultation during the winter of 2020-21 (the phase one consultation), where we set out initial policy proposals for condition B3, a common theme was a request for further detailed information.<sup>10</sup> We consider that the level of detail provided in the consultation was appropriate to give consultees sufficient information about proposals in order that they could understand the proposals. While we could have provided less information in order to make the consultation shorter, a likely consequence would have been respondents would have had too little information to respond fully. In addition, we chose to run the three consultations concurrently given the cross-cutting nature of

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<sup>9</sup> The OfS published three consultations in January 2022: a consultation on a new approach to regulating student outcomes, a consultation on the Teaching Excellence Framework, and a consultation on constructing outcomes and experience indicators for use in OfS regulation.

<sup>10</sup> See [www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education/](https://www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education/).

the policy proposals within them. We considered that this was helpful in allowing consultees to consider the consultation proposals in the round and having regard to related policy proposals and regulatory context. This has facilitated informed responses from consultees.

32. We also consider that the consultation on regulating student outcomes published in January 2022 was part of a developing set of proposals for how the OfS proposed to regulate quality and standards. This means that for many respondents this consultation presented a continuation of the themes and concepts which we had set out in earlier consultations.

### **Our phased approach to consulting on a revised approach to regulating quality and standards**

- In our **'phase one consultation'** published in November 2020 we set out proposals for:
- how we would define 'quality' and 'standards' more clearly for the purpose of setting minimum expectations for all providers
- how we would set numerical baselines for student outcomes and assess a provider's absolute performance in relation to these
- how we would clarify the indicators and approach used for risk-based monitoring of quality and standards
- how we would clarify our approach to intervention and our approach to gathering further information about concerns about quality and standards.

A frequent response to the phase one consultation was that respondents asked for greater detail and further information about our policy proposals. We considered it was appropriate to respond to this consultation by ensuring that the consultation published in January 2022 was as comprehensive as possible.

Our **'phase two consultation'** was published in July 2021.<sup>11</sup> This consultation built on phase one. It proposed a revised set of conditions of registration that set out minimum expectations for quality and standards for all registered providers, and new conditions of registration for those seeking to join our Register. It also included revised guidance about our proposed approach to gathering evidence and monitoring compliance.

Our **'phase three consultation'** was published in January 2022.<sup>12</sup> This consultation built on the earlier two consultations and set out three sets of proposals:

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<sup>11</sup> See [www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/changes-to-our-approach/phase-two-high-quality-courses-and-reliable-standards/](https://www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/changes-to-our-approach/phase-two-high-quality-courses-and-reliable-standards/).

<sup>12</sup> See [www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/changes-to-our-approach/phase-three-student-outcomes-and-the-tef/](https://www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/changes-to-our-approach/phase-three-student-outcomes-and-the-tef/).

1. A consultation on setting minimum expectations for the outcomes that universities and colleges deliver for students. This is the consultation that we are responding to in this document.
2. A consultation on a new Teaching Excellence Framework, which would give ratings to universities and colleges, providing an incentive for them to deliver excellent teaching and learning for their students, over and above the minimum expectations. We refer to this throughout this response document as the 'TEF consultation'.
3. A consultation on the way we proposed to construct, present and interpret the data which would form the evidence base for regulating student outcomes and would inform the TEF assessments. The same data also supports our work to ensure that all students, irrespective of their characteristics, have equal opportunity to benefit from their higher education. We refer to this throughout this response document as the 'data indicators consultation'.

33. The individual phase three consultations contained sufficient information to be read as standalone proposals, but our view remains that it was important to provide respondents with the opportunity to read the detailed proposals across all three consultations if they wished to. An alternative could have been to release consultations sequentially, but we consider this would have been inappropriate because respondents needed to understand the proposals in the round. We would have put respondents in a position of providing views, for example, on the construction of data indicators, without a complete understanding of the effect on the numerical thresholds that might be proposed in the assessment of condition B3.
34. We recognised how important it would be for an individual provider to have access to data that demonstrated how the proposals might affect it directly. We therefore prepared and released to individual providers a range of data outputs (in a range of alternative formats) and technical specifications, so they could understand the direct effect of the proposals for them. We published anonymised data at a sector level to enable other respondents to understand the effect of our proposals.
35. We also consider that we took steps to help respondents to engage with the proposals we were making in the phase three consultations. For example, we summarised the proposals in video presentations on our website, hosted webinars, held meetings with students, higher education providers and their representative bodies to discuss the proposals, and answered questions that were raised.
36. We noted the view of some respondents that the time given to respond to the consultations was too short. The consultations were open for eight weeks and we consider that this was appropriate because it balanced the response time for respondents with the benefits of setting minimum expectations for student outcomes in the interests of students. We consider that an eight-week period was sufficient for respondents to understand the proposals and develop a response. There was and remains significant student and taxpayer interest in moving forward the proposals that we first set out in November 2020, as these were intended to establish

minimum expectations that would protect all students by mitigating the risks of harm to students who may be disadvantaged by poor quality courses. Those risks include, for example, that students may not receive value for money, or that they may study for longer than otherwise necessary at providers where there is too high a risk that they may not be able to achieve positive outcomes. We also had regard to guidance from the Secretary of State for Education that stated that he 'would like the OfS to progress rapidly to ensure that a robust enhanced regulatory regime can be operational as soon as possible'.<sup>13</sup>

37. We have been pleased with the detail and comprehensiveness of the responses received from a wide variety of respondents. We received nearly 250 responses to the consultation, which included responses from all different types and sizes of registered providers. Our view is that the clarity and focus of those responses demonstrated that stakeholders were able to fully engage with and understood the range of material published.
38. We recognise that many of the points raised about the complexity of the proposals may also have relevance to how we can effectively implement our proposals, because higher education providers will want to fully understand our new approach as it is implemented. We are therefore committing to delivering support to all providers as we adopt our new approach. This will include publication of guidance and supporting materials, training sessions for staff at higher education providers (both unregistered and registered), and publication of outcomes from the first round of compliance assessments to increase general understanding of our approach to the consideration of context.

## **Consideration of contextual factors**

39. There was support for the specific proposals about considering individual providers' context when assessing compliance. However, in relation to other proposals many respondents sought further information about how the OfS would consider contextual factors if we implemented our proposed approach to regulating student outcomes. Some respondents asked for further information or made suggestions about implementation in relation to:
- a. How the OfS will consider context and how it will be evaluated (for example, what weight will be given to context).
  - b. Which factors will be considered by the OfS as context (such as providers' benchmarks or local area characteristics).
  - c. How the OfS should prioritise assessment (points relating to prioritisation are covered in the 'Prioritisation' section below).

## **Our response**

40. We welcome respondents' general support for the inclusion of context in our assessment process. We drafted the proposed condition B3 so that the OfS would always need to take account of a provider's context when making a decision about compliance. This principle is integral to how we intend to implement our approach to assessment.

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<sup>13</sup> 'Guidance to the Office for Student (OfS) – Secretary of State's strategic priorities' was issued to the OfS in February 2021 and was the most recent relevant guidance in force when the decision about the length of the consultation window was taken. The guidance letter can be found at [www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/).

41. We recognise that some respondents wanted us to set out, in detail, the way in which contextual factors may affect our judgement of whether a provider is compliant with condition B3. We have set out in our assessment process (see Regulatory advice 20) the opportunities that a provider will have to submit evidence to inform our judgement about whether the outcomes it has delivered for its students are positive. Our intention is not to limit our discretion by adopting a prescriptive list of contextual factors we will consider. If we did this, it would likely have unhelpful consequences, because it would either result in an unworkably long list of contextual factors, or prevent a provider raising contextual factors that are unique to its circumstances.
42. We note the responses requesting further information on precisely how the OfS will place weight on different contextual factors. We do not intend to publish further specific information on how the OfS will balance contextual factors. This is because the weight that we may place on different contextual factors will vary depending on the circumstances of the particular case, and, rather than producing and applying prescriptive guidance, we intend to exercise our discretion to place particular and appropriate weight on certain contextual factors, having regard to the particular facts and issues in any given case. This approach is in line with our principles-based approach to regulation as set out in the regulatory framework. We take this approach because the higher education sector is diverse, and the imposition of a narrow rules-based approach would risk leading to a compliance culture that stifles diversity and innovation and prevents the sector from flourishing.
43. Finally, we think that there is likely to be significant value in publishing the outcomes of assessments in relation to condition B3, including those where we find compliant and non-compliant behaviour. As explained under Proposal 4 (and subject to our final decisions on that proposal), we continue to propose that we would normally expect to publish information about the assessments we undertake after we have made final decisions. We expect that this approach will enable providers to understand how we have weighed different contextual factors in practice.

## **Interaction across different consultations**

44. Another overarching theme was a request for further information about the interaction between proposals in this and the TEF and data indicator consultations that were published at the same time. The most frequently raised question was about the impact of a breach of condition B3 (particularly where the breach might relate to relatively small areas of provision) on eligibility for the TEF, with respondents asking for further information about the impact of a breach on eligibility and the timing of decision-making about compliance with condition B3 and TEF assessments. Several respondents suggested that the proposed timing for condition B3 assessments would mean that a provider might prepare a TEF submission only to discover later that it was ineligible because the OfS had found the provider to be in breach of condition B3.
45. A smaller number of respondents requested further information about the links between the phase three consultations and the Department for Education (DfE) consultation on higher education reform. Generally, these respondents argued that the interaction with the consultation published by the DfE on higher education reform made the consequences of our proposals unclear and difficult to predict. The DfE consultation was published on 24 February 2022 and set out proposals in relation to student number controls, minimum eligibility requirements for access to student loan funding, foundation years, eligibility for a state scholarship, and growing high quality Level 4 and 5 courses. The consultation included

proposals to ‘incentivise high quality provision by considering the possible case for proportionate student number controls [...] as a lever to tilt growth towards provision with the best outcomes for students, society, and the economy’. The DfE consultation stated that if it implemented any such student number controls it would consider coherence with the OfS approach to regulating quality and standards, including condition of registration B3. The DfE has not published the outcomes of this consultation.

## Our response

46. As set out in our response to the overarching theme about the length and complexity of the consultations, we take the view that it was helpful to publish all three consultations together so providers could access detailed information about all the proposals and could understand the interrelationship between them. As noted in paragraph 33, we took this approach in part because of points raised in our phase one consultation where respondents said they were unable to comment in detail until a suite of more detailed information was published, and sought information about alignment between condition B3 and the TEF. We consider that it was appropriate to respond to these requests by publishing the consultations at the same time, and the benefits in allowing respondents to understand the proposals in the round outweighed the possible reduction in burden for providers in considering the consultations sequentially. One advantage of publishing the three consultations together is that it enabled us to review responses to them all at the same time and therefore to identify any implications and unintended consequences of the combined effect of our proposals. It has also enabled us to more efficiently and effectively plan a timetable for the implementation and delivery of the proposals.
47. We await the outcome of the recent DfE consultation on higher education reform and will work with the department to take forward any outcomes.
48. We have already stated that we will consult separately, and at a later date, on proposals for setting separate numerical thresholds for some courses, including HTQs and credit-only provision that might be funded in future by the Lifelong Loan Entitlement (LLE). This will, should it be necessary and appropriate, enable the OfS’s regulation of student outcomes to adapt to any changes in the higher education system that are generated by the government’s reforms.
49. Respondents asked about the impact of a breach of condition B3 potentially resulting in a provider being ineligible to participate in TEF, particularly where the breach relates to small areas of provision. With regard to points about the timing of B3 assessments in relation to eligibility for the TEF, we take a risk-based approach to regulation and we set out in our proposals that we would not assess every single indicator that falls below a numerical threshold, or every instance of possible non-compliance with condition B3. Rather we will prioritise our investigations, as set out in Proposal 5. Similarly, our ongoing assessment of compliance in relation to conditions B1, B2, B4 and B5 is prioritised according to the risk posed to students and taxpayers.
50. For this reason, the TEF consultation set out that, for the purpose of participating in the TEF, a provider would be eligible unless it had been found by the OfS to be in breach of one or more of the B conditions. This therefore requires the OfS to have undertaken specific regulatory actions against a provider, with the provider having the opportunity to make representations, before there is a finding that a breach has occurred. This being the case, a provider may have

individual indicators that are below the numerical thresholds used for the purpose of condition B3 but nevertheless remain eligible to participate in the TEF.

51. We have set out further detail of how the timelines for the TEF and the assessment of condition B3 will work for registered providers in our response to Proposal 8.
52. To confirm that each provider participating in the TEF was not in breach of condition B3 would require OfS to undertake a comprehensive assessment of all participating providers across all indicators and split indicators. This would not be consistent with our risk-based approach, would place undue burden on providers and would not be an efficient use of OfS resources.

## **Definition and measures of successful outcomes and unintended consequences**

53. Our consultation set out how the proposed condition B3 would require a provider to deliver positive outcomes for students on its higher education courses. We proposed the use of three outcome measures that captured students' continuation, completion and progression into positive outcomes (including managerial and professional employment, further study and several other outcomes such as travelling and caring).
54. Respondents frequently suggested that the approach proposed by the OfS within condition B3 excluded the wider benefits of higher education for students as well as the societal benefits of higher education, such as: increased confidence for students, learning gained, broader cultural capital, orderly conduct, independence, lower offending rates, less need of welfare support, and better health outcomes. Respondents to the consultation offered limited suggestions for what methods should be used to measure these outcomes. Those suggestions that were made included introducing new measures for learning gain, or additional qualitative surveys of students' views during their study.
55. According to these respondents, using what they described as a narrow measure of positive outcomes would incentivise providers to try to 'game' the system and to recruit students who were more likely to achieve what the OfS had proposed to define as positive outcomes. Respondents argued that this would adversely affect students from more disadvantaged backgrounds because it would result in providers being 'risk averse' in the students they choose to admit, and therefore limit access to higher education for students they considered at higher risk of not continuing in or completing their courses, or progressing into positive outcomes.
56. Several respondents suggested that registered providers would reduce academic standards to make it easier for students to pass academic assessments in order to ensure that more students would continue or complete their qualification. Others suggested that the proposals might result in unintended grade inflation because there was a link between students achieving a 'good degree' and going on to secure managerial or professional employment. Some respondents called on the OfS to monitor whether such undesired behaviours are taking place. Some respondents suggested that providers would close courses in an unplanned way, with negative consequences for students, rather than take action to improve outcomes for students who may study on those courses.

## **Our response**

57. We note respondents' views that our definition of positive outcomes is too narrow to reflect the wider benefits of higher education for students and society. Our view remains that it is important that the requirements we place on providers are clearly expressed in a condition of registration, in order for us to effectively regulate the sector. To do this, we need to set out how

we would measure the proportion of students achieving a positive outcome for the purposes of our regulation. We continue to consider, for the reasons set out below, that the measures we proposed are appropriate. However, we want to be clear that our use of these definitions of positive outcomes, in this context, does not mean that we do not consider that there are wider benefits of higher education for individuals or cohorts of students and society.

58. We consider that the proposed student outcome measures are well understood and replicable across providers without introducing additional data burdens on the sector. We considered whether it would be appropriate to supplement these outcomes by including further outcome measures that would provide information on the other, wider benefits that some respondents suggested; for example, measuring learning gain, ongoing surveys of student views, or progress while studying. In addition, we have had regard to respondents' comments about complexity, the number of indicators in our proposed approach to assessing condition B3 and increased regulatory burden. Our view is that there are not reasonable measures currently in place to measure these wider outcomes that could be used for all providers. To measure these wider benefits, we would therefore need to introduce further data collections or surveys of students' views. Our view is that if we sought to introduce these further outcome measures, this would add to complexity and create substantial additional regulatory burden.
59. We note that parts of the higher education sector are developing different frameworks for measuring wider outcomes for students, such as the Universities UK quality assurance framework. These frameworks, and other data developments in the sector, may provide a route to developing broader definitions of 'positive outcomes' that are replicable across all registered providers. We will remain open-minded about whether it may be appropriate to consider such measures for inclusion in our minimum regulatory requirements in the future. If we choose to develop or adopt other measures of positive outcomes, we would expect to discuss these with the sector during development and we would expect to conduct a formal consultation prior to implementation where appropriate.
60. We noted comments made by respondents about the risk that our choice of student outcome measures would incentivise providers to game the system by selecting students who are more likely to achieve positive outcomes, rather than taking action to seek to improve the quality of the higher education that they provide. We note that the English higher education sector is generally high performing, and many providers already support their students to achieve outcomes that are among the best in the world. Our approach is designed to ensure that our regulation maintains and strengthens the sector and its international reputation, and that all providers meet our minimum expectations for student outcomes. Our regulatory approach will focus on setting minimum expectations for the sector, and it deliberately seeks to reduce regulatory burden on most providers in the sector. We do not agree that this regulatory approach would lead to any meaningful number of providers choosing to game the system rather than improving student outcomes in response to the OfS's minimum expectations.
61. We take very seriously respondents' concerns that registered providers may take steps to reduce access for students from underrepresented groups because they are prioritising selection of students who will most likely achieve positive outcomes, or that providers may lower their academic standards in order for students to achieve positive outcomes.<sup>14</sup> We

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<sup>14</sup> We use the term 'students from underrepresented groups' throughout this consultation. It includes all groups of potential or current students for whom the OfS can identify gaps in equality of opportunity in different parts of the student lifecycle.

consider that our wider regulation, including our regulatory requirements for access and participation will mitigate these risks. In addition, we will take steps to increase our monitoring to identify instances where this may be the case.

62. Our approach to regulating student outcomes is complemented by our recently revised approach to regulating other aspects of quality and standards.<sup>15</sup> Taken together, these conditions of registration are designed to ensure a minimum level of protection for all students and taxpayers. Our regulation of access and participation plans (APPs) requires applicable providers to set targets to improve equality of opportunity. Our requirements for quality in condition B4 include that awards must be credible, and condition B5 sets out that the standards of courses must appropriately reflect sector-recognised standards. Therefore, providers seeking to improve their performance in relation to student outcome measures will need to do so in a way that also ensures compliance with the OfS's regulatory requirements in respect of quality, standards and equality of opportunity. We therefore consider that the interaction of our regulatory requirements means that providers will not act to game the system in the way described by some respondents.
63. If such cases did arise, we would expect to investigate whether those providers were compliant with other conditions of registration, including (but not limited to) conditions A1, B1, B2, B4 and B5. If we found a provider was not complying with our conditions or other regulatory requirements, we would take further regulatory action where appropriate. In addition, any provider with degree awarding powers (DAPs) that lowered its academic standards, or reduced the rigour of its curriculum or assessment, to secure compliance with condition B3 would be unlikely to be operating those powers securely. Such behaviour would suggest the provider was failing in its responsibilities to maintain quality and to set and maintain standards, which are core requirements for any provider with its own awarding powers. Organisations with degree awarding powers are expected to demonstrate that the standards that they set and maintain are consistent with sector-recognised standards and that assessment and awards are credible. We would therefore be likely to investigate whether it was appropriate for any provider that behaved in this way to continue to hold degree awarding powers.
64. Finally, we note respondents' suggestions that providers may choose to close courses rather than take steps to improve student outcomes. We recognise that this is a possible consequence. We therefore set out in our proposals (in the guidance associated with the proposed new condition – see paragraph 21 of Annex C) how we would deal with a provider making decisions to close courses. This means that if we undertake an assessment of an

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In determining the groups falling within this definition, the OfS has given due regard to students who share particular characteristics that are protected under the Equality Act 2010, as well as students who are otherwise underrepresented or disadvantaged. When referring to underrepresented groups, the OfS considers this to include, among others: students from deprived areas, areas of lower higher education participation, or both; some black, Asian and minority ethnic students; mature students; and disabled students (whether or not they are in receipt of Disabled Students Allowance). There are some student groups with protected characteristics under the Equality Act 2010 for whom the OfS has been unable to determine whether they are underrepresented at different points of the student lifecycle, because data is either collected at a national level, but with gaps in disclosure and absence of comprehensive data (for example in relation to religion or belief, sexual orientation and gender reassignment), or not collected at a national level (for example in relation to marriage and civil partnership, and pregnancy and maternity).

<sup>15</sup> For more about our revised approach to regulating quality and standards see [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/).

indicator that is below a numerical threshold, and the provider has closed one or more of the courses that contributed to that indicator, we will interrogate the timing and the provider's rationale for taking that action and would consider whether a provider had:

- taken action to improve its performance before the OfS's interest
- supported its students
- drawn lessons from its under-performance and applied, or had an intention to apply, those to its other courses
- sought to evade regulatory action by closing courses with weak performance and launching new courses in their place.

65. We consider that we have the regulatory tools necessary to take action to avoid the negative consequences that some respondents raised. We also agree with the respondents who suggested we should monitor the behaviour of providers carefully in order to identify such behaviour. We will consider how we can achieve this through our general monitoring activities, which may involve consideration of data and other sources of regulatory intelligence, such as notifications from students and other third parties, and any evaluation of our approach.

### **Number and complexity of split indicators and data points**

66. We proposed to use a reporting structure for each student outcome measures (continuation, completion and progression) that included separate indicators for each combination of mode and level of study. These indicators would then be 'split' by different course and student characteristics.

67. Some respondents argued that the proposed indicators would result in a very large volume of indicator and split indicators, which would put human and financial resource pressures on providers by creating a new requirement to analyse their performance in relation to these indicators and split indicators. These respondents suggested that additional resources would be needed both to allow sufficient time to analyse the data, but also to train staff who will undertake this analysis, which they considered is more complex than for previous indicator sets (for example, indicators published by the Higher Education Statistics Agency (HESA)). In addition, a few respondents suggested that the volume and complexity of indicators and split indicators would not allow providers and the OfS to focus on priority areas, and that this amount of information would not be informative for students.

### **Our response**

68. We recognised that the number of indicators we proposed to use and publish would result in a significant number of indicators and split indicators to show different student outcomes at a sector and provider level. The alternative to this approach would be to rely on much smaller number of indicators, but this would mean that we would be unable to identify and act where pockets of higher education were below our minimum expectations and therefore that we would not deliver our policy intention to protect the interests of students in respect of receiving a minimum level of quality wherever, whenever and however they study. It would also mean that we would not be able to present information about differently structured higher education and differences between student and course characteristics. Presenting information about indicators and split indicators was widely supported in responses to this and the phase one consultation.

69. Publication of such information would provide confidence in the regulatory system, help to inform students' decisions about what and where to study, and act as an incentive for providers to understand and improve their performance if necessary. In the interests of transparency, we therefore do not consider that the alternative approach of using and publishing a smaller number of indicators would be appropriate, as it would present a partial picture of performance.
70. We note comments that the number of indicators and split indicators will not allow us to focus on priority areas. We disagree, as we will set out a clear approach to prioritisation, both in general and for specific years. Our view is that our approach to prioritisation will enable us to focus on areas of greatest risk.
71. However, we have listened carefully to the comments made by respondents and intend to make changes to the presentation of our data to allow users to engage with the indicators and split indicators in different 'layers'. We are doing this by introducing a dashboard that focuses in the first instance on provider-level indicators. We are also minded to introduce ways for users to filter the dashboards so they can easily identify indicators and split indicators that are below our minimum numerical thresholds. Further details of these possible changes can be found in Proposal 4.
72. We recognise that, if we proceed with publication of the data dashboards, some providers would welcome further support in understanding them. We intend to provide training through the first year of implementation as one of several measures to reduce the potential impact, particularly on providers that may have more limited access to resources. We also recognise that published data will be of interest to a range of audiences. To help with accurate interpretation of the data, we intend to provide commentary explaining the construction of the data and information to help users understand any regulatory action we have taken.

# Proposal 1: Revising condition B3 and associated guidance in the regulatory framework

## Questions relating to Proposal 1

**Question 3:** Do you agree or disagree that the proposed wording of condition B3 will enable the OfS to meet its policy objectives? If you disagree, what changes do you think are necessary to do so?

73. Proposal 1 set out how we proposed to amend condition B3 to reflect our proposed approach to regulating student outcomes, and to ensure that the requirements we place on providers are clearly expressed in a legally binding condition of registration. We also set out proposals to amend the guidance accompanying the condition.

## Responses relating to Proposal 1

74. Proposal 1 set out the proposed wording of condition B3, which would require a provider to deliver positive outcomes for students on its higher education courses.
75. We also proposed to amend the guidance that accompanies the condition, including by outlining our approach to setting numerical thresholds and assessing whether the condition is satisfied by an individual provider at initial registration and on an ongoing basis. The draft guidance was set out in Annexes C, E and F of the consultation.
76. We explained that Proposal 1 would amend the regulatory framework. This would mean a change in the requirements placed on all registered providers and any provider applying for registration.
77. Respondents were asked whether they agreed or disagreed that the proposed wording of condition B3 would enable the OfS to meet its policy objectives. Over half of respondents disagreed, while around one third of respondents agreed and a small number of respondents declared that they didn't know.
78. Most respondents to this question focused on general points about how condition B3 could allow us to meet our policy objectives rather than the proposed wording of the condition itself. These points are addressed, together with our response, in paragraphs 139 to 202 below. We have also set out where specific comments and suggestions on the wording of the condition were included in responses. These are summarised and listed below along with our response.
79. The key general points made by respondents included:
- a. Comments that measures of successful outcomes are narrow and out of providers' control (we have responded to these points in the general themes section).
  - b. Comments that the proposed indicators may negatively affect the OfS's policy objectives and increase burden.
  - c. Requests for additional information about how the OfS will consider a provider's context in its decision-making.

d. Questions about non-recognised higher education courses and apprenticeships.<sup>16</sup>

e. Comments about potential impact on equality of opportunity.

80. The small number of other points made by respondents are summarised at the end of this section.

81. Some of the wording we included in the proposed condition and accompanying guidance was the same as draft wording contained in our recent consultation on other B conditions (and accompanying guidance).<sup>17</sup> Since our student outcomes consultation was issued, the draft wording of the other B conditions and guidance has been finalised.<sup>18</sup> In some cases, this wording was amended after the consultation. In light of those amendments, we have considered whether it was appropriate to make changes to the wording of condition B3 and guidance (as set out in Annex C of the consultation). In some cases, we have concluded that this would be appropriate and we have indicated where that is the case below.

### **Proposed text**

B3.1 This condition applies to the quality of higher education provided in any manner or form by, or on behalf of, a provider (including, but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider).

### **Respondents' comments relevant to B3.1**

82. Many respondents suggested that the scope of the condition was too wide and the paragraph should not extend to all higher education. In particular, some respondents argued that it should not include non-recognised higher education courses and apprenticeships. Respondents suggested that this would result in an expansion in the OfS's remit. They also suggested that the inclusion of non-recognised higher education courses and apprenticeships would increase regulatory burden for providers and regulatory overlap with other regulators (because these courses are already subject to inspection by Ofsted). Some respondents suggested that this would disincentivise providers from delivering this type of course. Further points were made about the scope of condition B3 and its application to specific types of courses. These are discussed in paragraphs 163 to 177.

83. One respondent argued that the condition should not include within its scope courses that a provider validates only, because awarding bodies should not hold the same responsibility for student outcomes as teaching providers (given the discrete role validating-only providers have in relation to courses delivered by a partner). They also argued that there was not sufficient

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<sup>16</sup> 'Non-recognised higher education courses' are courses that are 'not eligible for OfS funding' (this is how we described these courses in our consultation on regulating student outcomes). These courses have also been described as non-prescribed courses. Respondents to the consultation used all three terms. We have used 'non-recognised higher education courses' in this document, to be consistent with the other consultation responses we are publishing.

<sup>17</sup> This consultation concerned conditions B1, B2, B4, B5, B7 and B8, and is available at [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/).

<sup>18</sup> See [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/).

evidence that including validated-only courses within scope of condition B3 would support the assessment or improvement of student outcomes.

84. A further comment was that the wording of the condition should state how it relates to the OfS's wider regulation of quality and standards through the other B conditions.

## **Our response**

85. We note respondents' view that the scope of the condition is too wide. We have set the scope of the condition (in B3.1) deliberately widely so that it can, in principle, apply to higher education provided in any manner or form by, or on behalf of, a provider. However, in practice, a provider's obligations under the condition are limited by B3.3 and B3.4. The effect of B3.3 and B3.4 is that a provider is only required to deliver positive outcomes in the areas covered by the 'indicators' and 'split indicators' (which are defined by the OfS in technical documents from time to time).
86. This means that we would not, for example, be assessing student outcomes for transnational education students, as these students are not covered by the current definitions of indicators and split indicators. Likewise, we will not be assessing progression outcomes for students on non-recognised higher education courses, because they are not included in the Graduate Outcomes (GO) survey. The OfS may decide to make changes to the definitions of the indicators and split indicators in the future (by amending the technical documents), which would have the effect of changing the scope of a provider's obligations under the condition. However, we are committed to consulting further if we wish to widen or amend the scope of the indicators and split indicators.
87. The wording of B3.1 will create stability in our approach, and prevent the need for further consultation on how we regulate student outcomes (and the drafting of condition B3) each time it may be appropriate to introduce new student outcome measures or new aspects of existing student outcome measures, while also ensuring that we consult on whether to add or amend measures. For example, before introducing requirements for providers to comply with condition B3 for modular provision funded under a future LLE system, we would envisage a consultation focusing on the definition of an indicator (and the proposed numerical threshold value), rather than consulting on a different approach to assessment of compliance.
88. We disagree with concerns expressed by some respondents (with reference to non-recognised higher education and apprenticeships) that the proposed scope of the condition represents an expansion in the remit of the OfS, as well as points about overlap with other regulators' activities and increased regulatory burden. We consider that we have clear legal jurisdiction to regulate any activities of providers that are directly or indirectly connected with higher education and that, in any event, the scope of our proposals remains appropriate because this is consistent with our policy aim that all students, regardless of what or where they are studying, are entitled to the same student protection in relation to the quality of their course. We have set out some specific reasoning for including apprenticeships and non-recognised higher education within the scope of condition B3 below: for apprenticeships see paragraphs 174 to 178 and for non-recognised higher education see paragraphs 164 to 173. Further, where a course fell within the regulatory remit of another regulator, we would give consideration to that in our approach to monitoring and intervention, with a view to minimising regulatory overlap and burden. We have further mechanisms for reducing regulatory burden and regulatory overlap for apprenticeships, which are discussed in particular in paragraphs 133 to 135.

89. We note respondents' request for a statement of interaction between different conditions relating to quality and standards. Respondents did not expand on their reasons for this request, but we have understood this to mean that respondents consider there is value in providers and others understanding our approach to regulation of quality in the round. We agree that there is value in continuing to explain our overall approach to regulating quality to the sector and other users. We have already set out how the OfS approaches regulation of quality and standards in general terms, in our strategy and in the regulatory framework. We also take steps to improve the information that is available on our website about our approach. We do not think that the drafting of the condition is the appropriate place to provide such information, in the interests of avoiding excessive detail and length.
90. We considered the response that argued that the condition should not include within its scope courses that a provider validates only. We consider it is appropriate to include such courses in the scope because each registered provider holds responsibility for the quality and standards of all of its higher education courses, irrespective of the organisation that delivers them. We continue to take the view that it is appropriate to focus the attention of all providers in a partnership on any courses that do not meet our minimum expectations, and consider that any burden created in doing so is appropriate, having regard to reasonableness and proportionality and the need to ensure our regulation protects the interests of all relevant students.

## Decision

91. We have decided to adopt the wording in condition B3.1 as proposed.
92. We have made changes to the wording in paragraph 6 of the guidance related to condition B3.1, to be clear that a provider's obligations under the condition are set by B3.3. and B3.4.
93. We have also made changes to the wording in the guidance to ensure consistency across the B conditions of registration. This has arisen as, following our phase two quality and standards consultation in summer 2021, the draft wording of the other B conditions and guidance was finalised after our student outcomes consultation was published. The changes to the guidance related to condition B3.1 are as follows:
- a. Paragraph 1 – we added 'or courses leading to microcredentials' for the reasons explained at paragraph 38 of the Quality and standards consultation outcomes document.
  - b. Paragraphs 2 and 4 – we have made small drafting changes to be clear that the condition applies to all types of partnership arrangement, as also explained at paragraph 444 of the quality and standards consultation outcomes document.

### Proposed text

B3.2 This condition applies as an initial and general ongoing condition of registration for each **relevant provider** and as a general ongoing condition of registration for any provider that is not a **relevant provider**.

## Respondents' comments relevant to B3.2

94. We did not receive any specific comments about this proposal.

## Decision

95. We have decided to adopt the wording in condition B3.2 as proposed.
96. We have decided to adopt the guidance related to condition B3.2 as proposed.

### Proposed text

B3.3 Without prejudice to the scope of B3.1, the provider must deliver positive outcomes for students on its **higher education courses**.

## Respondents' comments relevant to B3.3

97. Some respondents commented that the OfS should reword 'must deliver' to 'must enable' or 'must provide opportunities to enable'. Respondents suggested that, in general, student outcomes were not solely the responsibility of providers, but a partnership with students, and therefore it was not within a provider's direct control to 'deliver' positive outcomes. Similarly, respondents suggested that providers could not 'deliver' positive outcomes because, in their view, providers were not responsible for students' choices and successes during their studies and after completing their qualification. It was commented that 'must enable' or 'must provide opportunities to enable' would be a more appropriate reflection of the nature of higher education study. Respondents particularly made these comments in relation to the progression student outcome measure. One respondent suggested that 'deliver' meant that they would need to 'deliver employment to our graduates and therefore we would fail this condition by default'.
98. Other respondents suggested that the OfS replace the phrase 'positive outcomes' with 'positive regulatory outcomes', or rephrase paragraph B3.3 to require providers to meet 'minimum regulatory expectations'. It was suggested that this would more accurately reflect what the condition requires providers to achieve, because of respondents' views that it measures a narrow set of outcomes. Respondents suggested that changing the drafting in this way would make it clearer to students and others that the 'outcomes' were those identified by the regulator rather than wider outcomes (such as those highlighted in paragraph 54).

## Our response

99. We have considered the comments about the wording in the condition 'the provider must deliver positive outcomes'. We have interpreted the underlying point to be that the phrase 'must deliver' places obligations on a provider to deliver positive outcomes in all circumstances, which is overly onerous because a provider does not have direct or sole control over the choices students make and the opportunities that are available to them. We do not agree that this is the case, for the reasons explained in the following paragraphs.
100. 'Must deliver' is used in the condition to describe the requirement placed on a provider in relation to each of the student outcome measures (continuation, completion and progression). For example, assuming a provider has sufficient data, it means that a provider must deliver continuation rates for its students that are at or above our minimum numerical thresholds, unless we judge that the provider's context means that the continuation rates it delivers can nevertheless be considered a positive outcome. 'Must deliver' in this context is therefore relatively narrow, in that relates only to the student outcomes, rather than requiring providers to deliver positive outcomes in any wider sense (as was suggested by some respondents). Further, the condition gives providers flexibility to determine how to deliver

positive outcomes as long as they comply with the other conditions of registration. (See paragraphs 60 to 63 for more on the interaction between condition B3 and other conditions of registration.)

101. We disagree with the argument a few respondents made that the outcomes of their students are entirely outside of their control, because our view is that providers can substantially influence outcomes for students through the quality of the education they provide and the support and advice they offer to students before and, in some cases, after graduation. Indeed, we intend to recognise the many ways in which providers achieve this through the TEF.
102. However, we recognise that there may be some circumstances where students do not achieve positive outcomes for reasons that may be outside a provider's direct control (for example, because of the particular circumstances of some students). We have considered the comments made by respondents and think that our approach to setting minimum numerical thresholds, together with our approach to assessing compliance with condition B3, adequately takes account of such circumstances.
103. The method we have adopted for setting minimum numerical thresholds will take into account both the average performance in the sector and the historical effect of different student and course characteristics. The result of this approach will be to create a requirement for a minimum proportion of students to achieve positive outcomes and will not, in practice, require **all** students to achieve positive outcomes. We consider that this means that factors that may genuinely be beyond a provider's control will have been accounted for in setting the thresholds.
104. We have set out in paragraph 618 that we will in September 2022 publish the final numerical thresholds, which will be determined using the approach to setting numerical thresholds that we have decided to adopt (see paragraph 408). We expect that the numerical thresholds we will set and publish in September 2022 will not be any higher than those that we consulted on in January 2022, and any adjustments we make to the numerical thresholds on this occasion will be downwards. We are taking this approach on this occasion in light of the fact that this is the first time the OfS will be introducing numerical thresholds for quality under this new policy approach to assessing condition B3. However, for the avoidance of doubt, when numerical thresholds are reviewed and set in the future, they may remain at the same level, or be adjusted upwards or downwards as appropriate, having regard to the data available and other relevant considerations at the relevant time. As set out in paragraph 376, we will normally review numerical thresholds every four years, in alignment with the TEF cycle. This means that, once we decide upon and set numerical thresholds in September 2022, we expect those numerical thresholds to remain at the same level until the expected review in 2026. Where we are proposing changes to our numerical thresholds or we otherwise consider it appropriate to seek views, we will consult.
105. For the avoidance of doubt, when we review numerical thresholds, we expect to use the same approach to setting numerical thresholds that we have decided to adopt as a result of this consultation. We do not intend to consult on that approach unless we are proposing changes to the approach itself or we otherwise consider it appropriate to seek views.
106. Our assessment of context for an individual provider will offer a mechanism to identify cases where a provider's context justifies the outcomes it delivers for its students. For example, the guidance accompanying the condition makes clear that we may consider 'any external factors [...] outside the provider's control that might reasonably be judged to have affected its

past performance.’ This may include ‘Evidence of particular course or profession attributes that are unique to that provider, or a small group of similar providers, and result in performance consistently below a numerical threshold, but that may otherwise be considered positive outcomes.’

107. We have considered whether it would be preferable to use the word ‘enable’ in B3.3, instead of ‘deliver’. Our view is that making this change would likely undermine our policy aim of ensuring that all students are entitled to expect a minimum level of quality in higher education provision. Using the word ‘enable’ would suggest that providers could satisfy condition B3 without needing to actually achieve positive outcomes, for example by simply taking steps towards positive outcomes. We also think that ‘enable’ could create ambiguity about what is required under the condition, which could be confusing for providers.
108. We note comments that we should change the wording ‘positive outcomes’ to ‘positive regulatory outcomes’ or a similar phrase. We think that it is clear from the drafting of the condition that ‘positive outcomes’ has a particular meaning within the condition, because this is explained in paragraph B3.4, as well as in guidance under the condition. We consider that students or others reading the condition are likely to understand that the condition creates a specific regulatory requirement rather than referring to some wider concept of positive outcomes.
109. We have updated the wording of condition B3.3 to add the following caveat: ‘Without prejudice to **the principles and requirements provided for by any other condition of registration and** the scope of B3.1...’. This is consistent with changes made to wording of the other B conditions of registration, which were agreed and finalised after the student outcomes consultation was published. This provides clarification, for the avoidance of doubt, that the principles and requirements set out in condition B3 do not affect the interpretation of other conditions of registration.

## Decision

110. We have decided to change the wording in condition B3.3 as proposed in the following ways:
  - a. Updated text to include ‘the principles and requirements provided for by any other condition of registration and’.
111. We have not made any changes to the wording of the guidance associated with B3.3.

## Proposed text

B3.4 For the purposes of this condition, delivering positive outcomes means that either:

- a. in the OfS's judgement, the outcome data for each of the indicators and split indicators are at or above the relevant numerical thresholds; or
- b. to the extent that the provider does not have outcome data for each of the indicators and split indicators that are at or above the relevant numerical thresholds, the OfS otherwise judges that:
  - i. the provider's **context** justifies the **outcome data**; and/or
  - ii. this is because the OfS does not hold any data showing the provider's numerical performance against the **indicator** or **split indicator**; and/or
  - iii. this is because the OfS does hold this data but the data refers to fewer than the **minimum number of students**.

## Respondents' comments relevant to B3.4

112. Some respondents thought that the reference in B3.4 a) to 'in the OfS's judgement' was inappropriate, as the question of whether a provider meets this requirement was a 'matter of fact' (rather than a matter for OfS judgement).
113. There were other comments that the definition of 'split indicators' (in B3.5k) would create too many split indicators and this would result in regulatory burden for providers. Respondents suggested that this burden would arise because of the staff resources required to understand a provider's performance in relation to all the different split indicators included. Some suggested that this would have a disproportionate effect on small providers that had less resource to understand their data. Further, some respondents suggested that the number of split indicators created might result in an inefficient use of OfS resources. Some respondents argued that individually the split indicators were reasonable, but that there were too many when taken as a whole set.
114. One respondent suggested that it would be more transparent if B3.4b included an explicit reference to how benchmarks were being used, and how they would be applied to determine whether a provider was compliant with condition B3.
115. A few respondents suggested that the OfS should change the word 'justifies' in B3.4b.i ('...the provider's **context** justifies the **outcome data**') to read 'explains the outcome data'. One respondent submitted that establishing justification of provider data was 'too strong, and all that could ever be established is that the provider's context adequately explains the data in question'. Another felt that 'justifies' was pejorative, presuming fault. This respondent suggested 'is able to account for' would be more appropriate.

## Our response

116. We note the comments from some respondents that the reference made to 'the OfS's judgement' in B3.4 a) was inappropriate, as the question of whether a provider meets this requirement was a 'matter of fact'. We included this phrasing in the condition to capture the fact that we would apply judgement about statistical confidence in considering a provider's underlying performance against a numerical threshold. Paragraph 22a of the draft guidance explained this in the context of registration assessments: 'the OfS will review a provider's

outcome data and consider whether it is satisfied that it has sufficient statistical evidence that the provider's performance against each of the indicators and split indicators is at or above the relevant numerical thresholds.' We also explained that we would make judgements about statistical evidence when enforcing the ongoing condition; paragraph 26a of the draft guidance stated that the OfS would consider 'whether it is satisfied that it has sufficient statistical evidence that the provider's performance against each of the indicators and split indicators is below the relevant numerical threshold' in assessing providers against ongoing condition B3. Accordingly, we consider that the guidance makes clear that this use of 'judgement' relates only to judgements about statistical evidence.

117. We have considered the general theme of the regulatory burden created by the number of indicators and split indicators against which providers would be assessed in our overarching themes section. For the reasons explained in that section, we consider that it is appropriate to assess providers against the fullest possible range of indicators and split indicators, in line with the drafting in the condition. As stated, an alternative to this approach would be to rely on much smaller number of indicators. However, this would mean that we were unable to identify and act where pockets of higher education are below our minimum expectations, and would therefore be prevented from delivering our policy intention of protecting the interests of students in respect of receiving a minimum level of quality wherever, whenever and however they study.
118. We have considered the suggestion that paragraph B3.4 should refer to the use of benchmarks. The drafting of the condition does not make direct reference to our use of benchmarking, but the supporting guidance and our Regulatory advice setting out our approach to setting minimum numerical thresholds do set out the role that benchmarks play in our regulation of student outcomes. We explained this in the consultation document as follows:
  - a. We set out our proposals for how we would set numerical thresholds in Annex F of the consultation document. This approach includes a step that takes account of policy and contextual factors when setting numerical thresholds. We set out that this step would involve an analysis of individual provider benchmarks for each indicator to identify whether there were a significant number of providers below the proposed numerical threshold but above their benchmark. In those circumstances, we proposed considering an additional downward adjustment to the proposed threshold because it would enable us to test whether our sector analysis is able to adequately account for the variation of different student populations at individual providers. This approach is now set out in Regulatory advice 20.
  - b. We set out in the consultation that our approach to assessing compliance with condition B3 would include consideration of evidence of the provider's performance in relation to benchmark values (where these are available) when assessing the context in which it is operating. This means that our assessment of individual providers would normally consider whether we have strong statistical evidence that the provider's performance is below a numerical threshold but above its individual benchmark. This is now set out both in the guidance to the condition which forms part of the regulatory framework (see paragraph 20(a) in Annex B) and in Regulatory advice 20, which we have published alongside the revised condition.

119. We consider that the condition guidance and Regulatory advice contain sufficient explanation of the role of benchmark values, and that it is not necessary to add additional explanation into the condition itself.
120. We have considered suggestions that we should change the word ‘justifies’ to read ‘explains’ or ‘is able to account for’ in B3.4(b)(i). We do not consider that ‘explains’ would be sufficient to deliver the policy intent behind this aspect of the condition, because this wording could allow providers with poor performance to satisfy the condition simply by ‘explaining’ the reasons behind their poor outcome data. ‘Justifies’ is a stronger term which better reflects the OfS’s policy intent; as explained in the condition guidance, the OfS must be satisfied that the context in which the provider is operating ‘justifies’ the provider’s outcomes, in that they nevertheless represent positive outcomes for its students. We have considered the alternative suggestion of ‘is able to account for’ and we consider that this wording would have the same effect as ‘justifies’ in this context. We have retained ‘justifies’ because it is more succinct. For completeness, we do not agree that ‘justifies’ is pejorative or presumes fault. We set out clearly in the guidance for the condition that this relates to an OfS judgement that, in light of its context, the provider is delivering positive outcomes for its students.

## Decision

121. We have decided to adopt the wording in condition B3.4 as proposed.
122. We have decided to make the following changes to the wording of the guidance associated with B3.4:
- a. We have made changes to paragraphs 17 and 18 to reflect the approach we are taking to publishing documents that set out the definitions of indicators and split indicators, our approach to setting numerical thresholds, and the numerical thresholds themselves. These changes are to clarify, for the avoidance of doubt, that when the OfS reviews numerical thresholds, it does not expect to also consult on the approach to setting the thresholds (unless it is proposing changes to the approach itself or otherwise considers it appropriate to seek views).
  - b. We have made some additional changes to the final section of the condition B3.4 guidance. These reflect changes made to guidance of the other B conditions of registration, which were agreed and finalised after the publication of the student outcomes consultation. They include the following:
    - i. Paragraph 38 – we have added text in the guidance to include any relevant wider regulatory concerns in relation to imposing specific ongoing conditions of registration and monitoring requirements.
    - ii. Paragraph 38 – we have simplified the guidance that accompanies condition B3 in relation to the regulation of DAPs and university (or university college) title. This is to be clear that, where we have identified a breach of B3, we would be likely to suspend a provider’s eligibility to be authorised for new or extended DAPs or university title, and that we may also decide that a provider is not suitable to be authorised for new or extended DAPs or university title where there is a breach or where we have imposed a specific condition in relation to condition B3.

- c. We have made some minor wording changes to better reflect both the original policy intent and any changes to the policy that have resulted from this consultation, as well as some stylistic changes for readability.

## Proposed text

B3.5 For the purposes of this condition:

- a. **'combination of mode and level of study'** means a specified mode of study combined with a specified level of study, as set out in the technical documents.
- b. **'context'** includes, but is not limited to:
  - i. factors that may explain the reasons for a provider's historical performance;
  - ii. actions a provider has taken, or will take, to improve its performance, and the extent to which those actions are **credible**.
- c. **'credible'** includes, but is not limited to, consideration of:
  - i. a provider's track record of improving outcomes for its students;
  - ii. the nature of a provider's plans, including whether they are likely to generate sufficient improvement in the provider's performance; and
  - iii. whether a provider has demonstrated that it will invest sufficient resources to deliver a sufficient improvement.
- d. **'designated data body'** means:
  - i. the body designated under Schedule 6 to the Higher Education and Research Act 2017 for the purposes of sections 64 and 65 of that Act; or
  - ii. if there is no such body, the OfS.
- e. **'higher education course'** is to be interpreted:
  - i. in accordance with the Higher Education and Research Act 2017; and
  - ii. so as to include, for the avoidance of doubt:
    - A. a course of study;
    - B. a programme of research;
    - C. any further education course that forms an integrated part of a higher education course; and
    - D. any module that forms part of a higher education course, whether or not that module is delivered as an integrated part of the course.
- f. **'indicators'** means measures of the extent to which, for each combination of mode and level of study, students achieve positive outcomes in respect of:
  - i. continuing in their studies;
  - ii. completing their studies;
  - iii. progressing into managerial or professional employment, or further study; and
  - iv. any other areas as determined by the OfS, as defined in the technical documents.
- g. **'minimum number of students'** means the minimum number of students set by the OfS in the technical documents.

- h. **‘numerical thresholds’** means the numerical thresholds set by the OfS in the technical documents in respect of the indicators and split indicators. ‘outcome data’ means data that the OfS considers is appropriate for showing a provider’s numerical performance against an indicator or a split indicator, including but not limited to:
  - i. Data sourced from the designated data body;
  - ii. Data sourced from the Education and Skills Funding Agency; and
  - iii. Data in respect of higher education provided in any manner or form by, or on behalf of that provider (including but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider).
- i. **‘outcome data’** means data that the OfS considers is appropriate for showing a provider’s numerical performance against an indicator or a split indicator, including but not limited to:
  - i. Data sourced from the designated data body;
  - ii. Data sourced from the Education and Skills Funding Agency; and
  - iii. Data in respect of higher education provided in any manner or form by, or on behalf of that provider (including but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider).
- j. **‘relevant provider’** means a provider for which, in the judgement of the OfS, outcome data exists in respect of the five year period preceding the date of the provider’s application for registration.
- k. **‘split indicators’** means the indicators broken down into further indicators on the basis of the following:
  - iv. specified student characteristics, including disability, ethnicity and sex;
  - v. students’ year of entry or qualification;
  - vi. subject type;
  - vii. course type;
  - viii. provider partnership and teaching arrangements; and
  - ix. any other bases as determined by the OfS,

as defined in the technical documents.
- l. **‘technical documents’** means one or more document published by the OfS from time to time which contain detail about the definitions in this condition.

## Respondents’ comments relevant to B3.5

123. A few respondents suggested that the OfS should remove wording relating to managerial and professional employment from the condition (‘progressing into managerial or professional employment, or further study’ was included within the definition of ‘indicators’ in B3.5(f)). We understand that respondents suggested this because they either thought that we should better reflect positive graduate employment outcomes by including more occupations as positive in our progression outcome measure (we proposed that graduates

obtaining 'managerial and professional employment' would count positively), or that we should not hold providers to account for the employment outcomes of their graduates at all.

124. Some respondents suggested that we should reflect students' experience and satisfaction in the indicators we use to regulate student outcomes. A few suggested that this should include using a measure constructed using the 'graduate reflections' questions in the Graduate Outcomes survey to ensure the students' views are heard.
125. Several respondents made points about the scope of the condition including modular provision (via the definition of 'higher education course', which was defined to include 'any module that forms part of a higher education course'), given implications for data collection and monitoring. Respondents noted that the indicator definitions that we proposed to use did not include measures suitable for measuring positive outcomes for students studying for individual modules or other microcredentials. It was suggested that creating this kind of indicator would require significant additional information to be collected from providers, and that would be unduly burdensome.
126. A few respondents suggested that the OfS should make changes to the condition to clarify how the condition would apply to apprenticeships, including being more specific about the way in which measures used by the OfS, the Education and Skills Funding Council (ESFA) and Ofsted to regulate apprenticeships would interact.
127. A few respondents made points about the use of the wording 'any other areas as determined by the OfS' (which was a limb of the definition of 'indicators' (B3.5(f)(iv))). Respondents commented that the inclusion of this limb implied a lack of transparency and a suggestion that there would not be further consultation on future changes (i.e. concerns that the OfS would not consult before introducing new indicators against which providers would be assessed).

## **Our response**

128. We noted respondents' suggestions that we should remove wording relating to managerial and professional employment from within the definition of 'indicators'. We understand that this was suggested either because respondents wanted to remove regulation of the employment outcomes of graduates from condition B3, or because they wanted the OfS to adopt a wider view of positive employment outcomes. Our view is that it is appropriate to include a progression indicator that measures graduate employment outcomes in condition B3. We have set out our reasons for this in our response to Proposal 2. We also note, as explained in paragraph 20, that section 23 of HERA (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows the OfS to assess the quality of higher education by reference to student outcomes, including by reference to further study of a particular description or employment of a particular description.
129. In relation to amending 'managerial and professional employment' to capture a wider definition of employment as positive, we considered this when developing our proposals and concluded that consideration of the extent to which a provider is preparing students to be able to take up managerial or professional employment (or further study) is in the interests of both students and taxpayers. Our reasons for this view were explained in paragraph 121 of the consultation document. As explained there, we consider it appropriate to draw distinctions between providers that are preparing their students to take up managerial and professional employment and those that are not, because we are of the view that most people who enter higher education do so to improve their life chances, including their

employment prospects. We therefore consider that it is important to ensure that graduates are achieving outcomes consistent with the higher education qualification they have completed. Low rates of progression into managerial or professional employment and higher-level study destinations commensurate with the qualification they have completed may suggest that a course has not equipped students with knowledge and skills appropriate to their intended learning aims, or that students were not effectively supported to transition into the workplace.

130. We considered the suggestion that further indicators should be included in the definition of indicators in B3.5f); in particular, that we should include indicators to measure student experience and satisfaction. We have set out at paragraphs 58 to 59 our reasons for not including further indicators in the condition now. We also consider that the 'graduate voice' questions in the GO survey are not within the mandatory question-set in the survey tool. This results in an uneven level of responses across providers and therefore mean that they are not currently suitable for inclusion in the student outcome measure. However, we have set out but that we are open to considering adding other measures of student outcomes in the future.
131. We have considered whether it would be appropriate to exclude modular provision from the scope of condition B3 given implications for data collection and monitoring. We have explained the scope of condition B3 in paragraph 74. As explained, our view is that it is appropriate to draw the scope of the condition widely, so that it is capable of being applied to any manner or form of higher education provision, including modular provision. However, as also explained, the current definitions of student outcome measures (the 'indicators' and 'split indicators', which are defined in technical documents we will publish) do not cover modular provision. This means that the condition will not require providers to deliver positive outcomes in respect of modular courses when the condition comes into force. However, the OfS may decide to apply condition B3 to modular courses in the future, which would occur via amendments to the technical documents that define 'indicators' and 'split indicators'. As we signalled in the draft condition guidance (see paragraph 17 of Annex C of the student outcomes consultation), the OfS is committed to consulting ahead of any change to the definitions of the indicators or split indicators, including before applying condition B3 to modular provision. For this reason, we do not consider it necessary or appropriate to amend condition B3 wording so as to exclude modular provision.
132. We considered suggestions that the OfS should explain how condition B3 would apply to apprenticeships, including being more specific about the way in which measures used by the OfS, ESFA and Ofsted to regulate apprenticeships would interact. We have set out in the paragraphs 133 to 135 information on how the arrangements between OfS, ESFA and Ofsted would interact. We do not consider it appropriate to include this information on the face of the condition, because to do so would add unnecessary complexity and length.
133. There are a number of organisations involved in regulating apprenticeships – the roles of different bodies are set out in the Apprenticeship Accountability Statement.<sup>19</sup> Ofsted is the inspectorate for apprenticeship providers and undertakes full inspections on a regular cycle, using its Education Inspection Framework ,and in line with the Further education and skills

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<sup>19</sup> See [www.gov.uk/government/publications/apprenticeship-accountability-statement](http://www.gov.uk/government/publications/apprenticeship-accountability-statement).

handbook.<sup>20</sup> A full Ofsted inspection will provide an overall effectiveness judgement as well as a specific judgement about the quality of a provider's apprenticeship provision where this is relevant. Inspectors' judgements about the quality of apprenticeship provision will draw on the outcomes that learners achieve. Student outcomes for apprenticeships are therefore within scope of a full Ofsted inspection, but Ofsted does not make a standalone judgement about a provider's student outcomes. ESFA has overall accountability for the quality of apprenticeships but, like Ofsted, it does not make standalone judgements about student outcomes.

134. We have set out that our approach once a provider is registered with the OfS is to avoid duplication, as far as possible, by relying on Ofsted inspections and intervention by ESFA as the mechanism for maintaining high quality in apprenticeships in areas of quality covered by our other B conditions.<sup>21</sup> However, given that neither Ofsted nor ESFA makes a standalone judgement about the outcomes that a provider is delivering for its students, we continue to take the view that it is necessary that these outcomes remain subject to condition B3 (given our policy reasons for measuring student outcomes, explained at paragraph 99).
135. We have committed to working alongside the other organisations that have a role in the apprenticeship system in England, including the ESFA, the Institute for Apprenticeship and Technical Education and Ofsted, to ensure that the system operates as effectively as possible. In particular, now we have made final decisions about our approach to regulating all aspects of quality and standards, we intend to work with the ESFA, the institute and Ofsted to ensure that information for providers makes clear the interactions between the different aspects of apprenticeship regulation and wider technical education regulation.
136. Finally, we note points that the use of the words 'any other areas as determined by the OfS' in the definition of 'indicators' (B3.5(f)(iv)) implied a lack of transparency and suggested that there would not be further consultation on future changes to the outcome measures we use in relation to condition B3 (namely, the indicators and split indicators). We consider consultation to be an important part of policy development and we will consult on any addition to the indicators or split indicators. We committed to such consultation in the draft guidance (paragraph 17, Annex C of the consultation document), and the same commitment has been included in the final guidance. We do not consider it appropriate to repeat this commitment in the condition itself, in the interests of avoiding unnecessary detail and length.

## Decision

137. We have decided to adopt the wording in condition B3.5 as proposed.
138. We have decided to make changes to the guidance related to 'Assessing compliance for providers seeking registration' (paragraph 23) and 'Information gathering, assessment of evidence and enforcement' (paragraph 32). These changes are clarifications to the guidance on undertaking assessments of initial and ongoing condition B3. They make clear that the OfS:
  - a. May give specific consideration to matters relating to the interpretation of statistics.

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<sup>20</sup> The Further education and skills handbook is available at [www.gov.uk/government/publications/further-education-and-skills-inspection-handbook-eif](http://www.gov.uk/government/publications/further-education-and-skills-inspection-handbook-eif).

<sup>21</sup> We set out this approach in our response to the phase two consultation at [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/).

- b. Will seek further information about contextual factors from a provider where the OfS considers it appropriate to do so.

## **General comments about the proposed drafting of the condition**

### **General comments about the effect of the condition**

- 139. Respondents made a number of general comments about the effect of the condition under Proposal 1, some of which are responded to in this section. Other points have been responded to elsewhere in this document.
- 140. One respondent argued that removing the text ‘recognised and valued by employers’ (which is included in the current text of condition B3, which states that ‘The provider must deliver successful outcomes for all of its students, which are recognised and valued by employers and/or enable further study’) ‘loses the role that employers play in both benefitting from employing graduates and developing and delivering [higher education] provision (for example apprenticeships and HTQs)’.
- 141. Some respondents welcomed the language change from ‘successful’ outcomes to ‘positive’ outcomes because they considered that this recognises the fact that the OfS will be considering contextual factors in making judgements about compliance with condition B3.
- 142. Respondents also suggested that the proposed approach to regulating student outcomes (and in particular, our proposed use of minimum numerical thresholds) does not promote excellence and may instead threaten academic standards, as providers may prioritise securing positive outcomes over other aspects of quality or target the numerical thresholds instead of looking at them as minimum expectations.

### **Our response**

- 143. We have considered comments that the removal of ‘recognised and valued by employers’ was unhelpful, in that the proposed condition B3 failed to adequately capture the interests of employers in employing graduates and their role in directly providing higher education. The changes that we have recently made to the other quality and standards conditions are designed to ensure that graduates are equipped with skills that are recognised and valued by employers (for example, revised condition B1 requires providers to ensure that their courses require students to develop ‘relevant skills’, which encompasses professional competencies and transferable skills).
- 144. We noted comments that our proposed approach would not promote excellence and may instead threaten academic standards. The purpose of our approach to regulating student outcomes is to set minimum expectations for all registered providers, together with our other quality and standards conditions, which providers are also required to meet. These minimum expectations alone are not intended to incentivise excellence. We accept that, without other tools, only setting minimum expectations may not create regulatory incentives for providers to excel. However, we have launched our revised approach to the TEF, and our intention is that this will work in parallel with our regulation of minimum expectations to protect students and promote and incentivise excellence.

### **The proposed indicators may affect policy objectives and increase burden**

- 145. Many respondents expressed the view in response to Proposal 1 that the complexity of the indicators and split indicators that would be used to assess providers against condition B3

would impede the OfS from achieving the policy objectives set out in the consultation (see paragraph 7) and that they would create excessive regulatory burden. Respondents argued that the large number of split indicators would lead to excessive amounts of data, making it challenging for the OfS to assess providers and achieve its policy objectives because it would not be able to easily identify poor performance. Respondents argued that the large number of indicators and split indicators would create administrative and managerial burdens for providers of all sizes, and responses from small and specialist providers in particular were concerned about the human and financial resources needed to understand, review and verify the proposed indicators.

146. Respondents suggested that the approach to creating indicators and split indicators would disaggregate data so much that some providers, especially those with small datasets, would be likely to have limited data. Respondents argued that this could have two effects. First, it would make data analysis problematic because the OfS would need to understand fluctuating performance that might result from changes that relate to a small number of students. Second, respondents commented that smaller providers might be penalised for not meeting the minimum student number requirements.

## **Our response**

147. We set out in our original proposals the balance we have sought to strike between the volume of indicators and split indicators, and the need to properly reflect the nature of different types of courses and the experiences of different students. We consider that the approach we have adopted, with the mitigations set out in Proposal 4, will address the points made about the number of indicators and split indicators, for the reasons explained in the overarching themes section (paragraphs 66 to 72).
148. We also discuss the volume and complexity of split indicators in the overarching themes. We consider that including the number of indicators and split indicators that we have proposed is necessary to enable us to identify and act where pockets of higher education are below our minimum expectations. In the absence of this granular information, we would be prevented from delivering our policy intention of protecting the interests of all students in respect of receiving a minimum level of quality wherever, whenever and however they study.
149. For further discussion of our response to points around the use of indicators and split indicators, also see our response to the data indicators consultation.
150. We have considered comments that the proposed approach to creating indicators and split indicators would lead to issues with data analysis due to small datasets, which would particularly affect smaller providers.
151. We have set out in our response to Proposal 6 (paragraphs 567 to 597.a), which sets out our approach to interpreting statistical uncertainty, the approach that we will take to assessment where there is fluctuating data. We also consider that our approach to statistical uncertainty addresses the points made by respondents that our proposals would unfairly penalise smaller providers. We consider that our use of statistical confidence in our presentation of data, prioritisation and assessment addresses the concerns raised by smaller providers. This is because the greater statistical uncertainty associated with smaller cohorts makes it less likely that a smaller provider's point estimate data will be considered to be below a relevant numerical threshold.
152. Finally, we are minded to take steps to improve the presentation of data in our dashboards because we recognise that our proposed approach would have resulted in smaller providers

having many indicators and split indicators visible where they had little or no data available. We are minded to introduce new tools in the data dashboards to show only indicators or split indicators where a provider has data, and to allow users to filter indicators by the number of students in the denominator. We consider that these steps will address the effects that the approach to creating indicators and split indicators may have on smaller providers.

### **Additional information about considering a provider's context and in decision-making**

153. Our consultation set out a proposal that we would consider the context of a provider when assessing whether it is delivering positive outcomes in line with condition B3. Many respondents asked for further information on how we would consider this context and which contextual factors would be taken into account. Suggestions for relevant contextual factors we should consider included provider benchmark values, rapid changes in employment trends in local areas, the geographic and economic characteristics of a local area, a provider's historical performance and its contributions to the local community.
154. Some respondents wanted further information about our decision-making in relation to judgements about compliance with condition B3, because they thought the consultation was not sufficiently clear or transparent.

### **Our response**

155. Paragraph B3.4 of the condition sets out how the OfS would judge whether a provider was delivering positive outcomes. This paragraph contains our proposed approach of testing performance against numerical thresholds as well as the context in which a provider is operating. In practice, this means that the OfS must always consider a provider's context when making judgements about its performance in relation to the numerical thresholds, unless the OfS is already satisfied that a provider is performing at or above the relevant threshold on the basis of its indicators.
156. We will take account of all relevant information when assessing a provider against condition B3. This will include factors relevant to that provider's performance, including any relevant information about the context in which it operates. We will do this to ensure that we have had regard to relevant information, including context as appropriate, because we consider this to be appropriate manner in which to operate and assess compliance with condition B3 having regard to fairness, reasonableness and proportionality.
157. There was considerable support in responses to this consultation and the phase one consultation for the use of context in any assessment. We set out an expanded list of possible contextual factors that we may consider in the phase three consultation. We note the requests for further information on how the OfS will consider a provider's context. We provided some suggestions towards this in the consultation – see paragraph 228 and the draft guidance set out in Annex F. We considered the suggestions from respondents that we should include provider benchmark values, rapid changes in employment trends in local areas, the geographic and economic characteristics of a local area, a provider's historical performance and its contributions to the local community as relevant contextual factors. We consider that the approach we have adopted will enable us to take account of all these factors if we agree that a provider has evidence that these may justify its historical performance. We did not consider it appropriate to create an exhaustive list of contextual factors, or to list factors we would consider in every case, because each case and

circumstance will be different, and our view is that this should be a matter of regulatory judgement based on the facts of an individual case.

158. We do not consider that the requests for further information about our use of context outweigh the need for us to keep an open mind to the specific circumstances of each case. The approach we will take is set out in the guidance accompanying the revised B3 condition and in Regulatory advice 20.
159. We note that some respondents wanted further information about our decision-making in relation to judgements about compliance with condition B3. We have taken this to mean both the process through which we will make decisions and who will make the decisions. The process for decision making is set out in Regulatory advice 7 and will follow the statutory process set out in HERA in relation to imposing specific ongoing conditions. Decisions will be made in line with the OfS's scheme of delegation.

### **Non-recognised courses, apprenticeships and modular provision**

160. A frequent theme raised by respondents in response to Proposal 1 was that some types of courses should be approached and considered in a different manner – either by not being included in the scope of the condition or by introducing an additional indicator for those courses. Many respondents argued that non-recognised higher education courses should be measured separately, instead of performance being included within the 'Other undergraduate' category. Several respondents suggested that there was a difference in student motivation and funding, and that expectations regarding student outcomes were therefore different. Many of these respondents also argued that courses for which progression data is not yet available, such as non-recognised courses, should not be included in the scope of B3 at all until data is available from the Graduate Outcomes survey and National Student Survey. Respondents also made further arguments about why non-recognised courses and apprenticeships should not be within scope of condition B3, which are addressed at paragraphs 85 to 90 (under B3.1).
161. One respondent asked how OfS regulation of student outcomes will work in relation to apprenticeships, including where Ofsted is already inspecting a provider. For example, would OfS regulation under condition B3 include considering elements of an apprenticeship which are below Level 4 (including occupational competencies and Level 2 Functional Skills Maths provision, where this is an integrated part of a student's higher apprenticeship journey)?
162. Another respondent suggested that the proposals may disincentivise providers from offering flexible, modular provision. Some respondents made general points about the impact of the planned introduction of the LLE in 2025 and the appropriateness of student outcome measures for regulation of modular provision. Several of these respondents suggested that the proposed approach would suppress supply of modular courses, which was counter to the government's policy. Respondents did not offer a specific rationale for this, and we have taken it to mean that providers would be less willing to offer courses that were subject to regulation by the OfS.

### **Our response**

#### **Non-recognised higher education**

163. We proposed in both the phase one and phase three consultations that we should include courses that are not eligible for OfS funding (or 'non-recognised higher education courses') in the coverage of our student outcomes indicators. (Most of these courses would fall within our

‘other undergraduate’ level of study definition.) This meant that we would take the same approach to regulating student outcomes for these courses as was proposed for courses eligible for OfS funding.

164. We have set out in paragraphs 86 to 91 our view that these courses are within the scope of OfS regulation and that it is appropriate that we should regulate them. We take this view because the courses are at the same level of study as courses that are eligible for OfS funding. We consider that it would be inappropriate for students at registered providers not to have the same regulatory protection as other students at the same higher education level, based solely on whether that course was eligible for public funding from the OfS.
165. We have considered responses that suggested that there was likely to be a significant difference between the outcomes for non-recognised higher education courses at Levels 4 or 5 (which make up the majority of non-recognised higher education courses) and Level 4 or 5 courses eligible for OfS funding, and therefore that non-recognised higher education courses either should not be regulated by condition B3 or should be included as a separate level of study in our data reporting hierarchy (noting that this would be for reporting purposes only, as the courses are at the same level of study as ‘other undergraduate’ courses). The effects of including non-recognised higher education courses as a separate level of study would be that data for those courses would also be used to generate split indicators in line with our data reporting hierarchy, separate numerical thresholds would be set for non-recognised higher education, and these indicators and split indicators would potentially be subject to OfS regulatory action.
166. We have conducted further analysis in light of these comments and our view is that performance across the sector for non-recognised courses at Levels 4 and 5 is broadly similar to that for higher education courses at Levels 4 and 5 that are eligible for OfS funding.
167. This similarity can be seen in Table 1, which uses the same data sources as the data published alongside the consultation, and shows the sector averages for continuation outcomes for students on full-time higher education courses at Levels 4 and 5 that are and are not eligible for OfS funding.

**Table 1: Continuation outcomes for higher education courses that are and are not recognised for OfS funding**

Course type	Sector average continuation rate	Median continuation rate	Weighted median continuation rate
Other undergraduate	79.4%	79.9%	80.3%
Higher education courses at Levels 4 and 5 that are recognised for OfS funding	79.7%	80.4%	80.8%
Higher education courses at Levels 4 and 5 that are not recognised for OfS funding	78.2%	79.6%	80.0%

168. Although respondents suggested that there were significant differences in relation to non-recognised courses that could lead to different outcomes, the data we have considered shows that there no substantial difference in the average performance for the sector between the differently funded Level 4 and 5 courses. We have therefore decided to retain non-

recognised higher education courses in our standard level of study groupings, rather than creating separate indicators for non-recognised higher education at Levels 4 to 6, and potentially at Level 7+, as distinct level groupings in their own right.

169. The drafting of condition B3 means that we will always consider whether the context in which a provider is operating justifies the provider's performance where it is below a numerical threshold. When we assess a provider against condition B3, we will seek to understand the nature of the courses contributing to a below-threshold indicator, and whether any particular course characteristics mean that the data nevertheless represents positive outcomes for the provider's students. Given that any potentially relevant contextual factors at play will depend on the particular circumstances of the provider (and could relate to any type of course, whether eligible for OfS funding or not), we do not consider it appropriate to set out a prescribed list of such factors in our condition or our guidance.
170. We are minded to publish information in our data dashboards about the proportion of non-recognised higher education that a provider delivers. This is designed to support providers and other users in understanding the effects of non-recognised higher education on a provider's performance in relation to 'other undergraduate' minimum numerical thresholds.
171. We note respondents' points that the regulation of modular provision may disincentivise providers from delivering more flexible forms of higher education. We do not propose to construct student outcome measures for modular courses until we have developed a definition for positive outcomes for modular courses and we have undertaken further consultation. Any such consultation proposals would have regard to the effect that regulating modular courses through condition B3 may have on providers.
172. Some respondents were of the view that the OfS should not regulate progression outcomes for students completing non-recognised higher education courses, given that progression data is not yet available for these courses. As we stated in our consultation, students studying on non-recognised higher education courses are not currently included in the Graduate Outcomes survey population. We therefore did not propose constructing a progression outcome measure for these courses, and this is reflected in our final policy decisions.

### Apprenticeships

173. Respondents asked how OfS regulation of student outcomes would work in relation to apprenticeships, highlighting that providers offering apprenticeships may be subject to a corresponding set of regulatory requirements due to the Ofsted inspection regime. We have explained in paragraphs 133 to 136 that we intend to regulate student outcomes for apprenticeships in the same way as other higher education courses, as well as the interaction between condition B3 and other bodies' apprenticeship regulation. We have also set out in detail the interaction between our approach to regulating quality and standards and other bodies involved in the regulation of apprenticeships. We have committed to minimising duplication in the regulation of apprenticeships where possible.
174. We noted a specific request for further information about whether OfS regulation through condition B3 would cover elements of an apprenticeship below Level 4. This means that if an apprentice does not continue from year one to year two this may be because they have not completed their occupational competencies rather than because of the taught elements of their course. In these circumstances our definition would count the apprentice's continuation and completion outcomes negatively. Our proposals set out that a 'higher education course' within the scope of the proposed conditions would include 'any further education course that

forms an integrated part of a higher education course'. We consider that the OfS has clear legal jurisdiction to regulate any activities of providers that are directly or indirectly connected with higher education and, in any event, consider that the scope of our proposals remains appropriate, because students would be registered on a higher education course, regardless of whether all the elements of that course are at Level 4 or above.

#### **Lifelong Loan Entitlement and modular provision**

175. As some respondents noted, the government has proposed a new approach to student finance for higher education from 2025. The LLE is intended to introduce greater flexibility into the student finance system, including by allowing funding of individual modules rather than whole courses leading to qualifications. We expect such a change will have a considerable impact on the higher education sector. Specifically, we expect it to have implications for how we regulate student outcomes, because our indicators are defined at a qualification rather than a modular level.
176. We note that some respondents asked how condition B3 would operate in the context of modular provision, with some linking this to the government's LLE plans. Our view remains that all students should be afforded regulatory protection, and all providers should be held to account for student outcomes, regardless of the length of a higher education course. However, we agree that the student outcome measures we have adopted will likely not be appropriate for measuring positive outcomes for individual modules. As set out in paragraph 104, our student outcome measures as currently defined do not encompass modular provision, and providers will not be obliged to deliver positive outcomes for modular courses when the condition comes into effect.
177. We are working with government and the higher education sector, including through learning from the OfS-led higher education short course trial, to develop appropriate measures for student outcomes. We will consult on any future changes to our approach to regulating student outcomes in light of the effects of the LLE once details of the policy are confirmed by government.<sup>22</sup>

#### **Potential impact on equality of opportunity**

178. Finally, respondents argued that proposed condition B3 and guidance could reinforce existing inequalities among students, by favouring the recruitment and the outcomes of already advantaged students. A few respondents commented that the OfS should undertake an equality impact assessment in relation to the proposals. Respondents commented that the historical differences in student outcomes for some groups of students meant that providers would change their behaviour to avoid recruiting these students in an effort to meet the OfS's proposed numerical thresholds. Respondents suggested that providers would be incentivised to orientate recruitment campaigns to focus on 'low-risk' students or adopt a 'low-risk' approach when planning courses, which would lead some providers to close courses or subjects in areas with lower continuation and completion rates.
179. A few respondents argued that addressing this issue through access and participation plans would not be an adequate solution, because APPs did not offer sufficient protections to prevent such undesirable action. One respondent argued that 'regulatory action and

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<sup>22</sup> The higher education short course trial is a collaborative programme between the OfS and DfE, in preparation for the planned introduction of the LLE in 2025: see [www.officeforstudents.org.uk/advice-and-guidance/skills-and-employment/higher-education-short-course-trial/](https://www.officeforstudents.org.uk/advice-and-guidance/skills-and-employment/higher-education-short-course-trial/).

messages should be aligned'. One respondent commented that the effect of the proposals would be that students from underrepresented groups would 'receive the message that higher education was not for them'.

180. In relation to this theme, some respondents argued that those providers doing most to increase access for students from underrepresented groups will experience more burden in complying with condition B3 (because those providers will have to do more work to comply, as students from underrepresented groups have historically been more likely to have poor student outcomes). Respondents suggested that this might lead to less recruitment of students from underrepresented groups, and they argued that this would 'undermine' what they described as 'the OfS's general duty to promote fair access'.

## **Our response**

181. We have noted the comments from respondents about the potential impact on equality of opportunity. We have considered these comments in the context of our legal duties, our policy objectives and the OfS's strategy for 2022 to 2025. We have set out this context in paragraphs 182 to 186 as well as responding to the points made by respondents.
182. In exercising its functions, the OfS must have due regard for the public sector equality duty (PSED) in the Equality Act 2010. This requires the OfS to have due regard to the need to eliminate unlawful discrimination and other conduct prohibited by the Equality Act 2010, and to foster good relations and advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. We also have a general duty under section 2(1) of HERA to have regard to the need to 'promote equality of opportunity in connection with access to and participation in higher education'.
183. In relation to responses requesting that we conduct an equality impact assessment before implementing the proposals, we explained in response to the phase one consultation that we keep under review how we embed our equality duties into policy development and policy implementation to ensure compliance with the PSED, as well as other relevant duties. We have engaged with equality considerations throughout our policy development and decision-making process and, in all phases of consultation on our approach to quality and standards, we have explicitly called for responses on the potential impact of these proposals on individuals on the basis of their protected characteristics, in order that these can inform our decisions. Throughout, we have had proper regard to matters within the scope of the PSED and other relevant duties. We have therefore already extensively considered matters relating to equality.
184. The OfS strategy, published in March 2022 following public consultation, states that our two areas of focus for 2022 to 2025 are quality and standards and equality of opportunity. They are closely connected and mutually reinforcing: improving equality of opportunity without ensuring quality and standards will not lead to positive student outcomes and, likewise, ensuring quality and standards without improving equality of opportunity means that students who could benefit from higher education will not.
185. Our general view is that meaningfully extending equality of opportunity means providing all students, irrespective of their characteristics, with the opportunity to benefit from their higher education. Our view is that our approach to condition B3 will incentivise providers to support all students, regardless of their background, to achieve positive outcomes. The approach to regulating student outcomes that we are adopting sets minimum expectations for all students and would enable us to act where any group of students is being left behind. At the same

time, we will continue to take steps through our regulation of access and participation to address risks to equality of opportunity for students from underrepresented groups and other students, before, during and beyond their time in higher education.

186. The cost in financial and personal terms of being exposed to a low quality course or receiving inadequate support, and failing to succeed in employment beyond their course, is significant for any student, and particularly those from lower socioeconomic backgrounds. Our view is that a provider that recruits students from such backgrounds is obliged to ensure that they have a high quality academic experience, including positive student outcomes. Many English higher education providers offer high quality courses to students from underrepresented groups that result in positive outcomes above the numerical thresholds we proposed. We do not accept that it is necessary to compromise quality to deliver higher education to these groups.
187. We note comments from respondents who consider that providers are likely to change their behaviour in response to our approach to regulating student outcomes. We do not consider that the numerical thresholds we have set should result in providers with performance above the numerical thresholds seeking to change recruitment practices. We have decided on our approach to setting numerical thresholds, which takes account of historical differences in student outcomes (see paragraph 189). Our view is that the downward adjustments we have made to the numerical thresholds have the effect of ensuring that the thresholds themselves do not disproportionately affect underrepresented students. Where an individual provider is below a numerical threshold, we do expect it to change behaviour by taking steps to improve the outcomes for its students rather than seeking to change the students it recruits.
188. There is a risk, as respondents suggest, that providers choose to make changes to their behaviour, for example changing their recruitment practices or lowering academic standards. While we do not consider this risk to be high, we have set out our response to these points in paragraphs 55 to 60. We also set out, in paragraph 63, our approach to considering regulatory action if we identify such behaviours.
189. We take very seriously suggestions from some respondents that providers may take steps to reduce access for students from underrepresented groups because they are prioritising selection of students who they consider are most likely to achieve positive outcomes. We consider that our wider regulation, including our regulatory requirements for access and participation, will mitigate these risks. Our regulation of APPs requires applicable providers to set targets to improve equality of opportunity. We note that some respondents argued that this approach is insufficient to prevent undesirable provider behaviour. We have set out in paragraph 65 that we intend to monitor behaviour in the sector with a view to identifying whether providers are acting irresponsibly. Providers are required to take all reasonable steps to implement their approved APP and may face regulatory action if they do not. However, we will consider the point that a provider may seek to alter the type of students it recruits even where there are no current concerns about access for underrepresented groups, as we formulate proposals for our forthcoming consultation on a new approach to access and participation plans. (We expect to publish this in winter 2022). In addition, we will consider how we may potentially use our evaluation of our approach to identify patterns of concerning behaviour. We may also consider information from other sources of regulatory intelligence, such as notifications from students and other third parties.
190. We note that some providers were concerned about the indirect effect of the proposed condition because of the 'messages' our approach to regulation would send to students from

underrepresented groups. Our view is that setting minimum expectations for all students is a positive message. We consider that these expectations should encourage students to expect the support and teaching they need to succeed in higher education. We therefore do not intend to make further changes to the condition in response to these comments. However, as noted in paragraph 65, we may potentially use our evaluation of our approach to identify patterns of concerning behaviour, which may include trends in recruitment across the sector or at individual providers.

191. Finally, we note that some respondents argued that those providers doing most to increase access for students from underrepresented groups will experience more burden in complying with condition B3, and as a result this may lead to reduced recruitment of students from underrepresented groups. Our view remains that providers should recruit students for whom they can provide support and deliver positive outcomes, in line with our minimum expectations. We do not consider that our numerical thresholds will have the effect of creating more burden for most providers because they are set to support our minimum expectations. Where the performance of an individual provider is below a numerical threshold, we accept that some burden may be created, because we expect that provider to improve the outcomes for its students rather than seeking to change the students it recruits. However, we consider that this burden is appropriate and proportionate given the risks to students.

### **Other comments made by respondents**

192. We received a number of other individual comments that were either supportive of the proposals or made points addressed elsewhere in this response document.
193. One respondent from a students' union made a specific point in support of Proposal 1, stating that it was appropriate that providers are required to deliver positive outcomes for students, and that students, and representative bodies such as students' unions, should be directly involved in any investigation and be able to provide their own input. We do not consider that it is necessary to explicitly include students' unions in the evidence gathering process for determining whether a provider is compliant with condition B3 because we expect that, as with academic expertise, we will be able to draw on the views of students' unions where necessary without making further amendments to the condition guidance.

### **Decision**

194. We have considered the points made by respondents in relation to Proposal 1 and have addressed these in detail above.
195. We have decided to adopt condition B3 and the associated guidance, largely as set out in Proposal 1 of the consultation. We have summarised the changes we are making to the condition and guidance below. The revised condition is set out in Annex B.
196. The revised condition will come into effect on Monday 3 October 2022. We have set out further information about how the revised condition will come into effect in response to Proposal 8, and in a separately published notice of determination.<sup>23</sup>

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<sup>23</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

197. We have amended some of the wording we included in the proposed condition and accompanying guidance, which was the same as draft wording contained in our recent consultation on other B conditions (and accompanying guidance).<sup>24</sup> Since our student outcomes consultation was issued, the draft wording of the other B conditions and guidance has been finalised.<sup>25</sup> We have amended the drafting of condition B3 to be the same, where this is appropriate. We consider it helpful to providers that our quality conditions and guidance share the same wording as far as this is appropriate, rather than contain different formulations only because consultation took place at a different time.
198. We have made the following changes to the wording of the condition:
199. We have updated the wording of condition B3.3 to include ‘...the principles and requirements provided for by any other condition of registration and..’. This reflects changes made to condition wording and guidance of the other B conditions of registration, which were agreed and finalised after the Student Outcomes consultation was published. We have made the following changes to the wording of the guidance to the condition:
- a. Paragraph 6 – we have made changes to the wording of the guidance related to condition B3.1 to clarify a provider’s obligations under the condition being set by B3.3. and B3.4.
200. We have made some additional changes to the ‘Information gathering, assessment of evidence and enforcement’ section of the guidance, which reflect changes made to guidance for the other B conditions of registration, agreed and finalised after the publication of the student outcomes consultation. These include the following:
- a. Paragraph 1 – we added ‘or courses leading to microcredentials’ for the reasons explained at paragraphs 38 of the Quality and standards consultation outcomes document.
  - b. Paragraphs 2 and 4 – we have made small drafting changes, to be clear that the conditions apply to all types of partnership arrangement, and also made consequential changes to paragraph 4 of the guidance for the reasons explained at paragraph 444 of the Quality and standards consultation outcomes document.
  - c. Paragraph 29 – we have added ‘where a provider, or another legal entity that the OfS considers to be operating substantially the same higher education business, has previously been registered, a history of non-compliance with ongoing condition B3 is likely to result in a judgement that initial condition B3 is not satisfied.’
  - d. Paragraph 37 – we have added text in the guidance to include any relevant wider regulatory concerns in relation to imposing specific ongoing conditions of registration and monitoring requirements.
  - e. Paragraph 38 – we have simplified the guidance that accompanies condition B3 in relation to the regulation of degree awarding powers and university (or university college) title. This is to be clear that where we have identified a breach of B3 we would be likely to

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<sup>24</sup> This consultation concerned conditions B1, B2, B4, B5, B7 and B8, and is available at [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/).

<sup>25</sup> See [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions-outcomes/).

suspend a provider's eligibility to be authorised for new or extended DAPs or university title, and that we may also decide that a provider is not suitable to be authorised for new or extended DAPs or university title where there is a breach, or where we have imposed a specific condition in relation to condition B3.

201. We have made some minor wording changes, to better reflect both the original policy intent and any changes to the policy that have resulted from this consultation, and stylistic changes for readability.
202. We have not chosen to increase the number of outcome measures within scope of condition B3. We will remain open-minded about whether it may be appropriate to consider such measures for inclusion in our minimum regulatory requirements in the future. If we choose to develop or adopt other measures of positive outcomes in the future, we would expect to discuss these with the sector during development, and to conduct a formal consultation prior to implementation where appropriate.

## Proposal 2: Constructing indicators to assess student outcomes

### Questions relating to Proposal 2

**Question 4:** Do you agree or disagree with the proposals for how we will construct student outcome measures? Do you have any alternative suggestions?

204. Proposal 2 set out how we intend to construct indicators to assess student outcomes.
205. We set out our proposal to use student outcome measures relating to continuation, completion and progression, constructed on the basis set out in full in our data indicators consultation.<sup>26</sup> These relate to:
- the proportion of students continuing on a higher education course
  - the proportion of students completing a higher education qualification
  - the proportion of students progressing to managerial or professional employment, or further study or otherwise achieving a positive outcome as defined by the OfS.
206. In relation to the completion measure we set out two possible methods for constructing the indicator; **cohort tracking**, based on tracking individual student's actual outcomes, and a **compound indicator** that uses the rates at which students withdraw from higher education study in a given year to estimate rates of completion. We sought views on which of these two approaches was preferable to use.
207. We also set out how we would use these measures in the construction of indicators and split indicators, including the modes and level of study that would be covered. We proposed to include data for both validated and subcontracted partnerships in the data dashboards for any providers involved in a partnership. Annex C sets out the data structure that we proposed using for regulation of student outcomes.
208. This proposal was based on our view that we should construct indicators from readily available data in a way that allowed us to identify pockets of poor performance while relying on measures and levels that are well established and understood in the sector. This approach would help to minimise burden for providers by ensuring there are not additional data returns and that the proposed measures are already used and understood by providers. The indicators we proposed recognise that there are likely to be differences in performance between different modes (i.e. full-time, part-time and apprenticeship) and levels of study (for example, first degree, postgraduate taught and postgraduate research) and that these warrant separate consideration. In making these proposals we considered whether we should add additional levels of study (for example splitting Level 4 and 5 courses in our 'other undergraduate' category to form two separate indicators, or including separate indicators for integrated foundation years or non-recognised higher education). We took the view that our

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<sup>26</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/).

proposals balanced the potential complexity and burden that a larger number of indicators would create with the policy aim to protect students from weak outcomes.

## **Responses relating to Proposal 2**

209. Respondents were asked for their views on proposals to construct student outcome measures, including indicators and split indicators, as set out in paragraphs 52 to 115 of the consultation document. They were also asked whether they had alternative suggestions for the construction of student outcome measures.
210. Almost two-thirds (65 per cent) of respondents disagreed with the proposals for how the OfS will construct student outcome measures, while 30 per cent agreed and 6 per cent declared that they didn't know.
211. Many of the respondents who did not agree with the proposals in general said they supported some aspects of the proposals; for example, many respondents supported the use of continuation and completion measures. Most respondents who disagreed with the proposal focused their comments on the progression indicator.
212. The key points made in response included:
- a. Views that the proposed indicators represent a narrow view of student outcomes and successful achievements, and that student outcomes are affected by external factors beyond a provider's control, particularly in relation to progression.
  - b. Specific comments about the construction of the proposed continuation, completion and progression measures.
  - c. Comments that the number of proposed indicators would create complexity and burden for providers.
  - d. Suggestions that some courses, such as first degrees with an integrated foundation year and non-recognised higher education courses, should have their own indicators and associated thresholds.
  - e. Various views relating to timing, for example disagreeing with the use of a four-year time series, or suggesting that the census point in the GO survey is too early to capture positive outcomes.
  - f. Comments that the inclusion of partnership data in the dashboards adds complexity and could act as a disincentive for degree awarding bodies to enter into new validation or subcontractual arrangements.
  - g. Views that providers may seek to reduce their recruitment of students from disadvantaged backgrounds because of concern that these students will be less likely to achieve positive outcomes as defined in the indicators.

## **Comments about a narrow view of student outcomes**

213. Many respondents took the view in relation to Proposal 2 that the proposed student outcome measures represent a narrow view of student outcomes and successful achievements. Respondents suggested that indicators could be affected by external factors beyond a

provider's control, particularly for continuation and progression, and would penalise providers that have a sensible approach to student needs and career prospects.

214. We have addressed this theme of responses in the overarching themes section. We have therefore focused the analysis in this section on respondents' comments that were directly about how we proposed to construct the student outcome measures. We received significantly more detailed comments on the technical definitions we proposed for the construction of student outcome measures in our separate data indicators consultation. We have responded to these detailed comments in our response to that consultation.

### **Construction of a continuation measure**

215. There was broad support for the use of continuation as a measure in responses to the phase one and phase three consultations. Respondents to this consultation continued to agree that it is a legitimate and reasonable measure of quality and has been used in the sector as a measure for many years. They suggested that it can be measured reasonably and effectively, can be substantially influenced by a provider and is sufficiently within its control.
216. However, some respondents to this consultation pointed to particular examples where a student may withdraw from their course for personal reasons such as ill health, taking up caring responsibilities or employment, rather than as a result of inadequate support from a provider. They said that this meant that student continuation outcomes were not in a provider's direct control.
217. We saw additional comments from some respondents, which were relevant to our decision whether to adopt the continuation outcome measure:
- a. Respondents suggested that adopting our proposed approach (which counted a full-time student positively in relation to the continuation outcome measure if they were in higher education one year plus 15 days after their start date), rather than using an approach which has previously been used by HESA (which used one year plus 50 days), was not appropriate and would create burden for providers as they would need to adjust to a different census date.
  - b. Respondents expressed mixed views about the proposed approach to count a student positively in relation to part-time continuation indicators if they were in higher education two years plus 15 days after their start date.<sup>27</sup>
218. Some respondents commented that our proposal to construct continuation indicators based on a census point that is 14 days after a student has commenced their studies was inappropriate. Respondents took the view that the 14-day census point was too soon and argued that a longer period (up to 50 days) was more appropriate. They argued that a short period was not appropriate because students may leave within 14 days, but then transfer to another provider after this period. Our proposals would count student transfers as a neutral outcome, but respondents argued that 14 days was not sufficient time for a student to successfully transfer. This would mean that students would be counted negatively in our indicator even if they were to transfer to another provider, which we would otherwise count

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<sup>27</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/).

as a neutral outcome. Respondents argued that a provider's performance would improve if we used a longer census period.

## **Our response**

219. We note the broad support for use of a continuation measure and general agreement with our proposal that continuation rates provide a helpful and important indication of whether a student has been appropriately recruited onto a suitable course that matches their abilities and aspirations, and whether they then receive the support they need to continue on that course. We also note, as explained paragraph 20.c, that section 23 of HERA (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows the OfS to assess the quality of higher education by reference to student outcomes, including by reference to continuation.
220. We note the examples raised by some respondents of a student withdrawing from their course for personal reasons, rather than as a result of the quality of the course including inadequate support from the provider. On balance, our view is that these examples do not warrant amendment to our proposed construction of the continuation outcome measure. We stated in our consultation that we accept that it may not be possible for a provider to deliver positive outcomes for 100 per cent of its students in any of our student outcome measures because of the particular circumstances of some students. We do not consider that this is a reason not to measure students' continuation outcomes in the way we proposed. We take this view because our approach to setting minimum thresholds removes the possibility that a numerical threshold would be set at a level requiring all students to achieve positive outcomes, and because, as explained above, we consider that there is considerable value to be gained by measuring continuation.
221. We considered the responses that related to the proposed census dates for the continuation outcome measure for both full-time and part-time students. We have set out a detailed response to these points in our response to Proposal 2 in our data indicators response document. These cover some finely balanced points, but we consider that the rationale we set out in our original proposals remains appropriate as having regard to reasonableness and proportionality, and we are not making any changes to the method for constructing the continuation outcome measure.
222. We also considered the points about including students in the data for the construction of continuation rates 14 days after they commenced their studies, and that students transferring to other providers (who would be counted positively) can take longer than this to transfer. We recognise that this may result in some students being counted negatively when they have achieved an outcome that we are otherwise treating neutrally. However, our view is that such effects could reasonably be expected to be seen to occur in the same way for most providers. We do not agree that changing the census period would have a material effect on compliance. A detailed analysis of the reasons for this decision are set out in our data indicators consultation.
223. We are not making changes to the proposed measurement period (i.e. 14 days from the start of the academic year) for the continuation measure because:
- a. We remain of the view that outcomes for students are likely to become increasingly negative as the time since their course start date increases, because they will have expended more time, effort and money on a course that they do not continue.

- b. We wish to maintain consistency with our approach to measuring continuation established in our access and participation plan dashboards, and we consider that a consistent approach will minimise regulatory burden.

224. We have decided to adopt an approach that includes a continuation measure, as proposed in the consultation. The technical specification for how this measure will be constructed is set out in our response to the data indicators consultation, and shows where we have made minor changes in response to the consultation.

### **Construction of a completion measure**

225. Respondents did not overall provide a clear preference between the two possible methods for constructing a completion outcome measure we proposed (the cohort tracking or the compound indicator methodology). We received a broadly balanced set of views on the benefits of each.

226. Reasons for support for the cohort tracking method included:

- a. Although it is lagged, it produces a rate that reflects what actually happened to students whereas the compound indicator is based on estimates.
- b. It is more accurate and therefore more appropriate for the basis of regulatory intervention.

227. Reasons for support for the compound method included:

- a. It provides more timely values. This is particularly pertinent when tracking completion of part-time and flexible students.

228. In our analysis of the data indicators consultation we saw additional comments from some respondents, which were relevant to our decision about whether to adopt the completion outcome measure:

- a. Respondents suggested support for the OfS taking forward only one of the proposed approaches, to limit the complexity and burden of our overall approach.
- b. Some respondents sought further information about the relationship between the two proposed measures and the OfS's publication of the Projected completion and employment from entrant data (Proceed) measure, and also with the Table 5 method from HESA's UK Performance Indicators.

### **Our response**

229. We consider that completion is one of the most relevant measures of student outcomes available, and tells us whether a provider is recruiting students who are able to succeed through to the end of their courses. We also note, as explained 20.c, that section 23 of HERA (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows the OfS to assess the quality of higher education by reference to student outcomes, including by reference to completion. Many respondents agreed that completion was a legitimate indicator of student success and, as with the continuation indicator, is a measure that has been in use by providers for a long time and an outcome over which they have some control. Those respondents also took the view that acceptable rates of completion are unlikely to be

achieved without good quality resources and academic support, and this is likely to mean the provider is also delivering high quality courses.

230. We note that there was no strong preference expressed by respondents to this consultation about whether to adopt the cohort tracking or compound indicator method for constructing the completion indicator. This pattern was the same in responses received to our data indicators consultation. We agree with respondents that it is preferable to only take forward one measure, to ensure that our overall approach is appropriate and reasonable.
231. In paragraph 11 of the consultation document we said that ‘We think that there are advantages to both methods, but our provisional view is that a compound indicator would be preferable as it would offer a more timely view of whether a provider is delivering positive outcomes for students.’
232. We have changed our view on the preferable approach to constructing a completion indicator and have decided to adopt the cohort tracking method. We have taken this decision because:
- a. Our analysis of consultation responses suggested to us that the cohort tracking method was, in general, better understood across the sector and by other stakeholders.
  - b. We consider that during the initial implementation of our new approach to regulation of student outcomes it is most helpful to use a method of constructing the measure that is based on actual performance, as opposed to the estimates that would have been included in the compound indicator method.
233. This has been a finely balanced judgement and we continue to recognise that the compound indicator gives a more timely view of students’ completion, which is an advantage. Although the OfS broadly agrees with the advantages of both methods described in consultation responses, we have decided that on balance, the cohort tracking method is the more reliable of the two measures because, as respondents pointed out, it reflects what actually happened to students rather than estimating completion rates. We plan to take advantage of the more timely values of the compound indicator by taking the following steps to make the most of the different completion measures available to us:
- a. We are minded to continue to produce and publish the compound indicator, to enable providers and others to have a more timely view of completion rates.
  - b. We will use the compound indicator in our general monitoring activities. For example, we may use the compound indicator as a source of regulatory intelligence when considering whether to open an investigation in relation to compliance with other B conditions.
234. We noted respondents’ comments in relation to the Proceed measure and, as we set out in paragraph 181 of our phase three consultation on data indicators, we intend to align our measures, including Proceed, to the definitions settled on through this consultation process. We consider that standardising our measures in this way will reduce burden on providers and users of our data.
235. In conclusion, we will adopt an approach that includes a completion measure constructed using the cohort tracking method. The technical specification for how this measure will be constructed is set out in our response to the data indicators consultation. We are minded to separately publish data on completion rates using the compound indicator method.

## Construction of a progression outcome measure

236. A minority of respondents agreed with our proposals for constructing a progression outcome measure. Many of those who disagreed with the proposals for constructing outcome measures focused their comments on this measure. Respondents made points about the breadth of the outcome measure and about the reliance on the Graduate Outcomes survey as the basis for the progression indicator.
237. Respondents raised the following points about the breadth of the outcome measure. In each case, respondents argued that the OfS approach resulted in the proposed progression outcome measure not fully representing the positive outcomes that students achieved:
- a. Some respondents made comments about the GO survey's 15-month census point. In particular, they stated a view that many students do not commit to seeking a job after graduation, or at least not within the 15 months allowed for in the indicator definition. They argued that this meant that the OfS was looking at outcomes before students had progressed sufficiently through their career to achieve managerial or professional employment, and that we should therefore have a wider definition of positive outcomes.
  - b. Similarly, some respondents pointed to the nature of some qualifications that lead directly to employment which is not classified as managerial and professional for the purposes of Standard Occupational Classification (SOC) codes, but otherwise required graduate-level study. Respondents cited a few different examples of this, including veterinary nurses, animal-based careers such as zookeepers, and dental nurses. Some respondents commented that the proposed approach would have a detrimental effect on providers delivering creative and performing arts courses, because graduates of those courses would seek employment in roles that were not classified in SOC codes 1 to 3.
  - c. The SOC codes are reviewed by the Office for National Statistics every ten years and the next review is not due to be published until 2030. A few respondents suggested that the OfS should maintain a separate list of occupations that it considered to be 'positive outcomes' for graduates. They suggested this would enable the OfS to take account of the examples such as dental nurses that are not classified as managerial or professional, and professions that may develop new requirements for higher education qualifications before the next review of SOC codes. Respondents gave higher-level teaching assistants as an example of an occupation that was not recognised in SOC codes 1 to 3 in the 2010 classification, but was in the 2020 classification.
  - d. Respondents suggested that the proposed progression measure did not take account of entrepreneurship or intermittent employment as part of building creative portfolios. They argued that these were positive outcomes for students.
  - e. Respondents disagreed with our proposal not to count 'interim activities' as a positive outcome. Respondents generally focused on the OfS proposal not to include interim study as a positive outcome. They pointed to students completing foundation degrees with a top-up to a bachelors' degree, who are within scope and therefore invited to complete the GO survey, but who will not have had 15 months from graduation in which to find employment. This meant that our proposal not to count interim study positively for these students may result in the measure suggesting that a provider did not deliver positive outcomes, because they had completed an additional qualification within the 15 months since graduation, but had not then moved into a positive outcome in the three

months since completing that qualification. A few providers suggested that the GO survey data should be augmented with HESA and individualised learner record (ILR) data to show whether a student had completed interim study.

238. Respondents made the following points about the reliability of the GO survey as the basis for a progression outcome measure:
- a. A few respondents made points about the accuracy of GO survey coding. They argued that graduates who go onto pursue careers in the arts were potentially being misrepresented in GO coding.
  - b. Some respondents made points about the use of the GO survey while the survey data was classified as 'experimental' and argued that the survey design was not constructed to align with the purpose of the proposed progression measure. One respondent commented that individuals who have already participated in the GO survey were not aware that their responses would be used for purposes proposed by this consultation.
239. One respondent suggested that we should augment our use of the GO survey by linking those students who said in the GO survey that they had undertaken 'interim study' with the wider data held by the OfS on student destination (i.e., link these students to the individual student record to fill in the further study gaps).
240. In our analysis of the data indicators consultation, we identified additional points from respondents, which are relevant to our decision about whether to adopt or amend the progression indicator:
- a. Respondents suggested that 'doing something else' should be treated positively, because this would be in line with the wider OfS proposed approach of providing benefit of the doubt where there is ambiguity about whether an outcome is positive or not.
  - b. Respondents disagreed with the proposed progression measure because they argued that it did not take into account structural differences in the economy. They generally pointed to regional differences in employment when making this argument.

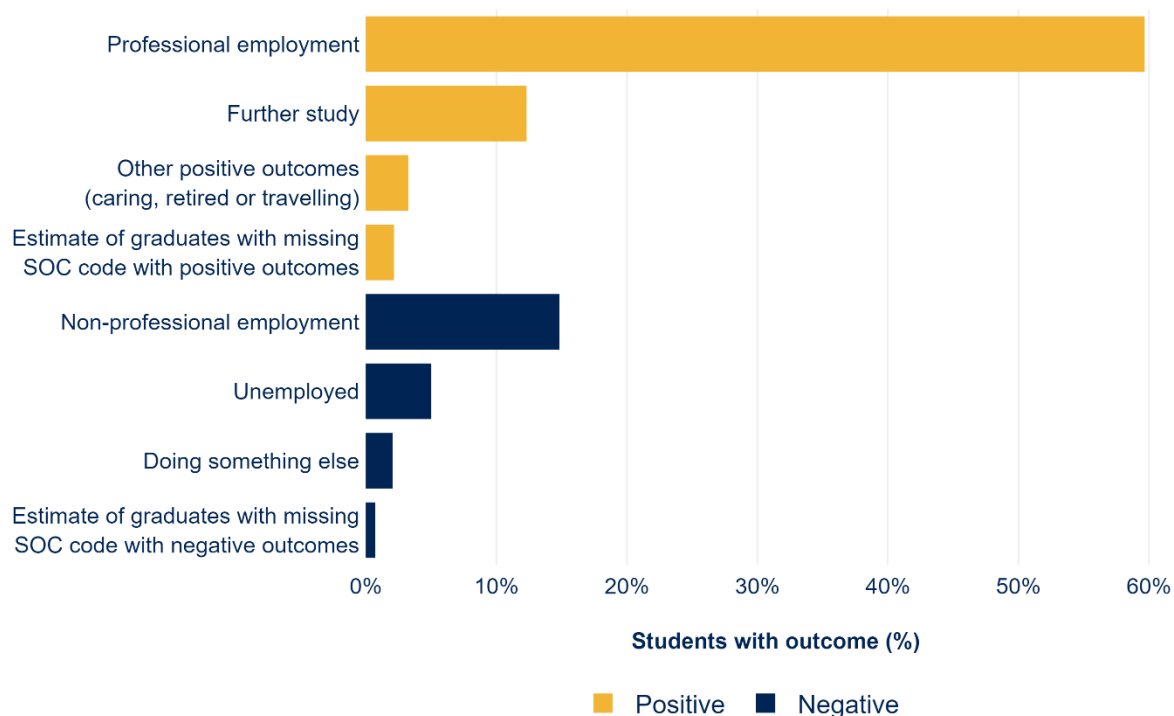
## **Our response**

241. We considered comments in relation to the progression indicator and have set out the detail of our response to the points set out in paragraphs 237 to 240. In general, we noted that many respondents argued that the construction of the progression outcome measure was too narrow. We have set out our response to respondents' general comments that the student outcome measure is too narrow in the overarching themes section. We have responded in this section to the specific comments about the progression indicator. We also note, as explained 20.c, that section 23 of HERA (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows the OfS to assess the quality of higher education by reference to student outcomes, including by reference to progression to further study of a particular description or employment of a particular description.
242. We recognise the points made about the survey's 15-month census point and its potential effect on fully representing the positive outcomes that graduates achieve. We note that the census point for GO survey is set later than that of the Destinations of Leavers from Higher Education survey (the previous tool used to measure graduate destinations, which had a census point of six months), in recognition that it was likely to be more meaningful to survey

students 15 months after graduation because they could be reasonably expected to have taken up employment or further study opportunities during this longer period. However, during the development and implementation of the GO survey, it was also recognised that an extended period between graduation and survey census date would increase the likelihood of lower response rates. The balancing of these issues was tested through the period of sector engagement and consultation when the GO survey was introduced, and a 15-month census date was considered to strike the right balance between allowing students reasonable time to progress and mitigating the risk of lower response rates.

243. An alternative census point that allowed students more time after graduation to progress into managerial or professional employment or further study, for example a 24-month census date, might increase the proportion of positive outcomes for individual providers and the sector average, because graduates might reasonably be expected to have had more opportunity to progress into managerial or professional roles or further study over a longer period. However, for the reasons set out in the paragraph 242, we have decided that a 15-month census date strikes the right balance. We also consider that changes to the GO survey to accommodate an alternative census date would lead a disproportionate increase in costs and regulatory burden, and the case for making such a change has, on balance, not been made. We will, however, continue to consider whether there may be alternative ways to measure progression that could be used in the context of condition B3 in future.
244. We considered comments by respondents that suggested that the 15-month census point did not recognise that some students do not commit to seeking a job after graduation, or at least not within the 15 months allowed for in the indicator definition. They argued that this meant that the OfS was looking at outcomes before students had progressed sufficiently through their careers to achieve managerial or professional employment, and that we should therefore have a wider definition of positive outcomes.

**Figure 1: Progression outcomes for students split by positive and negative outcomes**



245. We considered responses suggesting that our proposed indicator focused too narrowly on managerial and professional employment. Some responses appeared to suggest that the proposed progression outcome measure covered only the employment of students, and this supported their view that the measure was too narrow. This is not the case and we do not agree that the measure is too narrow. We took steps in our original proposals to ensure that the progression outcome measure considered a wide variety of possible positive outcomes for students 15 months after they had completed their study. We have set out in paragraph 247 the breadth of our progression outcome measure and how we consider that this addresses the points of respondents.
246. We take the view that the majority of students will seek to progress their career or to progress to further study within 15 months of graduating, as these are opportunities that flow from completion of a higher education course.
247. We do, however, acknowledge that it might not be possible for an individual to take up such opportunities for personal reasons, or as a result of decisions or preferences to do other things. We therefore took a wide view of the outcomes that might be counted as positive under our proposals. This means that we deliberately chose to include progression outcomes beyond managerial and professional employment. These included students who were travelling, caring for others, and self-employed or building a professional portfolio (in professions linked to SOC codes 1 to 3). Figure 1: Progression outcomes for students split by positive and negative outcomes shows the distribution of outcomes for full-time first degree students and demonstrates the wide variety of outcomes that count positively in our definition. It also demonstrates that the proportion of graduates ‘doing something else’ is very small.

248. As set out elsewhere in this document (for example paragraph 220), no numerical threshold is set at 100 per cent and we consider that they are all set at a level that can comfortably account for graduates who choose, or are not able, to take up employment opportunities within 15 months.
249. We are also taking a wide view of what should count as positive outcomes when considering circumstances where students have progressed onto further study. The previous definition in the regulatory framework states that we will consider progression to postgraduate study only as positive. We are now adopting a much wider definition, including progression to further study. This means that we will consider students as having positive progression outcomes if:
- a. They are studying at higher level or to postgraduate level study, because we recognise that there will be study progression from Levels 4 and 5 to Level 6, which should be counted positively.
  - b. They are studying at the same level of higher education. We are doing this because we recognise that there are instances where further study at the same level may be viewed as a positive outcome. We have therefore decided to count progression to any level of higher education study positively when constructing the progression indicator.
250. Finally, we consider that the progression outcome measure is also likely to be generous in its reflection of positive graduate outcomes, because it only reports the outcomes of those students who have successfully completed their higher education course. Students who did not complete their course are not included in the coverage of the measure and, not having completed their course, are therefore less likely to have achieved a positive outcome from higher education. If students who do not complete their course were included in the progression measure, we expect that the proportions achieving positive outcomes could be observed to be markedly lower than in our current measure.
251. We noted comments from respondents that some qualifications lead directly to employment that is not classified as managerial and professional for the purposes of SOC codes but otherwise required graduate-level study. We considered in our original proposals whether it was appropriate to use different SOC code groupings.<sup>28</sup> We do not consider that the examples raised by respondents, such as veterinary nurses, animal-based careers such as zookeepers, and dental nurses, offered new evidence that the approach we proposed was not reasonable, and do not intend to make changes to the definition of managerial and professional employment in our progression outcome measure. We take this view because:
- a. The SOC 2020 unit groups assigned to graduates are readily available for a range of users, supporting a transparent and well understood definition of managerial and professional employment. This definition is produced by the Office for National Statistics and is an internationally recognised method for classifying employment outcomes. The SOC system enables the collection and categorisation of those varied destinations in a way that is transparent and recognisable for national and international audiences.
  - b. The application of any standard classification we might adopt would be limited in its ability to reflect the complexity of every individual occupation in all instances. While we

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<sup>28</sup> Our consultation on constructing data indicators set out in detail our rationale for proposing use of SOC codes 1 to 3 and the alternative definitions of employment outcomes we considered (see paragraphs 261 to 269).

acknowledge that there will be specific jobs which students report in the GO survey that sit outside of the managerial and professional employment definition yet might suit that classification, we consider that the SOC codes 1 to 3 capture a substantial and helpful range of roles.

- c. Our approach to considering context will allow us to take account of any examples of occupations that are not included in SOC codes 1 to 3 but which were directly relevant to the qualification studied, such as dental nurses. As we will have data about performance at subject level, this will make it easier to consider these issues. Our approach enables us to do this because we specifically set out in the guidance for the condition that the OfS will consider 'evidence of particular course or professional attributes that are features for that provider, or a small group of similar providers, and result in outcomes consistently below a numerical threshold, which may otherwise be considered positive outcomes.'

- 252. We also considered the comments by some respondents that the cycle for updating the SOC codes (which happens once every ten years) is too slow to recognise emerging employment trends or developing roles. As many respondents highlighted, measuring the diverse range of sectors and professions that graduates enter is challenging. We accept that the nature and pace of change in the labour market mean that job roles and even sectors will continue to be created and redefined over the coming years. Some respondents suggested that the OfS should develop and maintain a separate 'higher education specific' list of employment outcomes.
- 253. We do not agree that we should establish what would effectively be a 'shadow' SOC coding framework. We think that this would increase regulatory burden and potentially create confusion. However, we intend to publish outcomes of condition B3 compliance assessments and one benefit of this will be to draw attention to particular circumstances where we have placed weight on the professions that are not included in SOC codes 1 to 3, but which we accept are positive outcomes for graduates of particular courses. We think that this will have a similar effect to the suggestion of creating a separate list, without adding significant regulatory burden.
- 254. When assessing progression indicators, we will use information available to us to inform our judgement about whether a provider's outcomes are justified in its context. We anticipate that when assessing progression indicators we may consider the GO survey data in conjunction with the subject students studied where appropriate to inform our judgment. As noted in paragraph 251, we have also included in our approach the opportunity for providers to submit additional information to support our assessment of progression indicators, in recognition that in some limited circumstances SOC 2020 groups 1 to 3 may not adequately reflect positive outcomes for graduates. Finally, we anticipate in these circumstances that we may consider evidence from the GO survey – such as whether students are using the skills developed on their course – to understand students' perspectives on their outcomes. We may also consider evidence from Longitudinal Education Outcomes data, which demonstrates that there are graduates in employment not classified in SOC 2020 groups 1 to 3 who are nonetheless earning above average salaries.
- 255. We have noted the points made by respondents that the specifications of the progression indicator may not adequately reflect the complexities of progression for some students, such as those studying creative or performing arts. Our understanding of responses was primarily

that industry roles for these students were frequently not 'professional or managerial' and that the indicator did not reflect self-employment or voluntary work that is frequently undertaken in those industries.

256. We think that the points about self-employment and voluntary work are misconceptions about our proposed approach that it is important to address. We have carefully considered the varied career pathways taken by students and have included a number of activities as positive outcomes that we think are particularly relevant to creative arts students. As a result, freelance work, self-employment or activity creating a professional portfolio are all included as positive outcomes if the employment that activity relates to would map to SOC codes 1 to 3. We also consider that use of SOC 2020 groups 1 to 3 does not adversely affect the creative industries. We take this view because the SOC 2020 classification includes artistic, literary and media occupations and design occupations in group 3. This means that the professions in the blue box below would be included as managerial or professional employment.

**Artistic, literary and media occupations and design occupations included in SOC group 3**

- artists
- authors, writers and translators
- actors, entertainers and presenters
- dancers and choreographers
- musicians
- arts officers, producers and directors
- photographers, audio-visual and broadcasting equipment operators
- interior designers
- clothing, fashion and accessories designers
- design occupations.

257. This means that, if a graduate reported that they were a self-employed actor or were developing a musical portfolio, these outcomes would count positively towards the progression outcome measure.
258. We have considered the limited number of other specific examples such as dental nurses and zookeepers that were raised in consultation responses, and continue to think that we would be able to address these specific instances where appropriate through our approach to considering context. We also think it is unlikely that these limited number of issues would be likely to be material to a provider's regulatory outcome in the vast majority of cases.
259. We have reflected on the specific points raised in consultation responses in relation to our proposal not to count interim study positively and the effect that this would have on the presentation of outcomes for particular courses (such as foundation degrees where students

progressed on to a Level 6 top-up year). We still consider it appropriate not to treat interim activities as a positive outcome for the reasons set out in our data indicators consultation, namely that GO survey infrastructure does currently not support taking an appropriate, consistent or comprehensive account of interim activities. This is because:

- a. The survey does not collect information about whether 'interim study' resulted in a student gaining a qualification or how long they studied for. We consider that these may be important attributes for defining an appropriate student outcomes measure.
- b. The survey collects only very limited information about any employment within the interim 15 months, about whether a graduate was employed at any point and how many jobs they have had since qualifying. The survey does not currently collect any detail about the job and employer names or duties of any interim employment, and without these details, graduates who worked in managerial or professional employment in the interim period could not be differentiated from those whose interim employment was not managerial or professional.

260. For these reasons, the GO survey is not currently adequately equipped to accurately collect data in relation to interim activities. We take the view it would be disproportionate for reasons of costs and survey burden to seek to amend the GO survey, and this could not be done quickly. Therefore, in the interests of students and taxpayers and of reducing regulatory burden for the sector, we have decided not to seek to amend the GO survey in order to collect data in respect of interim activities at this time. We will, however, continue to consider whether it may be appropriate to make such adjustments to the survey in future, or whether there may be alternative ways to measure progression that could be used in the context of condition B3 in future.

261. This means that we have decided not to amend the progression indicator to count interim activities as positive outcomes. However, we acknowledge the points made by respondents. The drafting of condition B3 means that we will always consider whether the context in which a provider is operating justifies the provider's performance below a numerical threshold. When we assess a provider against condition B3, we will seek to understand other factors that may be contributing to a below-threshold indicator, and whether any information means that the data nevertheless represents positive outcomes for the provider's students. We will, therefore, consider issues relating to our approach to interim activities where we consider this is relevant to our assessment of an individual provider's performance. We note that as part of the assessment process, a providers could also seek to demonstrate whether some of its students had in the interim:

- been employed in professional or managerial roles
- undertaken interim study (for example, 'other undergraduate' students progressing to a 'top up' year as part of planned route)
- otherwise achieved a positive outcome as defined by the OfS in the definitions related to the progression student outcome measure.

The OfS would make a regulatory judgement about whether or not this information justifies the provider's performance.

262. The OfS will use that information in our assessments of performance in relation to the numerical thresholds and whether a provider is delivering positive outcomes for its students.
263. We are minded to publish information in our data dashboards about the proportion of respondents to the GO survey who reported interim study. This is designed to support providers and other users in understanding the effects of non-recognised higher education on a provider's performance in relation to 'other undergraduate' minimum numerical thresholds.
264. We considered whether it would be possible to link individual student outcomes from the GO survey to the student level data we hold to augment the 'further study' outcomes. We concluded that it would not be satisfactory, because we could only match data in the way suggested for students who pursued further study at a provider that is required to return HESA or ILR data. This would mean that study at private, non-registered providers, any study abroad and some occupational training (for example for pharmacists) would not be captured.
265. We also concluded that undertaking an accurate matching exercise would introduce additional delay into the production of the progression outcome measure. This delay would likely be significant, because we would need to have access to the relevant year's HESA and ILR data to complete the matching. We consider that this delay would prevent us from taking timely action in relation to progression outcomes.
266. We therefore do not intend to undertake further data matching as suggested, because we do not consider it would deliver significant benefits in terms of timeliness or completeness of the data.
267. We do not consider that this is necessary in order to take account of the specific arrangements that some providers have in place. As set out in paragraph 261, we have decided not to amend the progression indicator to count interim activities as positive outcomes. However, we acknowledge the points made by respondents. The drafting of condition B3 means that we will always consider whether the context in which a provider is operating justifies its performance below a numerical threshold. When we assess a provider against condition B3, we will seek to understand other factors that may be contributing to a below-threshold indicator, and whether any information means that the data nevertheless represents positive outcomes for the provider's students.
268. In relation to responses that the category in the GO survey of 'doing something else' should count positively in the construction of the indicator, we noted that these responses did not identify any examples of outcomes that may fall into this category and would not be captured by any of the other categories in the GO survey that would be positive. We have therefore decided to continue to treat 'doing something else' as a negative outcome, because it is unclear what sort of activities graduates selecting this response option might be engaged in, and in particular whether any of those activities might represent a positive outcome. We consider this appropriate because the GO survey includes a sufficiently comprehensive range of alternative response categories for respondents to select. As we have identified in other instances, when undertaking compliance assessments we will consider issues relating to our approach to 'doing something else' where we consider this is relevant to our assessment of an individual provider's performance.
269. We noted comments from respondents that our proposed progression outcome measure did not take account of structural differences in the economy and that the differences between

employment outcomes in different regions of England should be considered in our approach. As set out in our proposals, we intend to use our geography of employment and earnings indicator, which we consider can help contextualise graduate outcomes by capturing some of the labour market differences experienced by graduates living in different parts of the UK. This quintile-based approach classifies travel to work areas, based on the proportion of employed graduates living in that area who are in professional or managerial occupations. We proposed that split indicators constructed for progression outcomes include the quintiles generated by this classification. The summary of responses received, including the OfS response, to the separate data indicators consultation outlines more information about our proposals and decisions relating to the selection and construction of split indicators (Proposal 9).

## **Reliability of the Graduate Outcomes survey**

270. Many respondents made points about the use of the GO survey in the construction of the progression indicator. We noted similar points in paragraph 238.
271. As outlined in our separate data indicators consultation, we recognise that available data will cover three years of GO survey responses by the point the revised condition B3 comes into effect.
272. We have considered points made by providers that the GO data is new and experimental. In many cases respondents misunderstood the Official Statistics classification of 'experimental' as meaning the data is unreliable. It is normal practice to flag all new official statistics as experimental while understanding of the statistics is developed. HESA removed the experimental label from its publication of the 2019-20 GO data, reflecting its assessment that the survey is now well established and proven to be of high quality, and we agree with that assessment. We recognise the points expressed by respondents on the risks of response bias. Views were mixed on whether we should take further steps to account for this. We agree with the conclusions reached by HESA following the research on the possible response bias in the survey, which found the possible impacts overall to be sufficiently low that the additional complexity introduced by weighting would not be justified.<sup>29</sup> We agree with HESA's conclusions on the applicability of weighting, and consider that the approach the OfS is adopting in relation to a minimum response rate will reduce the impact of response bias.
273. We note that all providers with GO survey data are provided with an opportunity to raise queries about their data prior to publication as part of HESA's general quality assurance measures. The details of this process are set out by HESA in its outcomes report.<sup>30</sup> We consider that this process enables providers to address coding discrepancies. We also consider that the contextual factors included in our assessment process will give providers a further opportunity to identify instances where students achieved employment that should be considered positive.
274. Having considered consultation responses and the additional information set out in paragraphs 272 and 273, our view is that the GO survey is currently the best source of information available on what graduates are doing. We take this view because no alternative source of information offers similar coverage of the wide range of possible graduate

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<sup>29</sup> See [www.hesa.ac.uk/blog/21-06-2021/graduate-outcomes-no-need-to-weight](http://www.hesa.ac.uk/blog/21-06-2021/graduate-outcomes-no-need-to-weight).

<sup>30</sup> See [www.hesa.ac.uk/files/Graduate\\_Outcomes\\_SOC\\_Review\\_Summary\\_20220413.pdf](http://www.hesa.ac.uk/files/Graduate_Outcomes_SOC_Review_Summary_20220413.pdf).

outcomes. The cost of introducing an additional data collection, or of expanding GO survey to increase its coverage, would be significant. Having considered all of the points made in the consultation responses, we consider that it is appropriate to use the GO survey for regulatory purposes. As we do so, we will consider whether the design of the survey and the policy choices we have made about the construction of progression indicators are relevant to our assessment of an individual provider's performance. We take assurance that GO survey results provide a representative sample of graduates' employment and study destinations for use in the assessment of compliance with condition B3.

## **The number of proposed indicators**

275. Many respondents expressed the view that the number of proposed indicators to assess student outcomes is too large and adds complexity to the process leading to regulatory burden for providers.
276. Respondents suggested that such a large volume of data would not be informative for students, would make it difficult for providers to know where best to focus efforts on improvement, and would hinder effective regulation, as relevant data may be overlooked. Many respondents suggested the OfS should use a more focused set of indicators based on the modes and levels of study where there is the highest risk of poor outcomes for students, or where there is the greatest public interest. Some respondents referred to the Australian Tertiary Education Quality and Standards Agency as an example of an approach to regulating student outcomes that used a smaller number of indicators, and suggested this could be replicated to avoid complexity and burden.
277. Other suggestions included that the OfS should set a limited number of key indicators that it will assess on a rolling three-yearly basis, and that the OfS should publish the areas for prioritisation at least a year ahead of implementation to provide greater certainty for providers.

## **Our response**

278. The volume and complexity of indicators was identified as an overarching theme, and we respond to this within that section, and in our response to Proposal 1.
279. We acknowledged in our consultation that the proposed approach to constructing student outcome measures would generate a large number of indicators and split indicators across all providers. We anticipated that even an individual provider that is generally performing above our numerical thresholds may have pockets of provision that are below a numerical threshold. We considered this necessary in order to allow us to adopt an approach that could identify, and, if appropriate, allow the OfS to take regulatory action to target and address, performance that falls below our minimum expectations even in a provider that is otherwise generally performing above them. We considered this to be in line with our policy objective to protect students in providers, and courses, where performance falls below our minimum expectations.
280. We considered suggestions from respondents that our approach should instead rely on a smaller number of indicators. We note that some respondents thought that the total number of indicators and split indicators was too high, but that the rationale for including the different modes, levels and splits was reasonable. These respondents did not suggest which indicators or split indicators should be removed. Other respondents suggested that there should be a more limited number of indicators – some suggested around 14 would be

appropriate because this would reflect the provider level indicators. One respondent suggested that this was similar to the number adopted by the Tertiary Education Quality and Standards Agency in Australia.

281. We have considered how it would be possible to create a smaller set of indicators, and concluded that this would only be feasible if we took one or more of the following steps.
- a. We regulated only at a whole provider level – i.e., not considering split indicators for subject, course type or student characteristics.
  - b. We did not disaggregate outcomes by level of study – i.e., treating all undergraduate courses as one level.
  - c. We did not create separate modes of study – i.e. treating full-time, part-time or apprenticeship provision as one mode of study.
282. We consider that none of these approaches would be appropriate because they would not allow us to identify performance below a whole provider level. This would very likely mask areas of poor performance within larger providers, and thus result in more regulatory focus on smaller providers even in instances where a larger number of students were at risk of poor outcomes at a larger provider.
283. We also consider that the effect of greater aggregation of levels and modes of study would be likely to result in numerical thresholds set in ways that had a disproportionately positive or negative impact for some providers. For example, there is a significant difference in the numerical thresholds proposed for continuation outcomes for full-time and part-time first degree courses. If we adopted an approach where we did not disaggregate by mode of study we would likely need to set a threshold that either had a disproportionately negative effect on providers with a significant proportion of part-time first degree courses, or was set too low to allow us to effectively address poor outcomes for students on full time first degree courses.
284. For these reasons, and for those given in our consultation, we have decided to retain the number of indicators and split indicators set out in our consultation proposals. However, we expect several factors to address the points identified by respondents:
- a. We will not assess every possible instance of non-compliance with condition B3 as we do not consider that this would be practical, or an efficient, effective or economic use of our resources. We set out our proposals for prioritisation under Proposal 5, which takes a risk-based approach to monitoring and intervention reflecting the resources available to the OfS. Our responses to the consultation analysis of respondents' views relating to Proposal 5 are set out paragraphs 506 to 522.
  - b. We recognise the importance of presenting this information in a way that is manageable for users and minimises burden. We are therefore minded (subject to final decisions about publication of data) to introduce a primary dashboard that focuses only on whole provider indicators and includes a filter which allows users to identify only those indicators or split indicators that are below the relevant minimum numerical threshold.
  - c. We expect that all providers are already considering the student outcome measures we are using. We expect most providers will already understand the performance of their students on the basis of the types of split indicators are presenting. We think that for some smaller providers our data dashboards would offer an opportunity to engage with

data at this level without the need to produce it within their own systems. We intend to make information available to providers to support them in doing this.

### **Treatment of courses with structural differences from typical higher education courses**

285. Respondents suggested that some course types were not adequately considered within our proposed approach. The types of courses that were identified were:
- part-time courses
  - non-recognised higher education
  - first degree courses with an integrated foundation year
  - online courses.
286. Respondents argued that structural differences in the way these courses were delivered, or the types of students who study on them, meant that providers delivering more of them would appear to have poorer outcomes. Respondents suggested that these courses should be considered separately and with different numerical thresholds.
287. Respondents commented that part-time courses, first degrees with foundation years, online courses and non-recognised higher education courses targeted students who require a higher degree of flexibility, students with different socioeconomic characteristics (age, familial situation, professional career) and life experiences, and thus potentially have different outcomes.
288. Several respondents argued that full-time degrees with integrated foundation years usually recruit students from disadvantaged backgrounds and aim to widen access and higher education participation, and are therefore structurally different from other first degree courses. Respondents argued that the performance of disadvantaged students meant they were less likely to meet the proposed thresholds and, if merged with other first degree students, would make a provider's performance appear poorer.
289. A few respondents suggested that if the DfE decides to reduce the fees for integrated foundation years then the threshold should be lower, to recognise the reduced resources available.
290. Several respondents commented that integrated foundation years were an important mechanism for increasing access to higher education. These respondents suggested that the numerical thresholds should be lower so as to avoid disincentivising providers from delivering integrated foundation years and thereby reducing opportunities for some students to access higher education.
291. Some respondents suggested that online or distance learning should be treated as different mode of study with separate minimum numerical thresholds, because they considered that the outcomes of such learning were likely to be different from face-to-face teaching. Respondents argued that it would be more appropriate to have a separate mode of study for online or distance learning.
292. Lastly, many respondents agreed with our proposals to temporarily exclude provision funded through the Lifelong Loan Entitlement, given the need to develop new measures of student outcomes more appropriate to modular study. However, as LLE is gaining increasing

importance in the educational landscape, respondents were interested in future approaches. Several respondents also supported the exclusion of transnational education (TNE). Respondents suggested that the OfS should consider potential challenges (e.g. those related to data collection and quality) before and if including those courses in condition B3 indicators, and to further consult before any numerical thresholds are set. In particular, one respondent asked about the feasibility of creating TNE outcomes measures, in particular how non-UK data would be appropriate for regulatory purposes.

## Our response

293. We have considered points suggesting that a different approach should be adopted for some types of higher education course. We have considered alternative approaches, and how our proposed approach could be amended, for example to include additional 'modes' or 'levels' of study to cover these types of higher education courses and produce different numerical thresholds in relation to these. We note that if we added additional 'modes' or 'levels' of study this would increase complexity and the number of indicators, split indicators and minimum thresholds that we would produce, thereby also increasing regulatory burden.
294. We have balanced these varying arguments and set out our response to each of these types of higher education course in the remainder of this section. In general, we remain of the view that our use of different modes and levels of study is appropriate because it strikes an appropriate balance between the range of different course structures and approaches to learning that might have an effect on the outcomes and a greater number of numerical thresholds, which would lead to increased complexity and burden. We have discussed the number of indicators and split indicators included in our proposals in paragraphs 66 to 72, and note that many responses argued that the number of indicators and split indicators was already too large, and that we should be seeking to reduce rather than increase the number of indicators.

### Part-time courses

295. We note that respondents commented that part-time courses have different structures from other forms of higher education and target students who value flexibility. We consider that part-time courses are sufficiently different in structure and outcomes to be treated as a separate mode of study. This is why we included part-time study as separate mode of study in our proposals, and will continue to do so as we implement our proposals.

### Non-prescribed higher education

296. Our response to Proposal 1 sets out our reasons for including non-recognised higher education courses within the scope of the condition and our reasons for treating these alongside other higher education courses.

### First degree courses with an integrated foundation year

297. We did not propose a separate level of study for first degree courses with an integrated foundation year. Instead, we proposed to include a split indicator within the first degree indicators. This would have the effect of identifying where performance for students studying on integrated foundation years was substantially different from that of other students.
298. In relation to the points about first degree courses with an integrated foundation year, we set out in our phase one consultation that our policy was not to set different numerical thresholds for students from different backgrounds to account for the known historical variation in performance, because accepting weaker outcomes for some students would not be consistent with delivering our regulatory objectives, which seek to ensure that all students

can expect a minimum level of quality. There was strong agreement in responses to the phase one consultation with the principle that we should not set separate numerical thresholds for different student characteristics.

299. We recognised in our phase three consultation that the continuation and completion outcomes for students on first degree courses with an integrated foundation year have historically been worse than those for first degree courses without such a year. We set out our proposed approach to regulating integrated foundation year courses in the context of our policy not to set different thresholds for students from backgrounds with historically weaker outcomes.
300. However, our approach does take account of the historical differences in outcomes both for underrepresented students and those studying on integrated foundation years:
- a. Our method for setting minimum numerical thresholds includes tests to ensure that our thresholds would not disproportionately affect groups of students with shared characteristics or particular course types. This directly took account of performance of students on integrated foundation years. For example, it was one reason for proposing a lower value for the numerical threshold for continuation. In our 'Setting minimum numerical thresholds' document we set out how we reached our proposed numerical thresholds for continuation for full-time first degree students. In this analysis we set out our view that a threshold of 85 per cent for positive continuation outcomes may have been appropriate. However, we took the view that setting a threshold at this level might have been disproportionate because the point estimate for 'first degree with foundation year' would be below the numerical threshold for 69 providers. We therefore made a further downward adjustment and proposed a threshold at 80 per cent.
  - b. We also will use benchmark values as a cross-check of a provider's performance during the assessment of any potential non-compliance. This means that we will be able to compare the performance of an individual provider for its foundation year students with the performance that would be expected across the sector for similar students.
301. We consider that our approach therefore addresses concerns that the characteristics of students on integrated foundation years may result in adverse regulatory outcomes for a particular provider.
302. We note comments that first degrees with an integrated foundation year usually recruit underrepresented students and are therefore structurally different from other first degree courses, and therefore that a separate numerical threshold would be more appropriate. We recognise that a foundation year will contain different educational content from later years of a first degree (which themselves will contain differing content – for example the final year is likely to include an extended piece of independent study). However, the ultimate learning aim of the course on which a student registers is the same as for a first degree without an integrated foundation year. We do not accept that generally a student registering on a first degree course with an integrated foundation year should have any different expectations about how likely they are to complete their first year of study from a student studying on a course without such a foundation year. We also note that setting a different numerical threshold for first degree courses with an integrated foundation year because many recruit underrepresented students would not be in line with our policy intention. This is because we do not wish to set different minimum expectations for students on the basis of their personal characteristics.

303. We agree that there is value in separating out the data for first degree courses with an integrated foundation year as a course type, as this will allow us to see any differences in a provider's performance between different course types. This will provide helpful contextual information about a provider's performance without providing an incentive for that provider to seek to justify weaker performance because of the backgrounds of the students it has recruited.
304. We considered an alternative approach of having a separate levels of study for first degree courses with and without an integrated foundation year. We think that respondents anticipated that this would result in a lower numerical threshold for first degree courses with an integrated foundation year. Our method may not have resulted in a lower numerical threshold for integrated foundation years as respondents expected, but we consider that it may have changed the balance of our decision in relation to the first degree indicator and resulted in our concluding that a higher numerical threshold was appropriate (for example, retaining the 85 per cent threshold without further downward adjustment).
305. We noted that some respondents thought the DfE proposals for a lower statutory fee limit for integrated foundation years would justify a lower numerical threshold. We do not agree, because we take the view that providers should only ever recruit students to courses where they have resources to deliver the minimum quality requirements and to deliver positive outcomes. We also note that there are already differences between the funding available to students and providers. For example, a provider with a TEF award registered in Approved (fee cap) category with a basic fee limit can only charge a maximum of £6,000 per year for its integrated foundation year. Another provider registered in Approved (fee cap) category with a higher fee limit may charge up to £9,000. We do not propose in those circumstances to set different numerical thresholds dependent on the fees a provider can charge.
306. We note comments that introducing numerical thresholds for courses with an integrated foundation year at the same level as first degrees without an integrated foundation year may result in fewer providers delivering these courses. We consider that where a provider's outcomes are below a numerical threshold there is primarily an incentive for that provider to improve its outcomes. However, we recognise that respondents consider that providers may not choose that course of action. We note that our approach to regulating access and participation is a mitigation against the closure of first degrees with an integrated foundation year. If a provider is using first degrees with an integrated foundation year as part of a general access and participation strategy, as suggested by respondents, then if it stopped running those courses in an attempt to comply with condition B3 (noting our views on closure of courses set out in paragraph 65), we would expect that provider to remain compliant with our regulatory requirements in relation to access and participation. It could do this by, for example, introducing other mechanisms to improve access, or by ensuring access and participation in relation to other courses. We may also monitor changes in delivery of foundation years through our general monitoring activities, which may involve consideration of data and other sources of regulatory intelligence, including possibly via evaluation of condition B3.
307. We take the view that the mitigations built into our approach will allow us to take into account any effects of historical student outcomes for integrated foundation years when we set numerical thresholds and when we assess individual providers. Therefore, we do not consider it necessary to create a separate level of study for integrated foundation years.

### Online and distance learning

308. We note responses that suggested that online or distance learning should be treated as a different mode of study, with separate minimum numerical thresholds. We considered our response to these suggestions both on their own merits and in the wider context of the comments from respondents that the proposed number of indicators was too high.
309. The available data could allow us to identify distance learning as a separate mode of study. While for some providers distance learning can be in both full-time and part-time modes, for many providers distance learning would mirror their part-time population because all of their distance learning courses are part-time. Therefore, any additional indicator or split indicators for distance learning as a separate mode of study will have limited additional value for many providers. The effect of creating a separate mode of study would be to increase the number of indicators and split indicators, but it would not result in data being consistently available across all of these indicators.
310. In some instances, there would be clear distinctions between online-only distance learning and face-to-face courses, as some distance courses are wholly online and some courses are wholly face-to-face. However, the coronavirus pandemic has blurred this distinction, with many providers offering blended learning (a mixture of online and face-to-face teaching), and we expect that providers will likely continue to do so into the future. Whereas distance learning courses can be identified within student data returns, blended learning courses currently cannot. We consider that the distinction made by respondents between distance and online only learning with face-to-face teaching has become increasingly less clear, and that this trend will continue in the future as online teaching is incorporated into more courses. Therefore, we consider it less beneficial and practical to treat distance or online learning as a separate mode of study.
311. For these reasons, and to avoid increasing regulatory burden with the introduction of further indicators and split indicators, we have decided not to treat online or distance learning as different modes of study with separate minimum numerical thresholds.

### Lifelong loan entitlement and transnational education

312. We noted responses that supported the exclusion of both modular provision that may be funded by the LLE and transnational education courses from the indicators, as we start to implement the new approach to regulating student outcomes.
313. As noted in response to Proposal 1, we agree that the student outcome measures we have adopted will likely not be appropriate for measuring positive outcomes on individual modules. We are therefore working with government and the higher education sector, including through learning from the OfS-led higher education short course trial, to develop appropriate measures. We will consult on any future changes to our student outcome measures and numerical thresholds in light of the effects of the LLE, once its details are confirmed by government.<sup>31</sup>
314. We set out in our phase three consultation that we intend to publish sector-level analysis of outcomes for TNE courses based on 2019-20 and 2020-21 data from the aggregate offshore record. Similarly, we confirmed that we intend to consult specifically on the detail of data requirements for TNE courses and any indicators that may be included in the scope of

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<sup>31</sup> The higher education short course trial is a collaborative programme between the OfS and DfE, in preparation for the planned introduction of the LLE in 2025: see [www.officeforstudents.org.uk/advice-and-guidance/skills-and-employment/higher-education-short-course-trial/](https://www.officeforstudents.org.uk/advice-and-guidance/skills-and-employment/higher-education-short-course-trial/).

condition B3 in the future. In formulating that consultation, we will consider the additional points raised by respondents to the phase three consultation. We anticipate that we would be more likely to introduce measures of continuation and completion rather than measures of progression for TNE courses.

## **Time series**

315. Some respondents commented that a four-year time series of data was too long, resulting in indicators not providing an up-to-date picture of the performance of the course, and not reflecting more recent successful interventions.

## **Our response**

316. We proposed that each indicator would be split to show a provider's performance in aggregate and over a time series of the latest available four years of data for that indicator. We continue to take the view that it is necessary to consider aggregate performance, in part because this addresses points made by respondents about the reliability of data relating to small student populations. We also consider that a four-year time series allows us to strike the best balance of being able to identify trends in performance without considering data that is too far removed from current performance to allow us to draw meaningful conclusions. The use of a four-year time series is intended to align with the proposed cycle of TEF assessments as set out in Proposal 1 of the TEF consultation. We recognise that a provider's performance will change over time and we have set out in our approach to assessment how we would be likely to place more weight on performance in the most recent years of the time series.

## **Inclusion of partnership data in indicators**

317. Respondents suggested that the inclusion of data for both validated and subcontracted partnerships in the data dashboards would create additional complexity and might have a negative impact on partnerships. According to these respondents, making providers accountable for the outcomes of learners at partner providers would entail a significant administrative burden in terms of monitoring. In addition, some respondents suggested it would create a strong incentive to discontinue partnership arrangements.
318. Some respondents also argued that the proposal would create confusion about the accountability of teaching and awarding providers and may double-count students. Some respondents, for instance, asked for more information about which provider would receive an improvement notice.
319. Lastly, one of these respondents argued that any disincentive to set up new partnerships could create higher education cold spots in some parts of the country. The respondent suggested that there are some areas in which students can only access higher education through partnership arrangements between local colleges and higher education providers.

## **Our response**

320. We consider that each provider holds responsibility for the quality and standards of all of its higher education courses, irrespective of the organisation that delivers them. We continue to take the view that it is appropriate to focus the attention of all providers in a partnership on any courses that do not meet our minimum expectations and consider that any burden created in doing so is appropriate having regard to reasonableness and proportionality, and the need to ensure our regulation protects the interests of all relevant students.

321. Our approach is important because it means that we can identify a provider's performance in different aspects of its provision which supports our policy objectives of protecting the interests of all students. In addition, we think that there will be value for providers in having data that allows them to see how the OfS is looking at outcomes for all of their students. We do not think that this approach risks double-counting students; rather it correctly ascribes responsibilities to all different providers within a partnership for the relevant students.
322. We accept that, to produce comprehensive information on student outcomes for validation-only arrangements for unregistered providers, we will need to introduce additional data collection. We consider this additional collection is likely to be necessary to ensure that our regulation can protect all relevant students, and we will set out proposals for how we will collect this data in a future consultation. However, we recognise the current data limitations in relation to partnership arrangements and are therefore minded not to publish the separate 'partnerships' view of a provider's student population within our dashboards in the first year of operation of the new approach to regulating student outcomes. Our current view is that we should publish data on partnership arrangements as a split indicator instead. We intend to focus on improving data quality in this, including by making the data available to providers, in order to be in a position to make decisions about publishing separate partnerships dashboards in the future.
323. We accept that including courses delivered through partnership arrangements in our approach to regulating student outcomes will increase scrutiny of the outcomes achieved for students in these arrangements. This may result in accountability for the same students sitting with more than one provider, and it is possible that this may disincentivise future partnership arrangements.
324. We do not wish to unnecessarily curtail competition between providers, impose unnecessary regulatory burden or limit choice for students, but we continue to take the view that these factors should not take precedence over ensuring students are protected from unacceptably weak outcomes and that a minimum level of performance should be delivered wherever a student studies.
325. We take the view, as set out in all phases of our consultation on a new approach to regulating quality and standards, that it is not appropriate for a lead provider to seek to generate income, or gain other benefits, through partnership arrangements while abrogating responsibility for the quality of those courses, including the outcomes they deliver.
326. We note responses that suggested that some providers may choose to withdraw from partnership arrangements rather than focusing on improving outcomes for the students involved. It is possible that some providers may withdraw or decide not to enter new partnerships because they consider that to be a reasonable and valid step to address poor quality and student outcomes. If partnership arrangements that do not deliver positive outcomes for students are terminated, we do not consider that to be adversely limiting student choice, because courses that do not meet the OfS's minimum expectations for quality cannot be considered a meaningful choice and their continuing provision would not be in the student or taxpayer interest. Our approach will focus regulatory attention where it is needed most, and we consider that providers that are delivering positive outcomes above our minimum numerical thresholds through partnership arrangements should not face disincentives or additional regulatory burden. It is, however, also possible that some providers may withdraw from existing partnerships, or decide not to enter new partnerships, in order to avoid increased regulatory scrutiny, regardless of the quality of the courses

delivered and the outcomes achieved. While accepting that this may be a possible consequence, we expect providers to act responsibly. This is why paragraph 20 of the guidance for revised condition B3 sets out that we would be likely to interrogate the timing and a provider's rationale for closing courses (for the avoidance of doubt this would include courses delivered in partnership) and would consider whether a provider had:

- taken action to improve its performance before the OfS's interest
- supported its students
- drawn lessons from its under-performance and applied, or had an intention to apply, those to its other courses
- not sought to evade regulatory action by closing courses with weak performance and launching new courses in their place.

327. If there is evidence that a provider is withdrawing from partnerships simply to evade regulatory attention, or that it is not behaving responsibly as set out in paragraph 326, we may look into this and potentially investigate further. We may also choose to take steps to monitor changes in partnership arrangements as part of our ongoing evaluation of the effectiveness of our regulation of student outcomes.

328. We have decided to adopt the proposal set out in the consultation that we would not prioritise assessment of a lead provider's indicators related to the outcomes delivered through its partnership arrangements within the first year of implementation of the proposals. This would mean that we would allow lead providers time to understand the data and, if necessary, consider taking action to improve outcomes that may be below the numerical thresholds we set.

329. To reflect this approach, our current view is that we should not include the 'partnerships' view in our data dashboard for the first year of implementation. This will mean that partnership data will be shown, in aggregate, as a split indicator. Providers will have access to data that will allow them to review and analyse the performance of particular providers or courses. We will also explore how we can facilitate providers sharing data where they have appropriate data sharing agreements.

330. In relation to the validation system more generally, we have previously signalled that we would consider further the operation of the validation system in England, including the extent to which we should use the commissioning power given to the OfS by section 50 of HERA. We recently announced a pilot to incentivise higher education providers to offer more vocational and technical qualifications at Levels 4 and 5, in a validation partnership with the Open University. This pilot is an important first step in considering how the OfS's powers can extend the options available to a wider range of providers, as well as increasing opportunities and choice for students.

## **Potential impact on recruitment of students from disadvantaged backgrounds**

331. A smaller but considerable number of respondents argued that the proposed indicators are affected by student and area characteristics, e.g., family income, social capital and regional economic imbalances. For example, students from areas with fewer managerial job opportunities may want to remain in their communities. According to these respondents,

integrating contextual analysis with quantitative measures is not sufficient because publishing the data alone could still harm public perception of the provider.

332. The main idea expressed in these responses was that the proposed approach could not only overlook background inequalities but reinforce them. According to these respondents, the proposals could encourage providers to focus recruitment campaigns on low-risk students. This means targeting better-off communities and individuals, while excluding deprived areas and students from disadvantaged backgrounds, as they are more likely to perform worse in the proposed indicators.

## **Our response**

333. We note respondents' comments about the effect that our choice of student outcome measures may have on recruitment of students from disadvantaged backgrounds. We note comments that publication of this data could harm public perceptions of providers. We will take final decisions about publication of data before the condition comes into effect, but we have set out our initial view in relation to the potential harm caused by publication of data in paragraphs 456 to 463.
334. We have set out our response to comments regarding the potential for our approach to result in changes in providers' recruitment patterns in our response to Proposal 1.

## **Decision**

335. We have considered the points made by respondents in relation to Proposal 2 and have addressed these in detail above.
336. We have decided to adopt the approach set out in Proposal 2. This means that we will use student outcome measures relating to continuation, completion and progression, constructed on the basis set out in full in our data indicators consultation.<sup>32</sup> These relate to:
- the proportion of students continuing on a higher education course
  - the proportion of students completing a higher education qualification
  - the proportion of students progressing to managerial or professional employment, or further study or other positive outcomes.
337. We have decided that we will adopt the cohort tracking methodology for constructing the completion outcome measure.
338. The technical specifications for how these measures will be constructed is set out in our response to the data indicators consultation, which also shows where we have made minor changes in response to that consultation.
339. We will consult on any future changes to our student outcome measures and numerical thresholds in light of the effects of the LLE once its details are confirmed by government.
340. We have made the following changes to the approach set out in our consulted upon proposals:

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<sup>32</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/).

- a. We are minded to publish primary dashboard to simplify engagement with the indicators and split indicators included in our data dashboards.
- b. We are not minded to publish partnership data as a separate 'view' in the dashboard for the first year of implementation. We are minded to continue with our proposals to publish partnerships data as a split indicator. This decision will be made following the publication of the outcome of our consultation on our general approach to publication of information.

## Proposal 3: Setting numerical thresholds for student outcome indicators

### Questions relating to Proposal 3

**Question 5:** Do you agree or disagree with our proposed approach to setting numerical thresholds set out in Annex E? If you disagree, please provide reasons and any alternative suggestions.

### What we proposed

341. In our consultation we set out proposals for which numerical thresholds we would set and why. We set out a proposed method for setting these numerical thresholds and a document providing detailed information about how we had reached a proposed value for each of the thresholds included in the consultation.
342. We proposed that our method for setting numerical thresholds would be published, along with the detailed information about how we set each threshold. The values we proposed for each threshold are set out in Table 2.

**Table 2: Summary of proposed numerical threshold levels**

Level and mode of study	Continuation	Completion (cohort tracking)	Completion (composite indicator)	Progression
FT Other UG	75%	65%	65%	45%
FT First Degree	80%	75%	75%	60%
FT UG / PG border	85%	85%	80%	80%
FT PGCE	85%	85%	85%	85%
FT PG Taught Masters	80%	80%	80%	70%
FT PG Other	80%	80%	80%	85%
FT PG Research (PhD)	90%	75%	75%	85%
PT Other UG	55%	55%	55%	65%
PT First Degree	60%	55%	55%	75%
PT UG / PG border	60%	60%	60%	80%
PT PGCE	75%	75%	75%	85%
PT PG Taught Masters	65%	65%	65%	85%
PT PG Other	65%	60%	65%	85%
PT PG Research (PhD)	70%	60%	60%	85%
Apprenticeship – UG	70%	55%	55%	75%
Apprenticeship – PG	80%	80%	80%	80%

Note: 'FT' = 'full-time'; 'PT' = 'part-time'; 'UG' = 'undergraduate'; 'PG' = 'postgraduate'.

## Responses to question 5

**Question 5:** Do you agree or disagree with our proposed approach to setting numerical thresholds set out in Annex E? If you disagree, please provide reasons and any alternative suggestions.

343. Many respondents were in favour of the approach that we proposed to use contextual information, such as the historical performance of groups of students with certain characteristics, to set thresholds. However, even though respondents broadly agreed with the proposal, many still made points in relation to different aspects of the approach.
344. The key points made included:
- a. Highlighting the importance of taking account of context when setting numerical thresholds, and views that in relation to the progression thresholds in particular further factors should be considered.
  - b. Comments about the appropriateness of the progression measure, and therefore of the progression thresholds themselves.
  - c. A suggestion that setting numerical thresholds may lead to the OfS making inaccurate judgements of non-compliance in relation to small datasets that are subject to more volatility and are less reliable.
  - d. A suggestion that the OfS should consult on its four-year review of thresholds, and that these thresholds should not increase over time.
  - e. Views about the impact of numerical thresholds on the recruitment of students from disadvantaged backgrounds.
  - f. A suggestion that non-recognised courses should not be included in the threshold for 'other undergraduate' courses and should instead have a separate threshold.
  - g. A view that numerical thresholds should not be set above the sector average.

### The use of context in setting numerical thresholds

345. Many respondents commented that our approach to considering historical sector data and the impact of sector-wide contextual factors such as student characteristics was appropriate. However, other respondents suggested the proposed approach does not adequately consider the situation and context of providers or other factors, such as subject variation, geographical factors, or major incidents, such as the coronavirus pandemic, particularly in relation to the progression thresholds. We consider that respondents were suggesting that consideration of contextual factors in relation to the thresholds set out in our proposals did not go far enough and that we should further reduce the proposed numerical thresholds. A few respondents argued that the proposed approach is based on the assumption that students' performance should be entirely attributed to higher education providers, whereas there are wider societal issues that could affect student outcomes. A couple of providers disagreed with our general policy not to set different numerical thresholds for students with shared characteristics.

346. Many of the responses suggesting the OfS should consider wider context in setting thresholds were general in nature, giving broad examples such as student characteristics and socioeconomic factors, which were often stated to be outside of the control of the provider. There were a limited number of specific contextual factors identified by respondents that they thought we should be incorporated into our approach; for example, respondents mentioned part-time, disabled and mature students, and regional labour markets, but no reasons were put forward as to why these factors were not already adequately accounted for.
347. Several respondents commented on how the effects of the pandemic should be taken into account in setting thresholds. Respondents were concerned that outcomes from 2020 onwards, which they expected to be lower, were not yet reflected in the data used to set thresholds and that this might mean that thresholds have been set at too high a level. Two respondents referred to the use of temporary policies by providers, such as no-detriment policies (which were put in place by providers to ensure that students were not disadvantaged by changes that were required to teaching and assessment as a result of the pandemic) and suggested that the lifting of these policies may have a short-term negative effect on providers' performance as shown in the data.
348. A small number of respondents made points about the potential for variation in performance based on subject area, particularly for progression outcomes, and recommended that we consider setting different thresholds for each subject.
349. Some respondents also suggested we should consider a measure related to the learning distance travelled by students, or another measure of educational gain, and suggested that this was particularly relevant to higher education students studying at further education colleges. Many of these respondents, however, recognised the difficulty in establishing a measure of this nature.
350. There was also a small number of suggestions that we should set separate thresholds for distance learning providers or courses, because of the different characteristics and learning patterns of these students.

## **Our response**

351. We welcome comments from respondents in support of considering broader contextual factors as part of our method for setting numerical thresholds (we deal with responses about use of context as part of our assessments of individual providers in Proposal 5). Our analysis highlighted that respondents were generally in favour of an approach that is guided by data but is not determined by an algorithmic approach.
352. Our proposed approach to setting minimum numerical thresholds took account of contextual factors in three ways. These are set out in detail in Annex E of the phase three consultation.
- a. We proposed making a downward adjustment to a numerical threshold where our analysis showed that there has been a generally observable difference in student outcomes in the past, when accounting for particular student or course characteristics for all providers in England. This adjustment enables us to take account of the impact that different student and course characteristics have had in the past on student outcomes. We proposed using our Exploring Student Outcomes analysis to support this work. This analysis took into account age on entry, disability type, ethnicity, Index of Multiple Deprivation (IMD), Tracking underrepresentation by area (TUNDRA), sex and free school meals eligibility

- b. We proposed making a further downward adjustment if our analysis of individual provider benchmarks showed that, for a given indicator, a significant number of providers were below the proposed numerical threshold, but above their benchmark. We proposed considering this adjustment because it will enable us to test whether our sector analysis is able to adequately account for the variation of different student populations at individual providers. This test allows us to see whether the initial downward adjustment has been sufficient to account for the impact of past performance across the higher education sector. Our benchmarking approach is set out in full in our response to the data indicators consultation. The contextual factors we consider vary slightly for each student outcome measure, but include level of study, subject of study, entry qualifications, expected course length, Associations Between Characteristics of Students (ABCS) quintile, geography of employment quintiles.
- c. We further tested the proposed threshold value regarding relation to our general duties and our other statutory duties (for example under the PSED, or our duty to have regard to guidance from the Secretary of State). Where appropriate, we made adjustments to the numerical thresholds because we are required to have regard to various factors, and we are using regulatory judgement to set our numerical thresholds rather than a formulaic approach. This means that we may, for example, make further downward adjustments if we are concerned about the impact on a particular group of students. This step considered the effect of the threshold in relation to the different student and course characteristics we use for our split indicators (see Annex C for full details of our data hierarchy).

353. Where respondents commented that we should consider the wider context in setting our thresholds, we note that these comments were largely general in nature and did not identify specific factors that respondents thought we should incorporate into our approach in addition to those already set out in paragraph 352. Where respondents mentioned specific factors that we should incorporate (for example, disabled and mature students) our view is that these were already sufficiently included in the method we proposed, as explained in paragraph 352, our proposed approach already accounted for different student and course characteristics, and we used benchmarking.

354. Our document Regulatory advice 20 sets out the method we have decided to adopt. This method uses sector-wide data to inform our view of the impact that different course and personal characteristics have historically had on the likelihood of students achieving positive outcomes. We have chosen to consider factors that we think will be relevant to all providers, for example student disability, ethnicity and age. We think that our method allows us to reflect the effects these characteristics have had in the past – we do this by making a downward adjustment to the minimum numerical threshold that takes account of the effect these characteristics have had on student outcomes at a sector level. We have not identified, either through the responses to the consultation or our own analysis, any further factors not already in our proposed method that have been shown to have a material impact on student outcomes at a sector level. We have not, therefore, amended our method for setting thresholds to include additional characteristics in our analysis.

355. We understand the points made by some respondents about the impact of the pandemic on sector performance, given that the academic years in which the pandemic may have had an effect will not all be included in the data we use to set minimum numerical thresholds. However, we have observed that, to date, these impacts have not necessarily led to a

reduction in performance against student outcome measures. For example, continuation rates reported through the access and participation data dashboard show that many providers saw continuation rates increase in the latest year of data (examining continuation into 2020-21), while analysis of the 2019-20 Graduate Outcomes survey responses published by HESA identified little overall change to graduates' experiences in the labour market since the start of the pandemic.<sup>33</sup> We do acknowledge, however, that the most recent continuation outcomes data we have relates to full-time students who began their courses in the 2019-20 academic year, and establishes whether they continued into 2020-21: for a large number of first degree students, this means we have information about whether or not they continued to a second year of study in autumn 2020. And, while continuation outcomes will become known for full-time students who started in 2020-21 in spring 2023, the completion outcomes for these students will not be available until spring 2025. Likewise, we hold GO survey data for students who graduated in summer 2020, but not for those who graduated in summer 2021. We do not know what this data will show, and we anticipate that any effects may not be consistent across different student outcome measures.

356. We will use the latest available data from the academic year 2020-21 as we decide on our final minimum numerical thresholds. This will ensure that we have used the most recent data, which shows effects of the pandemic. However, we do not agree with suggestions that we should further account for this in our methodology for setting numerical thresholds. We have taken this view for the following reasons:
- a. We have decided to adopt a methodology for setting numerical thresholds that is guided by available sector data. As set out above, we will use the latest available data as we decide final numerical thresholds. This will include the data for academic years 2019-2020 and 2020-2021, which we consider to be the years that will have been most significantly and directly impacted by the pandemic. The incorporation of that data will therefore factor in any impact of the pandemic on higher education and student outcomes into the setting of the numerical thresholds. We therefore do not plan to make further adjustments to sector-wide thresholds without additional reliable and appropriate data that demonstrates the impact of the pandemic on student outcomes to support that.
  - b. We agree with responses to the phase one consultation that did not support a universal approach to issues of this nature (where a numerical threshold is reduced for the whole sector on the basis of a factor that may have varying impact on individual providers) or a fully algorithmic approach to student outcomes data.
  - c. We have set out our approach for considering the impact of the pandemic on individual providers in our approach to assessing compliance with condition B3. We think that this remains the most appropriate approach to considering the effects of the pandemic (having regard to reasonableness and proportionality) and do not intend to adjust our approach to setting numerical thresholds for this reason.
357. Some respondents suggested a need for different numerical thresholds based on subject area. We recognise that there have historically been differences in outcomes based on subject area, and we considered the merits of including different thresholds for different subjects. We have considered the historical variations between student outcomes in different

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<sup>33</sup> See [www.hesa.ac.uk/insight/16-06-2022/impact-covid-19-graduate-outcomes](http://www.hesa.ac.uk/insight/16-06-2022/impact-covid-19-graduate-outcomes).

subject areas as part of our method for setting thresholds, enabling us to adjust thresholds if we identify particularly wide differences. However, we have considered suggestions for different thresholds for certain subjects in the context of the large number of responses about the size and complexity of the dataset in its current format, and consider that the effect of adding subject-level thresholds would be to add further complexity and burden to the sector. In setting thresholds, we have noted where there may be some evidence of a greater impact in a limited number of subject areas, and have set out in Proposal 5 how we will consider this as part of our assessment of contextual factors for a provider.

358. On a similar note, a small number of respondents suggested that we should consider separate thresholds for distance learning students. We have set out our reasons for not taking this approach in paragraph 308 to 311.
359. Finally, we note the comments from some providers that numerical threshold values should take into account students' learning gain. These respondents recognised that this was 'challenging' and did not suggest a mechanism that we could use to reasonably take account of this in our approach to regulating student outcomes. We remain of the view that there is not currently an appropriate measure of 'value added' or 'learning gain' for use across the sector. We have therefore not included such a measure in our approach to regulating student outcomes.

### **The progression measure and thresholds**

360. Many respondents suggested that progression indicators are not appropriate to measure students' success and providers' quality, as they do not consider a provider's context and individual students' aspirations and ambitions. Many of the comments related to the proposals on how to construct indicators to assess student outcomes that are covered under Question 4 and the associated responses. In other words, many respondents focused on the appropriateness of the indicator in general rather than the process of setting a threshold. However, we have taken these comments to mean that respondents disagree with the proposal to set a numerical threshold for progression. We note, as explained above, that section 23 of HERA (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows the OfS to assess the quality of higher education by reference to student outcomes including by reference to progression to further study of a particular description or employment of a particular description from their higher education course, and to determine and publish minimum levels of student outcomes that applicable providers are expected to meet.
361. Respondents to this question also made points about the use of the Graduate Outcomes survey as a data source for the progression indicator. Most objections to the use of the survey pointed to the use of a fixed census point, which was felt may not be fully reflective of a graduate's eventual career path, for example because the census point is too close to graduation for careers with a less defined entry pathway such as self-employment. Some respondents also suggested that this fixed census point would be too sensitive to influence by external factors such as a downturn in employment markets. Further, some respondents took the view that response rates to the survey were too low to provide a reliable indicator of outcomes. A small number of respondents suggested the use of additional survey questions relating to graduates' views of the value of their studies to further support the data used in the progression indicator, because they considered this would provide a broader view of successful outcomes.

362. Many respondents expressed their opposition to linking the progression indicator to the SOC codes, as they took the view that there are challenges in the SOC definitions of managerial and professional jobs. Some respondents argued that the successful careers of people progressing to specific occupations, such as jobs in the creative industry, might not be recognised by the current SOC codes. Some respondents suggested we should not underestimate the positive outcomes of people who take graduate-level jobs that are not recognised under the current SOC system, which was also considered to be outdated as it is reviewed only every ten years.

## **Our response**

363. We note that many of the responses in relation to this theme relate to the construction of the progression indicator, rather than the method for setting thresholds, and in particular have focused on the use of the Graduate Outcomes survey as the data source for this indicator. As explained above in our response to Proposal 2, we remain committed to the use of the Graduate Outcomes survey as we consider this is the most relevant data source with adequate levels of coverage across the sector. We have set out our reasons for this in more detail in our response to Proposal 2.

364. We have set out our responses to the points raised by respondents elsewhere in this consultation response. Rather than repeat those explanations here we have set out below where we have addressed these points:

- a. The progression indicator's appropriateness to measure students' success and providers' quality is addressed in paragraphs 53 to 65.
- b. The use of additional questions from the Graduate Outcomes survey to provide further data on student perspectives on the outcomes they have achieved is addressed in paragraph 130.
- c. The construction of the progression indicator, including the census period of 15 months after completion used in the Graduate Outcomes survey, the use of SOC codes 1 to 3 only, and the ten-year review period for SOC codes, are addressed in paragraphs 236 to 269.

## **Effect of numerical thresholds for smaller providers**

365. Some respondents suggested that using numerical thresholds could increase the likelihood of judgements of non-compliance for smaller providers, mainly because of respondents' expectation of greater volatility in the data from year to year in small datasets. These respondents anticipated that below-threshold performance would occur in some years because of the outcomes of a very small number of students that would not necessarily reflect the quality of a provider's courses. One respondent suggested that this perception of increased likelihood of non-compliance may disincentivise providers from entering into partnerships with small, specialist providers. Respondents also commented that numerical thresholds might not be appropriate for smaller student population groups, such as postgraduate research students, due to issues flowing from small samples of students with variable study types.

366. A very small number of respondents also took the view that the threshold for progression for full-time first degree students, proposed at 60 per cent, would disproportionately affect

smaller providers because the data suggested that providers below this threshold were mostly smaller.

## Our response

367. We recognise that there are challenges in using data for varying population sizes, particularly for smaller population sizes. However, we do not think it is appropriate to exclude smaller student cohorts (unless smaller than the threshold of 23 students established for the purpose of data protection as set out in our consultation on student outcomes and experience data) from the protection against weak performance that condition B3 provides. Instead, we have set out our approach to considering statistical uncertainty and small populations in our response to Proposal 6. In addition, we have also set out in our response to Proposal 4 our intentions to simplify the presentation of data to support ease of use for smaller providers.
368. We have considered respondents' comments about whether smaller providers would be at increased likelihood of being found to be non-compliant with condition B3 because of potential volatility in smaller cohorts. We disagree with this view because:
- a. We have taken into account the difference that the number of students studying at different providers may have on the sector distributions that are part of our method for setting minimum numerical thresholds. We consider that we take some account of this in our approach to considering both weighted and unweighted medians when determining our starting point values when setting minimum numerical thresholds. In practice, this step allows us to see whether provider size is having an effect on the median performance of the sector.
  - b. Our approach to statistical uncertainty makes it less likely that an indicator with a small denominator (whether that is for a whole provider or a split indicator in a larger provider) may be considered below a numerical threshold compared to an indicator with a larger denominator and the same point estimate.
  - c. Our approach to assessment specifically sets out that we will give consideration to trends in a provider's data, for example instances where a provider could demonstrate that its aggregate performance for a particular indicator for the past four years was below the relevant numerical threshold because of performance in an earlier year, and that performance showed significant and sustained improvement in the most recent years.
369. We have also noted specific points that the proposed threshold for progression for full-time first degree students (60 per cent) would disproportionately affect smaller providers. The data published alongside the consultation (both in the data dashboards and in our setting minimum thresholds document) shows that proportionally more providers that are below the minimum numerical threshold for the full-time first degree progression measure have fewer than 100 students responding to the GO survey. We note the points made by providers but disagree with the view that, because smaller providers are more likely to be below this threshold, the threshold value is too high.
370. Our view remains that if around 40 per cent of students are not progressing to positive outcomes from their higher education course, as defined by our outcome measure, this represents a significant proportion of students. We would have concerns about this proportion of students not progressing to positive outcomes at any provider regardless of

the size of that provider. We note that our objective is to afford an appropriate level of protection to students at all providers. We have balanced these considerations and we consider that the numerical threshold for progression for full-time first degree students should be the same for all providers irrespective of their size. However, the decision on the level at which this threshold will be set will be taken in September 2022.

## **Consulting on the four-year review of the thresholds**

371. While many respondents who commented tended to agree with the use of a four-year review cycle in line with proposals for the TEF cycle, many requested further explanation about the proposed review and revision of the numerical thresholds, suggesting that this be done in consultation with the sector. Some of these respondents sought assurance that thresholds would not be expected to rise automatically over time, instead suggesting that any changes should be proportionate and evidence-based to support stability for the sector. A few respondents queried the transparency and objectivity of the OfS approach; they expressed concern that the numerical thresholds would be set (or adjusted in the future) arbitrarily on the basis of political imperatives. Respondents were strongly of the view that thresholds should not be set above the sector average in future.

## **Our response**

372. We will normally review thresholds every four years, in alignment with the TEF cycle. This means we expect that the thresholds we set now will remain at the same level until the scheduled review in 2026. However, we recognise the desire for more explanation about how we will approach this.
373. The purpose of the four-yearly review is to ensure that thresholds remain fit for purpose, i.e. that they continue to enable OfS to identify the poorest performance in the sector but remain reflective of the overall high quality of the English higher education sector.
374. When we review thresholds, we expect to use the same method that we have set out in our 'Setting numerical thresholds' document.
375. Our numerical thresholds will not automatically rise over time. As part of our review of numerical thresholds, we will consider all relevant information available at the time in determining an appropriate numerical threshold. Our intention remains that numerical thresholds for the purpose of condition B3 are focused on setting minimum expectations for quality. Our prioritisation process will focus on identifying and targeting unacceptably weak performance. We will use other tools such as TEF to seek improvement above our minimum expectations. In continuing to employ a data-led approach, we also do not consider that future revisions would be arbitrary or unduly influenced by external factors that are not relevant.
376. However, in light of responses from providers about potential future changes to higher education (notably the DfE proposals for higher education reform and the introduction of LLE), we consider that it is appropriate to make clear that we may consult earlier on changes to a threshold value if appropriate, for example in response to significant changes in the regulatory or funding landscape for courses. We have therefore decided to change the wording of our approach to reviewing numerical thresholds to say that we will 'normally' review thresholds every four years. This is intended to provide scope for an earlier review if there are significant changes in the regulatory or funding landscape within the next four

years, or later if these are likely to occur shortly after a review would otherwise have happened.

377. Any decision to make changes to any numerical threshold would be subject to consultation.
378. We note that some respondents would not support a numerical threshold being set at level above sector average performance. In general, we consider that the English higher education sector performs highly and that performance at or close to the sector average is generally unlikely to require intervention. However, in our proposals, we explained that there may occasionally be circumstances where we would use our regulatory judgement to set a threshold closer to or above the sector average, if we were to identify that quality in a particular part of the sector was low. We have explained our approach to this further in paragraph 139 of our consultation proposals, as an example of where we may need to balance our data-guided approach with regulatory judgement.<sup>34</sup> The data does not currently suggest that there are any parts of the sector where that is the case, and therefore all the numerical thresholds we proposed at consultation stage were below sector averages. We continue to consider that it is important, and in the student interest, for the OfS to use its discretion and regulatory judgement to respond to changes in performance in parts of the sector if that were shown to be needed in order to achieve our policy objective of ensuring an appropriate minimum level of quality for all students. In practice, we do not normally expect to set a numerical threshold above a sector average, but we may do this where we consider it appropriate, having regard to our policy objectives, the relevant factors and information at the time, reasonableness and proportionality.

### **Impact on recruitment of students from underrepresented groups**

379. Many respondents suggested that the proposed approach could affect the recruitment of students from underrepresented groups, as providers could be incentivised to reduce recruitment of students who are less likely to achieve positive outcomes. In particular, respondents suggested that providers would want to avoid recruiting students who they expected to have less chance of continuing, completing, and progressing, to avoid failing to meet the numerical thresholds. They suggested a provider would need to provide different levels of support to students from some backgrounds. Some respondents suggested this was particularly relevant for further education colleges that were more likely to recruit higher education students from disadvantaged backgrounds. One respondent took the view that if the OfS were to impose sanctions that could reduce the availability of higher education in some communities.

### **Our response**

380. We have noted that the points made in this section have concentrated on the overall policy of introducing numerical thresholds as part of an assessment of a provider's performance against condition B3, rather than on specific aspects of the numerical thresholds or the method we proposed to use to set them. We have addressed these points as part of our response to Proposal 1.

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<sup>34</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

## Non-recognised courses

381. Another theme in respondents' answers, particularly those from further education colleges offering higher education, was how non-recognised courses should be treated. In particular, many respondents suggested that non-recognised courses should be treated as a different category for which the OfS should set different thresholds (subject to a further consultation), rather than been considered in the 'Other Undergraduate' category, based on what respondents saw as fundamental differences between these and other courses. Other respondents went further and suggested these students should be excluded from the indicators completely because of reduced availability of data across the student lifecycle.

## Our response

382. We have set out our response to the inclusion of non-recognised higher education courses in our student outcome measures in paragraphs 163 to 172.

## Thresholds above the sector average

383. Some respondents took the view that we should not set numerical thresholds above the sector average. These respondents had noted our reference to the use of regulatory judgement in setting thresholds and felt that, considering that the UK higher education sector generally performs highly, setting a numerical threshold above the average would result in some providers being wrongly presented as underperforming. Other respondents suggested that the use of regulatory judgement could lead to a lack of transparency and considered that this suggested an undesirable degree of subjectivity in setting thresholds.

384. Some respondents argued that the way in which thresholds had been set could result in a provider having below-average performance that did not necessarily mean that its courses were of low quality, and therefore suggested that the OfS should also consider the distance of a provider's performance from the numerical thresholds in the prioritisation process and all other stages of the assessment.

385. A few respondents also suggested alternatives to the proposed approach, mainly focusing on setting the numerical thresholds. For example, a few suggested using benchmarked thresholds that consider student characteristics and the subject of study, such that providers are compared with those providing similar types of education to similar types of students. One respondent suggested setting the numerical thresholds at two standard deviations below the average, to ensure that the focus would be on providers that provide low quality courses.

## Our response

386. In our approach to setting the numerical thresholds for each indicator, we are guided by sector data and consider each threshold discretely. This means that the minimum numerical thresholds we proposed to impose in our consultation reflect actual performance in the sector for those indicators – for example, there is a difference between the thresholds for full-time and part-time first degree progression outcomes because there is a difference in outcomes for students on those courses. We use the sector average as a starting point before identifying appropriate adjustments to determine the threshold value having regard to our policy objectives, the relevant factors and information, reasonableness and proportionality. We note that none of the thresholds we proposed at consultation were above or at the level of sector averages at present.

387. We consider that this is reflective of a generally high performing sector. As explained in our consultation proposals, we consider that performance at or close to the sector average is generally unlikely to require intervention and we do not normally expect to set a numerical threshold above a sector average. However, there may occasionally be circumstances where we would use our regulatory judgement to set a threshold closer to or above the sector average, if we were to identify that quality in a particular part of the sector was low. We may do this where we consider it appropriate, having regard to our policy objectives (including the aim of ensuring a minimum level of quality for all students), the relevant factors and information at the time, reasonableness and proportionality. If we were to set a threshold above the sector average in the future, it would be because we considered the average to represent underperformance.
388. In relation to concerns that setting a numerical threshold above the average would result in some providers being wrongly presented as underperforming, we consider that in circumstances where we set a threshold above the sector average in the future, it would therefore be because we consider the average to represent underperformance and therefore would not be wrongly presenting a provider's performance.
389. In relation to points that the use of regulatory judgement could lead to a lack of transparency and an undesirable degree of subjectivity in setting thresholds, we set out in consultation the method we will use for setting thresholds. We have chosen to adopt this method and, when we make final decisions about the numerical threshold values, we will publish the outcomes. Our view is that applying regulatory judgement is appropriate, and preferable to an approach that might use algorithms to determine thresholds, because it enables us to ensure that thresholds are set at a level that is most likely to meet our policy aims.
390. In relation to the suggestion that the OfS should consider the distance of a provider's performance from the average of indicators in the prioritisation process and all other stages of the assessment, analysis of these responses suggested that many respondents who made comments of this nature had understood thresholds to be set predominantly using the sector average, rather than allowing for further adjustments as included in the proposed method. Given that the proposed thresholds are lower than the sector average, we do not consider it would appropriate to make an assessment using sector averages.
391. We have chosen not to set thresholds using a purely algorithmic approach, such as the use of standard deviations suggested by one respondent, so that we can exercise our discretion and use our regulatory judgment to ensure appropriate numerical thresholds are set having regard to our policy objectives, the relevant factors and information at the time, reasonableness and proportionality. As we have commented in paragraph 389, we could have set out a more determinative method for setting thresholds but have chosen not to do this so that we can give more weight to the circumstances of the sector in general.
392. A minority of respondents commented in this section about their preference for us to use benchmarked data to assess providers' performance rather than absolute thresholds. We have considered feedback about our approach in our response to our phase one consultation on quality and standards. We set out our consideration of alternative approaches, including setting numerical thresholds for providers based on their individual benchmarks in Annex G of the phase three consultation. The responses to this consultation have not changed our view that the use of absolute thresholds is the most effective way to achieve our policy objectives.

## Responses to question 6

**Question 6:** Do you agree or disagree with the proposed numerical thresholds set out in summary in Table 1 and shown in full in 'Setting numerical thresholds for condition B3' (available at <https://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/>)?

393. Question 6 asked respondents whether they agreed or disagreed with the proposed minimum numerical thresholds set out in Table 1 in the regulating student outcomes consultation. Views were fairly evenly balanced, with almost half (44 per cent) of respondents saying they agreed with the proposals but a similar proportion (38 per cent) who disagreed. Across the responses there was a range of general points about the approach to setting thresholds, some of which were consistent with the overarching themes or other points that we have covered elsewhere in our response.
394. We have focused in this section on those responses that were specific to individual numerical threshold values or general patterns relating to how the proposed thresholds were set. The main points were:
- a. Comments that proposed thresholds were not at the level respondents would expect, for example, that part-time and full-time thresholds for progression for the same level of study should be the same or that some courses should have a separate threshold, such as first degrees with an integrated foundation year.
  - b. Comments about the proposed approach to setting thresholds, including in relation to the OfS's judgement about the 'starting point' for determining where a numerical threshold should be set.
  - c. Requests for further information about the OfS's proposed approach.
  - d. Disagreement with the use of progression measures.
  - e. Views about the potential impact of the proposed thresholds on the recruitment of students from disadvantaged backgrounds.
  - f. Views that the proposed thresholds do not take sufficient account of context, in particular the impact of the pandemic.

### Suggestions about setting thresholds for some specific indicators

395. A small number of respondents identified individual cases where the proposed threshold was not at the level they would expect. For example, some disagreed with setting the threshold for part-time progression outcomes from first degree study 15 percentage points higher than the equivalent full-time threshold. Four respondents were unclear why integrated masters' courses had different proposed thresholds compared with first degree courses (across all indicators), and one respondent took the view that the proposed thresholds for PGCE courses may be too challenging. Where respondents gave reasons for these points, they commonly referred to what they considered to be the increased likelihood of students leaving for personal reasons where courses have a longer duration.

396. A small number of respondents made points about the increase in thresholds compared with those used previously by the OfS, with one suggesting an interim change to allow providers to adjust to increased expectations without causing excessive burden.
397. In addition, some respondents suggested that there should be different thresholds for some courses because of their particular context and the specific characteristics of students attending those courses. For example, some respondents suggested that there should be different thresholds for full-time first degrees with an integrated foundation year. These respondents repeated the points made in response to question 5 and argued that foundation years are often used as a way to widen participation in higher education, and therefore are more likely to attract students from disadvantaged backgrounds. Respondents considered that there was an increased likelihood that a higher proportion of those students would choose not to continue with their courses. A few quoted evidence that students attending these courses are less likely to continue and complete the course than students attending full-time first degrees, which, according to those respondents, justifies why full-time first degrees with an integrated foundation year should be treated as a separate level of study. In addition, as in question 5, some respondents argued that the OfS should set different thresholds for non-recognised higher education courses, because the nature of such courses makes it wrong to include them in the 'Other undergraduate' category. One respondent also suggested considering different thresholds for providers offering predominantly online learning because of the likelihood of lower completion outcomes at these providers. We have considered these points in response to Question 5 and have therefore not duplicated our response here.
398. A few respondents made points about setting thresholds for apprenticeships and suggested that thresholds should take into account the fact that providers cannot control whether students complete their apprenticeship. Although most of them recognised that completion rates of 55 per cent are lower than other modes and levels of study, they still considered that the proposed thresholds do not sufficiently take into account apprentices' potential lack of motivation to complete their apprenticeships. Respondents suggested that following the completion of the embedded qualification, apprentices often do not have the incentive to complete their apprenticeship and argued that this does not necessarily signal inadequate support from a provider. A small number of respondents also questioned the higher thresholds proposed for postgraduate apprenticeships, noting the limited availability of data for this type of study, and suggested that this could be lowered.

## **Our response**

399. Our proposed approach to setting numerical thresholds and our rationale for each of the proposed numerical thresholds was set out in our document 'Setting numerical thresholds', which we published alongside the phase three consultation. In that document, we demonstrated how we had followed our method for each threshold and made our proposal about the value for each numerical threshold. Our method set out that there would generally be broad consistency across numerical thresholds where there is reasonable similarity between types of courses.
400. We recognise that there are a small number of examples where a threshold for a particular level of study, or the relationship between two thresholds, may not appear to have been how respondents might have expected. For example, we proposed a minimum numerical threshold value for progression for full-time first degree courses at 60 per cent, whereas the proposed threshold for part-time first degree courses was 15 percentage points higher (75

per cent). We adopted a consistent approach to setting threshold values, and the in this example threshold for part-time courses is higher because sector performance is on average higher than for full-time courses at the same level of study. While some respondents suggested that students on courses with a longer duration may be more likely to leave for personal reasons and that the thresholds for PGCE courses may be challenging, the thresholds proposed are higher because this represents sector performance, and therefore the data does not suggest it is that case that students on such courses are more likely to leave or that the courses will be too challenging.

401. We think that the application of our method in this instance is appropriate because it reflects the differences in actual sector performance. It also reflects our policy position that we consider there to be structural differences in the delivery of higher education between part-time and full-time modes of study. If there were not differences in outcomes and thresholds for these modes of study, there would be less justification for treating them as separate modes of study for the purpose of the condition.
402. An alternative approach we could have taken would have been to set consistent thresholds across modes or levels of study without giving as much weight to the analysis of sector data. We considered whether these thresholds should be set at a more similar level, but concluded that it would be wrong to set thresholds much lower than current sector performance for part-time courses, or much higher than current sector performance for full-time, solely on the basis that this would make thresholds more consistent with each other.
403. We have noted points made by some respondents suggesting that the thresholds set for progression indicators are too high because they considered there to be a wider range of external factors influencing graduate outcomes. We consider that the method is firmly based on sector-wide data and takes account of contextual factors. Our approach to setting the numerical thresholds is data-driven, which allows us to have regard to data about sector performance. This means that the proposed numerical thresholds (for progression or otherwise) are set by reference to the sector's current performance. We use sector averages as a starting point and then make appropriate adjustments having regard to relevant information including context. This will enable us to set appropriate thresholds that are not too high. We do not consider that any consultation responses we received made specific points about the application of the method. Our view remains that the method was applied in such a way as to result in thresholds that enable us to focus our interventions on providers where there is most risk that they are not delivering positive outcomes for students.
404. We note that some respondents suggested that there should be different thresholds for some courses because of their particular context and the specific characteristics of students attending those courses. We continue to take the view we that do not want to do this, because we want to ensure that all students are protected and can expect the same minimum level of quality. In addition, section 23 of HERA, read with section 18 of the Skills and Post-16 Education Act 2022, allows us to assess the quality of higher education by reference to student outcomes, and it does not require us to determine and publish different minimum levels in relation to a measure of student outcomes in order to reflect differences in particular student characteristics, the particular institution or type of institution providing higher education, the particular higher education course or subject being studied, or any other such factor.
405. We have carefully considered the responses that suggested we should implement different thresholds for students studying first degree courses with an integrated foundation year. We

have set out our reasons for not setting a separate, and lower, numerical threshold for first degree courses with an integrated foundation year in our response to Proposal 3.

406. Some respondents commented on our proposed thresholds for apprenticeship study, noting the reduced amount of data available for this mode of study. It was also suggested that there was an additional influence from a student's employer on their progress or student motivation. We agree that the data available for the 'apprenticeships' mode of study is not as well established as for other modes of study, because higher education level apprenticeships have not been in existence for as long as other modes of study. We also note that there is less consistency in terms of sector performance over time compared with other modes of study, because apprenticeships have generally seen both growth in student numbers and improving performance in our outcome measures over the last four years. We consider that our methodology will take account of these points when we set the final minimum numerical thresholds in September 2022.
407. We also note suggestions that apprentices 'potentially lack motivation to complete their apprenticeships' and that this should result in lower numerical thresholds. We note that no direct evidence was submitted that apprentices are less motivated than other students and, in general, would expect the same support to be available for all students regardless of the course they study. We do not agree that this should be a factor that we take into account in our methodology for setting numerical thresholds. We expect that if the structure of apprenticeships courses results in differing student outcomes, this would be accounted for in our methodology and would support our rationale for creating a separate mode of study. A small number of respondents also questioned the higher thresholds proposed for postgraduate apprenticeships, noting the limited availability of data for this type of study, and suggested that this could be lowered.
408. We will decide the final numerical thresholds in September 2022, which will be determined using the approach to setting numerical thresholds that we have decided to adopt. We consider that the changes that we have made to our specifications for constructing student outcome measures will not have a significant effect on the sector averages or sector distribution. We therefore expect that the numerical thresholds we will set and publish in September 2022 will not be any higher than those that we consulted on in January 2022 and any adjustments we make to the numerical thresholds on this occasion will be downwards. We are taking this approach on this occasion in light of the fact that this is the first time the OfS will be introducing numerical thresholds for quality under this new policy approach to assessing condition B3. However, for the avoidance of doubt, when numerical thresholds are reviewed and set in the future, they may remain at the same level, or be adjusted upwards or downwards as appropriate, having regard to the data available and other relevant considerations at the relevant time. We will consider the suggestions set out in paragraphs 395 to 398 as we review the latest available data and set numerical threshold values in September 2022.
409. We noted suggestions that we introduce numerical thresholds through an interim change, to allow providers to adjust to increased expectations without causing excessive burden. We considered whether we should introduce some thresholds before others, or introduce them to build up to an appropriate minimum expectation level gradually over time. However, we consider that such approaches would not be appropriate and in the interests of students, because they would delay the introduction of numerical thresholds that set appropriate minimum expectations to ensure a minimum level of protection for all students on all courses.

We consider that there is a strong student and public interest in the OfS taking regulatory action now where providers are not delivering positive outcomes for their students. Further, we consider that such approaches could potentially increase regulatory burden as regulatory changes would be introduced at multiple points in time.

### **The proposed method for setting numerical thresholds**

- 410. Some respondents considered that the proposed method resulted in thresholds being set arbitrarily because of the policy factors that were included in the approach, for example having regard to guidance from the Secretary of State. Other respondents thought that the threshold values appeared reasonable, and also suggested that the process for future review should be transparent.
- 411. One respondent suggested that the starting point we have described in our methodology appeared to have been set at a point where the OfS could be sure some providers would fall below it. This respondent was concerned that this would mean that the whole sector would never be considered to be performing well enough. That respondent did not make any suggestions for an alternative approach.
- 412. One respondent suggested an alternative approach to setting thresholds by using the lower quartile of sector distribution rather than the sector average, in order to identify the weakest performance.
- 413. There were also comments that, if we were to find a large number of providers below numerical thresholds in the early years of implementation, this could suggest that our thresholds have been set too high and that they should be reviewed.

### **Our response**

- 414. We note respondents' views that our methodology will result in numerical threshold values that are set arbitrarily as a result of taking into account policy and contextual factors. The policy factors that we may consider when determining a numerical threshold are included in the method to allow us to adjust a numerical threshold if it would otherwise be set in a position that we considered did not deliver our policy objectives, or where a threshold would otherwise be inappropriate with regard to our general duties, our other statutory responsibilities (for example our responsibilities under the PSED, or our responsibility to have regard to guidance from the Secretary of State), reasonableness and proportionality. We do not accept that acting in accordance with our statutory duties or policy objectives will result in arbitrary decision-making. We also consider that the publication of our rationale for each numerical threshold will allow providers and others to understand the reasons for the value chosen for each threshold. We will publish the rationale in our Setting numerical thresholds document, and this will show where we have placed weight on a particular factor when setting a proposed numerical threshold and the effect this has had.
- 415. We have noted comments from some respondents regarding the starting point we have used for determining a numerical threshold. We have chosen to use a starting point based on sector average performance, as we consider that the English higher education sector performs highly and that performance at or close to the sector average is generally unlikely to require intervention. We continue to take the view, therefore, that this is an appropriate data point to start our analysis for each threshold which allows us to then make adjustments, including taking account of effects of historical performance for underrepresented groups of students, and we have not changed this view as a result of the consultation.

416. We note comments that suggested that the purpose of the methodology was to ensure that some providers would always fall below a threshold, because it is derived from a sector average. We disagree that this is the case, because our methodology allows for appropriate adjustments to be made to the starting point, which is based on sector averages. These adjustments are able to take account of very high performance and of the distribution of providers' outcomes across the sector. For example, several of our proposed thresholds would be likely to result in very few providers (fewer than five) being below a numerical threshold, because performance across the sector is consistently very strong for that indicator. We anticipate that improved performance in the sector over time may result in some indicators with no provider data below a threshold. The number of thresholds where this is the case may potentially increase over time.
417. We have deliberately chosen not to take an approach that sets a threshold relative only to the sector average, or to the proportion of providers below a threshold, because such approaches would not allow us to sufficiently take account of contextual or policy factors. We have also decided that thresholds should not move annually relative to sector performance but will normally be reviewed every four years. This review could result in threshold values increasing, remaining the same or decreasing as we consider (in light of our policy objectives) the average performance across the sector and the other factors in our methodology for setting minimum thresholds.
418. In relation to suggestions that we should set thresholds at the lower quartile of performance, we consider that if we applied this approach and held other aspects of our methodology the same, it would not be likely to have a significant effect on the thresholds because it would probably mean fewer downward adjustments were necessary, rather than resulting in lower thresholds. We do not consider there is any significant benefit in adopting this approach.
419. We have also noted comments suggesting that, if we were to find a large number of providers below threshold in the early years of implementation, this might suggest that thresholds had been set at an inappropriately high level. We have set out our policy intention to set minimum expectations for quality, and our proposed approach to setting numerical thresholds has been designed to allow us to set appropriate numerical thresholds in line with that policy objective. Our proposed methodology included a stage that tested whether setting thresholds at a particular level would affect too many providers. This resulted in some thresholds being lowered (for example, the threshold for full-time other undergraduate completion outcomes was proposed at 65 per cent rather than 70 per cent). We expect that we will normally review all thresholds every four years, as outlined in paragraphs 372 to 378.

### **Use of progression indicators**

420. As in responses to question 5, respondents expressed their disagreement with using progression measures as an indicator of providers' quality. A very small number of respondents said that this was because of a significant influence of external factors on a graduate's outcome, or the limited time between graduation and the census point for the Graduate Outcomes survey. Others explained that they disagreed with defining success based on whether students progressed to professional or managerial jobs; the definition of progression might vary between people, especially those in creative industries.
421. Some respondents also commented that students who are retired and studying for pleasure would not expect to progress to employment, and this would have a negative impact on progression rates.

422. We also received feedback in both the student outcomes consultation and the data indicators consultation about our proposal to not count interim study positively in the construction of the progression indicators (i.e. graduates who have undertaken another course of study between completion of their course and their GO survey census point). In particular this relates to students who complete a 'top-up' from a Level 4 or 5 qualification to a bachelors' degree.

### **Our response**

423. We note that many of the responses to this question related to the use of progression as an indicator rather than the specific values we had proposed for the minimum numerical thresholds. We have responded to these points elsewhere in this document, most fully in our response to Proposal 2 (see paragraphs 236 to 269).

424. In relation to points about retired students, we agree that it would not be appropriate to treat these students as having a negative outcome, and this is why our proposals set out that these students be treated positively in the progression indicator.

425. We have responded more fully to points made about the treatment of interim study in paragraphs 260 to 266.

### **Impact of the thresholds on recruitment of students from underrepresented groups**

426. Another theme that was raised in responses to question 6 was that the numerical thresholds pose challenges in relation to specific student groups and would have an adverse impact on student recruitment. Particularly, some respondents suggested that providers that recruit students from disadvantaged backgrounds might not be able to meet the proposed numerical thresholds. As a result, it was argued that providers would be incentivised to avoid recruiting students who are less likely to achieve positive outcomes in respect of continuation, completion and progression. Respondents suggested that this would have a negative effect on social mobility, which runs counter to the OfS's objectives.

### **Our response**

427. We have noted the further comments made about the impact of the values we proposed for minimum numerical thresholds on providers' recruitment behaviour. However, we consider that the comments made in this section relate to more general and overarching comments about the impact of the use of absolute numerical thresholds, rather than to our approach to setting numerical thresholds or specific thresholds that may have been inappropriate or inappropriately set. We have addressed comments of this broader nature in our response to Proposal 1.

428. Section 23 of HERA (as amended by section 18 of the Skills and Post-16 Education Act 2022) allows the OfS to assess the quality of higher education by reference to student outcomes, and sets out that the OfS is not required to determine and publish different minimum levels in relation to a measure of student outcomes in order to reflect differences in:

- particular student characteristics
- the particular institution or type of institution which is providing higher education
- the particular higher education course or subject being studied
- any other such factor.

429. However, we have included steps in our method for setting minimum numerical threshold values, which include explicit steps to take account of the historical variance of performance of students with different characteristics and ensure there is not a disproportionate effect. For example, in setting the threshold for progression for full-time other undergraduate students, we considered that a threshold of 50 per cent may be appropriate, but made a further downward adjustment to 45 per cent after we had considered the effect that a threshold set at 50 per cent might have on underrepresented students.
430. We note comments from respondents who consider that providers are likely to change their behaviour in response to our approach to regulating student outcomes, and that this will have a negative effect on social mobility. We have set out our response to these points in full in paragraphs 187 to 189. In summary, we do not consider that the numerical thresholds we have set should result in providers with performance above the numerical thresholds seeking to change recruitment practices, because they will be set in a way which takes account of historical differences in student outcomes. We take very seriously respondents' concerns that providers may take steps to reduce access for students from underrepresented groups because they are prioritising selection of students who they consider are most likely to achieve positive outcomes. We consider that our wider regulation, including our regulatory requirements for access and participation will mitigate these risks.

### **Numerical thresholds do not take sufficient account of context**

431. Some respondents took the view that the proposed thresholds do not fully consider a provider's context or additional socioeconomic factors that might affect students' outcomes. As with similar comments made elsewhere, this feedback was predominantly general in nature and did not identify specific factors that the OfS should additionally include in its approach. Where respondents were specific, their comments focused on the impact of the pandemic not being reflected in the thresholds proposed by the OfS, suggesting that the thresholds had been set at a level which is too high.

### **Our response**

432. We note that most of the small number of comments received on this theme pointed to the impact of the pandemic and that the datasets we used to set proposed numerical thresholds did not include data from that period. We are mindful of this issue and have set out more information about how we intend to deal with any impact of the pandemic earlier in this section and in Proposal 5.

### **Decision**

433. We have considered the points made by respondents in relation to Proposal 3 and have addressed these in detail.
434. We have decided to adopt the approach set out in Proposal 3. This means that:
- a. We will adopt the approach for setting minimum numerical thresholds set out in our consultation. We have published this approach in Regulatory advice 20 alongside this document.
  - b. We have changed the wording of our approach to reviewing numerical thresholds to say that we will 'normally' review thresholds every four years. This is intended to provide scope for a different timing of the review if there are significant changes in the regulatory or funding landscape.

- c. We will decide the final numerical thresholds in September 2022, using the approach to setting numerical thresholds that we have decided to adopt. We consider that the changes that we have made to our specifications for constructing student outcome measures will not have a significant effect on the sector averages or sector distribution. We therefore expect that the numerical thresholds we will set and publish in September 2022 will not be any higher than those that we consulted on in January 2022 and any adjustments we make to the numerical thresholds on this occasion will be downwards. We are taking this approach on this occasion in light of the fact that this is the first time the OfS will be introducing numerical thresholds for quality under this new policy approach to assessing condition B3. However, for the avoidance of doubt, when numerical thresholds are reviewed and set in the future, they may remain at the same level, or be adjusted upwards or downwards, as appropriate, having regard to the data available and other relevant considerations at the relevant time.

## Proposal 4: Publishing information about the performance of providers in relation to the OfS's numerical thresholds

### Questions relating to Proposal 4

**Question 7:** Do you agree or disagree with our proposal to publish information about individual providers' student outcomes and performance in relation to our numerical thresholds, as well as sector-wide data, on our website?

435. Proposal 4 set out proposals for publication of data and information that relate specifically to our regulation of student outcomes.
436. Alongside sector-wide data analysis, we proposed publishing on our website the following information for each provider as part of our regulation of student outcomes:
- a. Its student outcomes as shown by indicators and split indicators for each of our student outcome measures.
  - b. Its performance in relation to our numerical thresholds.
  - c. Information about the statistical confidence we have in the performance shown in those indicators.
  - d. The provider's individual benchmarks.
437. Alongside this information, we also proposed publishing information about an individual provider's compliance with ongoing condition B3. This would show whether the OfS had assessed a provider in relation to ongoing condition B3, and be clear that, where the OfS had not made an assessment, no assumptions should be made about the provider's compliance with the condition. Where the OfS found a breach or increased risk of a breach of condition B3, we proposed that we would provide information about that finding and any regulatory action taken to address a provider's performance.
438. We noted in the consultation document that we were separately consulting on our general approach to the publication of information about higher education providers, and said that any approach taken in future in relation to Proposal 4 would take account of the outcomes of that consultation. Since our student outcomes consultation was published, we have issued a supplementary consultation on the publication of information about higher education providers, and we have not yet made any decisions on the publication matters consulted upon.
439. Given the relevance of our publication consultation to Proposal 4, we do not intend to make any final decisions on Proposal 4 until we have considered responses to our publication consultation. This will be before condition B3 comes into effect. Nevertheless, we have reviewed responses to Proposal 4 and have set out our preliminary views on the points made. In light of the responses received, we are currently minded to proceed with Proposal 4 with some changes (summarised at paragraph 476), for the reasons explained below.

## Responses relating to Proposal 4

440. Question 7 asked respondents whether they agreed or disagreed with our proposal to publish information about individual providers' student outcomes and performance in relation to our numerical thresholds, as well as sector-wide data, on our website.
441. Many respondents commented that they agreed with the principle of being transparent and publishing information about an individual provider's student outcomes. However, many of them made points about the approach to be taken to data publication (namely, which information should be published, when and how), as well as the potential consequences of publishing this information.
442. Points made by respondents included:
- a. Requests for contextual information to be published alongside datasets to ensure that data is not misinterpreted.
  - b. Comments that the publication of data might lead to its misuse, for example through the publication of league tables.
  - c. Suggestions about when and how data should be published.

### Publication of contextual information alongside data

443. Respondents made suggestions about information that they thought should be published on the OfS website. Most respondents suggested that contextual information should accompany published data to avoid misinterpretation. Respondents suggested that such contextual information could include:
- a. Information on the actions a provider may have taken to improve performance, for example internal processes in place to improve student outcomes and the results of those processes.. Respondents suggested that this information could be provided:
    - i. By allowing a provider to submit information in advance of any compliance assessment made by the OfS.
    - ii. During any compliance assessment.
  - b. Information explaining that data showing performance below a numerical threshold does not necessarily correspond to low quality provision or a breach of condition B3.
  - c. Data showing a provider's performance against its benchmark values for each indicator and split indicator.
444. A number of respondents pointed to reputational risks of publishing data without additional information, in that students and other stakeholders could draw negative conclusions about the quality of a provider's courses which might be explained or justified by contextual information.
445. Some respondents also suggested that publishing contextual information would make data more accessible to non-expert audiences. Many respondents took the view that non-expert audiences, especially prospective students, would not be able to understand all of the published information, including concepts such as statistical significance and large datasets

with many split indicators, without supporting information. According to respondents, making information accessible to non-expert audiences, such as students and parents, would support their decision making (e.g., for prospective students' choice of provider and any stakeholder interested in understanding and comparing providers' performance).

## **Our response**

446. We have noted the number of respondents who agreed with the importance of transparency in respect of student outcomes data. This principle underpinned our publication proposals, and we continue to hold it as an important principle in our approach to regulating student outcomes.
447. We have considered the suggestions that respondents have made with a view to ensuring that the data and information we publish offers a rounded picture of a provider's performance. Part of the data we proposed to publish would cover the size and shape of provision at each provider. This would provide consistent and comparable information to support an understanding of each provider's context in terms of its size, the types of courses it offers and its mix of subjects, and the characteristics of its students. We consider this is an important part of any contextual information about a provider, which would help readers to interpret its performance.
448. In relation to comments made by respondents that our proposed dashboards should include information explaining that data showing performance below a numerical threshold does not necessarily mean that a provider has low quality courses or is in breach of condition B3, we agree that this is important, to avoid readers conflating the data with the OfS's regulatory judgements about condition B3. We proposed to do this at paragraph 181 of the consultation document, as follows:
- a. Where the OfS has not made an assessment of the provider's compliance with ongoing condition B3, we proposed to provide information alongside the publication to be clear that no assumptions should be made about the provider's compliance with the ongoing condition.
  - b. Where the OfS has made an assessment of the provider's compliance with ongoing condition B3 and found that there has not been a breach, we proposed to clearly publish this information and the reasoning for our decision.
449. We also proposed that, where the OfS has made an assessment of a provider's compliance with ongoing condition B3 and found that there has been a breach or that there is an increased risk of a future breach, we would publish information about our regulatory decision, as well as information about any regulatory action taken.
450. We have considered suggestions made by some respondents that we should publish information submitted by a provider as part of, or in advance of, a compliance assessment (in respect of the actions it says it has taken to improve performance). We note that providers will often have their own internal processes for improvement. In the consultation, we explained our view that the publication of student outcome data would support those processes, for example because publication allows us to draw attention to providers' performance and incentivise compliance by raising awareness of the issues identified. However, our current view is that it would not be appropriate for the OfS to publish information about the actions a provider has taken to improve submitted before or during a compliance assessment. This is because:

- a. We do not think that it would be appropriate to publish information submitted to the OfS by a provider in the absence of the OfS having undertaken an assessment of this information (in the course of its compliance assessment), as such information will not have been subject to OfS checks or verification. If a compliance assessment has been undertaken, we have explained in paragraph 448 that we have proposed to publish information about this (as well as indicating where no assessment has taken place).
  - b. We note that it would be open to a provider to publish its own explanation of the published data, including by reference to its internal processes or any actions it has taken to improve performance (for example, by publishing this information on its website).
451. We agree that it would be important for users have a clear understanding of what the published data shows. Noting comments from respondents suggesting we publish supporting information to make the data more accessible (including to non-expert audiences), we are minded to introduce measures into the published dashboards aimed at improving users' understanding, which may include:
- a. Tooltips that would give users more detailed explanations of what each element of the dashboard shows.
  - b. Improved user guidance and a navigational aid that would make selection of appropriate filters easier.
452. We recognise that, if published, the dashboards would contain a large amount of data that some users may find complex despite the mitigations set out in paragraph 451. We are still of the view that publication of this data is needed in the interests of transparency, and to enable us to meet our policy objective of identifying pockets of poor performance. However, we agree that we should make the data as accessible as possible for external users.
453. We are therefore also minded to introduce increased layering in the presentation of our dashboards. This means that the primary dashboard that users would come to when using our website would be a simpler dashboard containing only provider-level indicators and not the split indicators. We would then make available all the data to users through a data wizard, which would help users select the data that is of particular interest to them. Finally, we would make available an 'expert users' dashboards, which would provide all the information with filters customisable by the user. As set out in paragraph 451 we would provide additional explanatory information as part of the dashboards and, in addition, we may also produce training materials to support users, particularly those in providers and student representatives, to understand the data.
454. We noted respondents' suggestions that benchmarking data should be published alongside the data dashboards. We agree that benchmarking information can be a useful tool in understanding a provider's performance and we published benchmarking information in all of the dashboards at consultation stage (this showed benchmark values for each indicator and split indicator). Publication of benchmark values formed part of our proposals and we are still minded to include this information in the dashboards.
455. Finally, we note that some respondents asked us to publish contextual information that was already included in the 'size and shape' dashboards, for example information about a provider's size, its mix of levels and subjects and the characteristics of its students. We are

mind to promote these dashboards to ensure that any outcomes data we publish would be viewed in context.

### **Potential data misuse and reputational damage**

456. Some respondents argued that the publication of data without contextual information might be damaging for some providers, in particular, it could result in reputational damage for providers with performance below the minimum numerical thresholds. Some respondents argued that this could particularly affect small providers because of the volatility of student outcome measures based on small datasets. Many of these respondents wanted to see contextual information published alongside the data to mitigate these risks.
457. A few respondents suggested that providers should be given the chance to review and challenge their data before publication. Some respondents opposed the publication of data, regardless of whether mitigations would be put in place, because of the potential reputational risks to providers. We have addressed this point in paragraph 465.
458. Some respondents thought that publication of granular data without detailed contextual information might allow third parties to misuse the published information, especially given the large volume of data to be published. In particular, many respondents were concerned that league table compilers or similar organisations would create rankings of providers' performance, leading to misleading conclusions being drawn by end-users. A very small number of respondents suggested that this might incentivise providers to 'game' their data to reduce their reputational risk.
459. A few respondents suggested that the OfS should provide some guidelines to non-expert audiences on interpreting published information, to avoid data misuse by third parties.

### **Our response**

460. We have considered the points made by some respondents that the published student outcomes data could be interpreted or used in a way that would result in reputational damage for some providers. We recognise that publishing reports (such as the data dashboards) showing a provider's student outcomes alongside our numerical thresholds could create risks of undue negative publicity for providers, particularly where a provider was shown to be delivering student outcomes below our numerical thresholds. For example, if a provider's data shows that it is performing below a numerical threshold, there may be a risk that readers will equate this with low quality provision or a breach of condition B3, in the absence of an OfS decision on these matters (and in circumstances where its performance might be explained by contextual factors). This could potentially lead to negative consequences for a provider; for example, students may be dissuaded from applying to the provider based on perceptions of poor performance. Alternatively, as some respondents have suggested, there is a possibility that third parties could use the data we publish and present it in a way that is misleading to readers, for example by creating league tables on the basis of student outcomes data. This could possibly have a damaging impact on a provider's reputation; for example, a league table could be read by students and incorrectly equated with quality, and used to inform a decision not to choose a provider.
461. In making final decisions about our proposed publication policy set out in Proposal 4, we intend to consider these reputational risks, as well as the factors in favour of publication, including the public (and student) interest in publishing this information, which was set out in our consultation document (see in particular paragraphs 170 to 177). We continue to

consider that there is strong public and student interest in publishing this information, for the reasons set out in the consultation document. Our initial view is that these interests outweigh the risks of providers receiving undue negative publicity as a result of the data publication, particularly in light of the mitigations we have proposed to put in place to minimise those risks as set out in this section. In particular, we have proposed to publish a variety of contextual information alongside the data (as explained in paragraph 448), including making it clear that, where a provider has not been assessed against ongoing condition B3, no assumptions should be made about the provider's compliance with that condition.

462. Further, we have considered whether it would be appropriate to remove details of the OfS's numerical thresholds from the published data, to avoid third party misuse. Our initial view is that we should not do this because it would not prevent third party misuse, because the numerical threshold values will be published elsewhere and a third party could still link together the datasets and identify performance below those thresholds. Further, removal of the thresholds could restrict our ability to put in place the mitigations in relation to accurate interpretation of information.
463. In relation to comments that the publication of data may incentivise a provider to game its data to reduce its reputational risk, we consider that the other regulatory requirements placed on providers through ongoing conditions of registration as set out from paragraph 62 would mitigate this risk.

### **Suggestions about when and how the data should be published**

464. Several respondents suggested that the overall volume and complexity of the data would prevent non-specialist users from understanding the data or engaging with it at all. A number of these respondents specifically suggested that students, or prospective students, would not have the necessary background knowledge to usefully engage with provider data. To mitigate this, some respondents made suggestions about how the data should be presented. For example, some respondents suggested that the OfS should publish differences in a provider's performance from benchmark values or a simple dashboard to show only performance where thresholds are not met. Others thought that the dashboards should include a way of presenting only those data points that are below a numerical threshold – for example by including a 'below threshold filter' to reduce complexity and improve accessibility for non-experts.
465. Some respondents did not agree that data should be published at the same time it was given to providers because they thought providers should be given an opportunity to review the data before publication so as to allow time to identify and address any potential errors. A few suggested that the publication of data should be delayed until the OfS completes its assessment of a provider against condition B3, such that the data only becomes publicly available when there is accompanying contextual information about the OfS's assessment, to avoid misuse or misinterpretation.

### **Our response**

466. As stated above, we think it is important to ensure that any data we publish is presented as clearly and accessibly as possible. We are therefore minded to make changes to the presentation of dashboards compared with those we published alongside the consultation, as explained above. However, we note that respondents have made some specific suggestions and we have responded to those here.

467. In relation to the suggestion that the OfS should publish differences in a provider's performance from benchmarks, we note that benchmark data is not a determinative factor in decisions about compliance with condition B3, although we do expect to consider it during any compliance assessment. The dashboards provided to providers as part of the consultation did include benchmark data at all levels and we remain minded to include this information in the dashboards. We expect that the revised approach we are minded to take, which would layer dashboards to allow users to engage with increasing levels of information at different stages would make this information easier to understand.
468. We have considered the suggestion that we should publish simpler versions of the dashboards that show only performance where thresholds are not met, or including a way of presenting only those data points that are below a numerical threshold – for example a 'below threshold filter'. We did not include such a filter in our original dashboards because we considered that there could be a risk that it would encourage users to focus only on those data points below a minimum numerical threshold, rather than taking a holistic view of a provider's performance. The same risk would apply to publishing only data that showed performance below a numerical threshold. We are also mindful that our approach to statistical certainty (see response to Proposal 6) does not use a fixed confidence level to identify data below a threshold and that a filter could result in misleading information being presented.
469. However, we understand that some respondents took the view there could be benefit from the introduction of a 'below threshold filter'. We are currently minded to include a filter that allows users to make their own choices about whether to filter performance below thresholds and to vary the levels of statistical certainty used to highlight data points. We will consider further whether it is appropriate to include this filter when making final decisions about publication. Our current view is that these measures, along with clear information about use as set out in paragraph 451, would be sufficient to mitigate risk of misinterpretation.
470. We have noted the suggestions made by some respondents that prior to publication we should allow providers an opportunity to review the data we propose to publish, and identify where errors in data supplied by a provider may have affected the indicators and split indicators. All of the data that will be used to construct the indicators will have been supplied by individual providers and signed off by providers as appropriate for use for regulatory purposes when supplied to HESA and ESFA. The OfS supplies a range of data-checking tools for providers to use before their submission and signoff of student-level data, which are intended to help them identify and address issues of data quality.
471. Further, we have a well established, ongoing data amendments process that enables individual providers to ask to correct errors in the underlying data that are identified as genuine, widespread, significant and have a moderate or substantial impact on the OfS's or Research England's uses of the data.<sup>35</sup> We also have well established data audit processes which allow us to identify material issues of poor data reporting practice and processes at individual providers, and to hold a provider to account for its responsibilities in relation to

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<sup>35</sup> More information about the data amendment process can be found at [www.officeforstudents.org.uk/data-and-analysis/amendments-to-data/data-amendments-process/](http://www.officeforstudents.org.uk/data-and-analysis/amendments-to-data/data-amendments-process/).

compliance with conditions of registration F3 and F4 (which are concerned with the provision of information to the OfS and the designated data body, respectively).<sup>36</sup>

472. We also anticipate that providers may choose to identify concerns about the accuracy of their data as part of discussions with the OfS during any condition B3 assessment.
473. Our current view is that the mechanisms would be sufficient for the purposes of ensuring data accuracy, without the need to introduce an additional signoff process for the indicators generated from this data. If we were to introduce such a process, this would create a significant additional burden for both the OfS and providers, as well as causing delays to publication.
474. In relation to comments that data should only be published once the OfS has assessed a provider against condition B3, our current view is unchanged from that set out in the consultation proposals, namely that this would result in only a partial picture being available to users and would significantly reduce the transparency in information available to stakeholders.

## Decision

475. As set out in paragraph 439 we do not intend to make any final decisions on Proposal 4 until we have considered responses to our publication consultation. This will be before condition B3 comes into effect.
476. In response to comments on Proposal 4, and subject to our final decisions on these matters, we are currently minded to proceed with the proposal as set out in the consultation document but with the following changes:
- a. Introduce measures into the published dashboards which are aimed at improving users' understanding, which may include:
  - b. Clear statements about the appropriate interpretation of data, including whether a provider has been subject to OfS assessment. For example, making prominent statements on each dashboard that performance below a numerical threshold should not be interpreted as a provider being in breach of condition B3.
  - c. Tooltips which would give users more detailed explanations of what each element of the dashboard shows.
  - d. Improved user guidance and a navigational aid that would make selection of appropriate filters easier.

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<sup>36</sup> For more information, see [www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/conditions-of-registration/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/conditions-of-registration/).

## Proposal 5: Making judgments about compliance with condition B3, including consideration of context

### Questions relating to Proposal 5

**Question 8:** Do you agree or disagree with the proposed approach to assessment set out in Annex F? Is there anything we could do to improve the clarity of this information for providers?

**Question 9:** Do you agree or disagree with our proposed general approach to prioritisation? If you disagree, do you have any alternative suggestions for how we should approach prioritisation?

**Question 10:** Do you think that the OfS should adopt Option 1 or Option 2 (see paragraph 207) when defining the scope of each assessment for ongoing condition B3?

**Question 11:** Do you agree or disagree with our proposals for considering the context of an individual provider when assessing compliance with condition B3?

477. Proposal 5 set out proposals for how a provider's performance in relation to numerical thresholds, along with its context, would be considered in our assessment process.
478. When deciding whether an individual provider has satisfied condition B3, we proposed that we would make a judgement about:
- a. Whether a provider's outcome data for each of the indicators and split indicators are at or above the relevant numerical thresholds set by the OfS.
  - b. To the extent that the provider does not have outcome data for each of the indicators and split indicators that are at or above the relevant numerical thresholds, the OfS otherwise judges that at least one of the following applies:
    - i. The provider's context justifies the outcome data.
    - ii. This is because the OfS does not hold any data showing the provider's numerical performance against the indicator or split indicator.
    - iii. This is because the OfS does hold this data but the data refers to fewer than the minimum number of students.
479. We proposed to assess whether a provider satisfies this condition when it applies for registration if we are able to produce data indicators for the provider for at least one of the previous five years.
480. We proposed to adopt an annual cycle to consider ongoing compliance for providers. We proposed that this exercise would not be conducted automatically for all providers, but instead we would select a group of providers each year through a prioritisation exercise. We set out different approaches that we could use for prioritisation, for example: picking a theme such as subject, mode of study or group of students; considering providers whose

performance suggests there may be the most severe breaches; selecting providers where there is the strongest statistical confidence that performance is below a numerical threshold, or through a random selection of providers with performance below numerical thresholds. (The detail is set out in paragraphs 198 to 203 of the consultation document.) We proposed to use one or more of these approaches to prioritisation each year, separately or in combination.

481. We also set out that in addition to this prioritisation process, we would use our general risk-based approach to monitoring as set out in the regulatory framework to identify providers for which assessment of compliance with condition B3 is necessary, whether or not that provider is, or is likely to be, selected by the prioritisation process, as set out in the draft guidance at Annex C.
482. In addition, we published in an annex to the consultation document the approach that we proposed to take to assessing an individual provider's student outcomes and how we would make judgements about whether a provider applying for registration satisfies initial condition B3, as well as whether it satisfies ongoing condition B3.
483. We said that we anticipated publishing this information as guidance.

## Responses to question 8

**Question 8:** Do you agree or disagree with the proposed approach to assessment set out in Annex F? Is there anything we could do to improve the clarity of this information for providers?

484. Question 8 asked whether respondents agreed or disagreed with the proposed approach to assessment of condition B3 and whether there was anything we could do to improve the clarity of this information for providers.
485. Many respondents commented that they broadly agreed with the proposal for the approach to assessment. In addition, while a few respondents commented that the information was presented clearly, many respondents requested further information about the suggested approach. Some respondents made points about the consequences of using the proposed approach or made recommendations for improvement.
486. Points made by respondents included:
- a. Requests for additional information about different aspects of the assessment process.
  - b. Concerns that misleading conclusions could be drawn due to volatility in a provider's data and this will particularly affect small providers. These providers will also face additional burden through providing contextual information to explain their performance.
  - c. Support for the use of contextual factors in assessment and engagement with providers.
  - d. Suggestions that the OfS should use academic experts in the assessment of contextual information.

## Further information about various aspects of the assessment

487. Many respondents requested further information about the proposed approach to assessment:

- a. Additional information was requested about the proposed approach to considering a provider's context, including information about how contextual information would be used, the weight that would be given to context, and which contextual factors would be 'accepted' by the OfS. Some respondents requested further information about how the impact of factors they considered to be outside a provider's control, such as the pandemic, would be considered in our assessment. A few respondents pointed to paragraph 38 of the proposal, which stated that the OfS 'might ask providers for contextual information', which they thought implied that the OfS did not commit to seeking contextual information from a provider.
- b. Further information was requested about the following aspects and stages of the assessment process:
  - i. The statistical model that would be used to determine the distance between an indicator value and the relevant numerical threshold.
  - ii. The use of split indicators to assess whether a provider satisfies condition B3.
  - iii. How final decisions will be reached.
  - iv. Whether a provider can follow an appeals process if it disagrees with the OfS's decisions.
- c. Some respondents asked for further information about the timeframe for assessment, particularly about when providers will have to report their data, in order to help them manage their resources effectively.
- d. A few respondents asked for an extension of the timeline for engaging with the OfS and making representations following a provisional decision that a provider is not complying with condition B3.

## Our response

488. We note the requests from respondents for further information about how we will consider contextual information during the assessment process.
489. We do not think that it would be appropriate to produce a detailed list of all the potential matters that we could take into account when making judgments about a provider's compliance with condition B3 (or, alternatively (as one respondent suggested) a list of factors that would be 'accepted' by the OfS). We set out an expanded list of possible contextual factors that we may consider in our consultation, which was designed to give providers a steer about contextual information which may be relevant to an assessment. We do not consider it appropriate to create an exhaustive list of contextual factors, or to list factors we would consider in every case, because each case and circumstance will be different, and our view is that this should be a matter of regulatory judgement based on the facts of an individual case. For the same reasons, it is not possible for us to formulaically set out the weight we would attach to different contextual factors. However, we did also provide some steers about this – see paragraph 228 of the consultation document.
490. Some of the consultation responses asked for further information about our approach to considering the effect of factors they considered to be outside a provider's control, such as the pandemic, in our assessment approach. Our view is that we have adequately addressed

this in our original proposals where we set out at paragraph 224 of the phase three consultation that when considering a provider's context 'we will give consideration to factors where a provider can evidence the reasons for its historical performance. For example, we might consider any external factors the OfS considers to be outside a provider's control that might reasonably be judged to have affected its past performance.' We will consider where a provider can evidence the impact of external factors on its outcomes data. For example, this might include 'the evidenced impact of the coronavirus pandemic on a provider's performance and whether such impact is broadly consistent with that for other providers'. This would mean that where evidence is available that the experience of a provider or its students was directly impacted by the coronavirus pandemic, in a way that was not in line with general trends identifiable in data and already taken into account when setting the numerical threshold, we may consider this to justify performance below a numerical threshold.

491. We have noted responses that suggested that paragraph 38 of the consultation document implied that the OfS is not committed to seeking contextual information from a provider during its assessment of compliance. We understand this to be a reference to paragraph 38d of the consultation document, which stated that 'We propose to take account of all relevant information when assessing a provider's compliance with condition B3. This will include taking account of factors relevant to a provider's performance, and **may include the context in which it operates**' (emphasis added).
492. This drafting was not intended to imply that the OfS was not committed to seeking contextual information from a provider during its assessment. Rather, the reference to context here related to the preceding phrase 'factors relevant to a provider's performance', i.e. it was intended to convey the fact that, in reaching its decision about a provider's compliance with condition B3, the OfS will only take account of contextual factors where these are relevant to a provider's performance. For the avoidance of doubt, we are committed to seeking contextual information in all circumstances where we select a provider for assessment. On receipt of that information, we will review it and determine whether it is relevant to the provider's performance.
493. We noted requests for further information about the statistical model that would be used to determine the distance between an indicator value and the relevant numerical threshold. We published a document as part of our consultation that explained this, along with other detail about our statistical methodology, and we will publish a final version of this document to provide detailed information about the approach we are taking.
494. We note that a few respondents asked for further information about the use of split indicators to assess whether a provider satisfies condition B3. We explained the role of split indicators at paragraph 193 of the consultation document, and further explanation was also given in our accompanying data indicators consultation (see in particular Proposal 2). By way of high-level summary, and as explained in our consultation, condition B3 requires a provider to deliver positive outcomes for its students, in relation to all of the indicators and split indicators (the definitions of these terms were part of our consultation and are set out in Regulatory advice 20. In practice this means that we may choose to undertake an assessment in relation to the outcomes a provider is delivering in relation to any split indicator (for example, a particular subject within its full-time first-degree courses).
495. We note that a few respondents asked for more information about how final decisions about compliance will be reached and whether a provider can follow an appeals process if it

disagrees with the OfS's decision. We have published Regulatory advice 20 alongside this document, which sets out the different steps in the assessment process, which is based on Annex F of the phase three consultation. This sets out that, before finding a breach of ongoing condition B3, the OfS would first make a provisional decision to this effect. Where this is the case, we will write to a provider setting out the nature of the potential breach and our reasons for taking that view. A provider will be given at least 28 days to make representations in relation to this provisional decision.

496. After considering those representations we will make a final decision about whether there is a breach of ongoing condition B3, and determine whether any further regulatory action is necessary. Similarly, before deciding that a provider does not satisfy initial condition B3, we will make a provisional decision to this effect. We will then write to the provider about this provisional decision and the reasons for it as part of a representations process in respect of a provisional decision to refuse registration. The provider will have at least 28 days to make representations about the OfS's provisional decision. When we have considered a provider's representations we will make a final decision about whether initial condition B3 is satisfied and determine the impact this may have on the provider's application for registration.
497. There is no statutory appeals process for a decision that there is a breach of condition B3, or a decision to refuse registration, but a provider may decide to challenge those decisions by judicial review, and there are appeal routes in HERA in respect of sanctions imposed as a result of a breach.
498. We noted that some respondents asked for further information about the timeframe for assessment, particularly when providers will have to report their data, in order to help them manage their resources effectively. There is no additional general requirement for providers to submit data to support our assessment of condition B3. All the data we require is collected through existing data returns. Where we identify a provider for a compliance assessment in relation to condition B3 we will inform that provider. Some respondents commented that there would be a benefit to extending both the time for initial engagement with the OfS prior to a provisional decision being made and for representations following a provisional decision. We agree that in the first cycle of assessments there may be cases where we are assessing compliance in relation to multiple indicators or split indicators, when it would be helpful for providers to have more time to engage with the OfS. We are therefore including wording in Regulatory advice 20 to indicate that the initial engagement period would 'normally' be four weeks to allow us to accommodate these circumstances where appropriate. We anticipate that we will keep this under review as providers become more familiar with our approach. We do not consider it appropriate to extend the timeframe for representations following a provisional decision that a provider is not compliant with condition B3 (beyond our stated minimum of 28 days) because we will have already engaged with the provider about the nature of our concerns and consider that a minimum of 28 days is sufficient to prepare a response in these circumstances.

### **Volatile data and burden of providing contextual information**

499. Many respondents suggested that decision-making should not be based on small, volatile year-on-year datasets. Respondents suggested that volatile data could result in smaller providers being more likely to be found in breach of condition B3, because of the likelihood of a misinterpretation of the data. In these cases, respondents suggested that the OfS should engage with providers to discuss the data more frequently, and prior to making decisions about whether they have breached condition B3. On the other hand, some respondents

suggested that engagement with the OfS would require a provider to supply contextual information and that this would add burden, especially for smaller providers and providers that recruit students from disadvantaged backgrounds.

## **Our response**

500. We consider that it is important to use data in a way that properly reflects the effects of small cohorts on data reliability. Our view remains that we have sufficiently taken account of these issues in the following ways:

- a. We have decided to set a minimum student number threshold (currently 23 students). This means that indicators with student population sizes of fewer than 23 students will not be assessed.
- b. We have adopted an approach to analysing statistical uncertainty, as explained in Proposal 6. This allows us to understand the effect of smaller cohort sizes when interpreting the data presented. We have set out our general policy to have most reliance on data where we have the greatest statistical confidence that a provider's underlying performance is below a numerical threshold value. This means that in practice we would be unlikely to take regulatory action where there is significant statistical uncertainty regarding a provider's underlying performance.

501. We note responses suggesting that the OfS should engage more frequently with providers with smaller student numbers. We are adopting an approach in which we will engage with a provider selected for an assessment of compliance. We consider that this level of engagement will be sufficient for providers of all sizes and we do not think there is a need to introduce any additional measures to enable providers with small student numbers to engage with the OfS.

## **Support for the use of contextual factors and engagement with providers**

502. Many respondents were in favour of using contextual information to determine a provider's performance when it performs below a numerical threshold. This approach would allow a provider to explain why its performance might be below a threshold but not breaching condition B3. In addition, many respondents supported our proposal to engage with providers to seek relevant contextual information, as dialogue was considered an important part of regulatory decision-making.

## **Use of students or academic experts in assessment**

503. Another common theme was the suggestion that the OfS should draw on the expertise of the designated quality body (DQB) or engage with students or other sector experts in assessing a provider's compliance with condition B3. Some respondents suggested that the DQB could draw on academic expertise to assess contextual information, particularly on continuation and progression, and make informed judgements. A few others suggested that students and academic experts should be involved in the assessment process.

## **Our response**

504. We note the suggestions that the OfS should seek the involvement of others in decisions about whether a provider is compliant with condition B3.

505. In general, we are committed to drawing on expertise and knowledge of academic experts as we consider appropriate in our regulation of quality. In relation to regulating student outcomes, the OfS will undertake assessments itself and make decisions about compliance for individual providers. This is consistent with HERA, and we would make decisions in accordance with our published scheme of delegation. We hold considerable expertise and analytical capability in the data and, as an expert regulator, are best placed to consider a wide range of contextual factors. In general, we do not think bringing additional academic or other expertise or knowledge into the OfS assessment or decision-making process is appropriate for condition B3. However, if points were raised in contextual information where this would be of benefit then we could commission additional external input.

## Responses to question 9

**Question 9:** Do you agree or disagree with our proposed general approach to prioritisation? If you disagree, do you have any alternative suggestions for how we should approach prioritisation?

506. Question 9 asked whether respondents agreed or disagreed with our proposed general approach to prioritisation and asked for any alternative suggestions about how we should approach it. There were mixed views on the proposed approach. Under half of respondents agreed with the proposals, around a third disagreed with the approach and the remainder declared that they didn't know.

507. Points made by respondents included:

- a. Requests for further information about the proposed approach to prioritisation.
- b. Support for using a risk-based hybrid approach to prioritisation.
- c. Disagreements with a randomised approach to prioritisation.
- d. Requests for consistency in the prioritisation approach from one year to the next.

## Additional information about our approach to prioritisation

508. As one of the overarching themes arising from the consultation, respondents asked for more information about the approach that we would adopt to prioritising providers for assessment. The vast majority of responses mentioning this requested a transparent and clear process to set out which of the various possible approaches to prioritisation listed in the consultation document would be used each year.

509. In addition, respondents requested notification about which approach to prioritisation would be used each year as soon as possible, so they could more efficiently manage their resources. Another group of respondents requested additional information about how the OfS's adoption of a combination of prioritisation approaches would work in practice without significantly increasing the regulatory burden on providers. One suggestion to increase transparency and ensure an efficient use of multiple approaches was to appoint an independent panel that would decide the prioritisation process, possibly involving students and academic experts as well as OfS officials.

## **Support for using a risk-based hybrid approach**

510. Our proposals set out a number of different approaches the OfS could take to prioritisation. Most respondents were in favour of a hybrid approach that combined two of our proposed approaches. Many suggested combining prioritisation of the approaches listed at paragraphs 202b and 202d of the consultation document, to target providers where performance in relation to numerical thresholds suggests that there may be the most severe breaches, and where we have the strongest statistical confidence that a provider's performance is below a numerical threshold. In most cases, respondents were in favour of assessing the severity of the potential breaches (see paragraph 202b of the consultation document) using both the number and proportion of students affected and the distance between indicator values and thresholds. In other cases, responses indicated satisfaction with either of these approaches, while it was rare for a respondent to explicitly favour only one of the two. A small proportion of responses suggested a hybrid approach that would prioritise based on potential breaches for particular student groups, in addition to the severity of breaches.

## **Disagreements with randomised prioritisation**

511. Respondents were generally in favour of a risk-based approach to prioritisation and were concerned about the possibility of randomised prioritisation. According to some respondents, randomisation might lead to a focus on providers narrowly missing thresholds while ignoring others with significantly worse performance. Furthermore, they doubted that this option would be successful as a compliance incentive and believed that it would instead create significant administrative burden for providers. This was because it would require providers to understand the reasons why performance was below a threshold for all indicators and split indicators that were below a numerical threshold, by whatever distance and regardless of the size of the student population. They argued that this activity would divert resources from teaching.

## **Consistent approach across years**

512. Respondents also requested a consistent prioritisation approach from year to year instead of using a different approach each year. Specifically, respondents suggested that knowing in advance the prioritisation approach and having certainty that it would be the same for the foreseeable future would allow them to optimise their internal regulatory processes and to devote the necessary time and resources to improving. Some mentioned that this approach would also promote the sector's reputation and increase the public's confidence in the regulatory process, because they considered it would be more transparent than decisions made on an annual basis. A few respondents proposed that consistency and transparency could be improved by involving the DQB or the OfS's Quality Assessment Committee in making decisions about which providers to prioritise.

## **Our response**

513. We welcome the engagement with our proposals for prioritisation of providers for assessment of compliance with condition B3. In general, we recognise the value of providing transparency and certainty for providers in relation to all of our regulation. Our primary mechanism for delivering this certainty in the context of condition B3 is set out in paragraph B3.4 of condition B3. The effect of this drafting is that we will never assess compliance in relation to any indicator or split indicator that the OfS judges to be at or above a minimum numerical threshold. Providers delivering student outcomes where there is sufficient

statistical certainty that they are performing at or above our minimum numerical thresholds can therefore be confident that they will not need to provide any information to the OfS in relation to these aspects of their higher education delivery for the purpose of condition B3. Our approach to setting minimum numerical thresholds that set minimum expectations means that our view is that this will be the case for most providers across many of their indicators and split indicators.

514. In our proposals, we also set out our general approach to using statistical uncertainty when making judgements about a provider's compliance with condition B3 (see Proposal 6 for more information on this). This means that we will not normally undertake an assessment unless we have strong statistical evidence (by which we mean around 90 per cent statistical confidence that an indicator is below a minimum numerical threshold).
515. We are minded to adopt an approach to publishing information that is broadly in line with our proposals (see Proposal 4 for discussion of our approach to publication) to support providers and other users to more easily identify those indicators and split indicators that may be subject to regulatory assessment. We will add filters to data dashboards that allow users to select only indicators and split indicators that are below a minimum numerical threshold and to specify the level of statistical confidence that they wish to apply.
516. We therefore consider that providers will be able to identify easily which of their indicators and split indicators are below a relevant numerical threshold. Only these indicators are likely to be in scope for prioritisation by the OfS for a compliance assessment.
517. We expect that all providers will work to improve their student outcomes where performance is below a minimum numerical threshold. We note consultation responses that assert that providers are already focused on delivering these improvements. This is important because we agree that, regardless of whether the OfS selects a provider for assessment, activity will be under way to improve and maintain positive student outcomes.
518. We have decided to set out our general approach to prioritisation in our Regulatory advice on regulating student outcomes (this is set out in the yellow box below). This will provide a general framework through which providers can understand the process by which we will identify the areas that of greatest regulatory interest to the OfS in a particular year. We consider that it is appropriate that this framework should remain relatively high-level, to balance the preference of respondents for certainty about precisely which indicators will be prioritised for assessment over a number of years with the need for the OfS to identify and respond to likely risks to students. We also note that we expect providers to be striving to meet our minimum expectations, and a degree of uncertainty is an appropriate mechanism to induce this behaviour.

## **Prioritisation approach for assessing ongoing condition B3**

### **Selection of prioritised categories**

Each year as part of our general monitoring we will decide:

- Which student outcome measures and modes and levels of study we wish to prioritise.
- Whether we should focus in that particular year on any particular split indicators, such as subject of study or student characteristics, or on any other themes, such as partnership arrangements.
- How many cases we will assess in that year. We anticipate that in most years there will be more indicators or split indicators below a relevant threshold than we decide to assess.<sup>37</sup>

### **Selection of individual providers for assessment**

We will identify any provider with performance below a relevant numerical threshold in relation to the prioritised categories.

We will select providers for assessment from within this group, including by considering the following factors:

- the number of students affected by performance below a numerical threshold in the prioritised categories,
- the distance from the relevant numerical threshold in the prioritised categories,
- the statistical certainty we have that a provider's underlying performance is below the relevant numerical threshold
- the number of a provider's indicators or split indicators not in the prioritised categories that are below a numerical threshold,
- other regulatory intelligence, including, but not limited to, notifications from third parties, outcomes from the TEF exercise, and previous compliance with condition B3 or other conditions of registration.

### **Selection of scope of assessment**

If a provider is prioritised for assessment, we will determine the scope of our assessment for that provider (see paragraphs 532 to 534). This may result in our assessment focusing on only the indicators falling into the prioritised categories or on a wider selection of indicators and split indicators where performance is below a relevant numerical threshold.

Where a provider has other indicators and split indicators below a relevant numerical threshold, we will determine the scope of our assessment by considering matters, including but not limited to:

- the number of students affected by those indicators and split indicators;
- the distance from the relevant numerical threshold;
- the statistical confidence we have that a provider's underlying performance is below a relevant numerical threshold.

If a provider is not prioritised for assessment, we will not normally expect to undertake any further regulatory activity in relation to its compliance with condition B3 in that year. This does not, however, mean that a provider's performance would be judged to satisfy the condition if it were to be assessed.

519. We agree with respondents that it would not be appropriate to adopt a randomised approach to prioritisation, as this would not allow us to focus on the most significant potential non-compliance. We have therefore decided not to adopt a prioritisation approach based on random selection.
520. We note suggestions that the OfS should both publish the specific prioritisation criteria it will use, and maintain the same criteria for a number of years to create stability for providers. We agree that it is important that providers can reasonably understand whether they might be subject to regulatory action. We have set out why we think, in general terms, that our approach will allow providers to do this, and how the way condition B3 is drafted provides this reassurance to providers with performance above numerical thresholds.
521. We note respondents' views that the OfS should involve the DQB or our Quality Assessment Committee in making decisions about prioritisation. We do not agree that this is appropriate, because we hold considerable expertise and analytical capability in the data used for prioritisation and are best placed to consider a wide range of contextual factors. We do not think bringing additional academic expertise into the OfS decision-making process is appropriate for prioritisation of assessment activity in relation to conditions B3.
522. We intend to make decisions about our prioritisation of assessments for the first two assessment cycles (autumn 2022 and spring 2023) by the end of September 2022. We will make final decisions about the providers selected for assessment in the first cycle by October 2022.

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<sup>37</sup> These matters relate to our approach to general monitoring and do not prevent us undertaking assessment of compliance with condition B3 for other reasons throughout a particular year. For example, this might include assessments in relation to other regulatory activity relating to degree awarding powers, university title or regulatory intelligence that suggests compliance concerns.

## Responses to question 10

**Question 10:** Do you think that the OfS should adopt Option 1 or Option 2 (see paragraphs 207) when defining the scope of each assessment for ongoing condition B3?

523. Respondents were asked to say whether the OfS should adopt option 1 or option 2 when defining the scope of each assessment for ongoing condition B3. Option 1 suggested that we would consider only the specific indicator or split indicator that was identified through the prioritisation process. Option 2 suggested that once we have identified an indicator for an individual provider through our prioritisation process, we could go on to assess all of the indicators for that provider that are below a numerical threshold.
524. Respondents provided views about both options regardless of their preference. However, just over half of respondents (51 per cent) favoured option 2, just under a third (31 per cent) supported option 1; 14 per cent provided a view that did not clearly support one or the other, and 3 per cent actively opposed both.
525. The main points made by respondents included:
- a. Comments about the potential workload and burden for providers created by each option.
  - b. Support for a focus on whole provider performance, because of the importance of a provider's context.
  - c. A view that option 1 provides a targeted approach which might result in a more useful evaluation.
  - d. Highlighting that the choice of option relates to the approach that is taken to prioritisation in any year.

### Workload created by each option

526. The main point made by respondents was the potential administrative and regulatory burden that each option could generate. For option 1, the main point was that isolated assessments of indicators could entail a long-lasting burden for a provider because it may result in the same provider being assessed multiple times over a number of years, which would be more burdensome than an assessment of all indicators that are below numerical thresholds in a single year.
527. For option 2, despite not always opposing this alternative, respondents argued that this involved a more complex assessment for the OfS, and more input and engagement from a provider, including spending more time submitting responses to enquiries from the OfS.
528. Several respondents suggested there would be likely to be a negative impact from each option for small providers, because of the work that would be generated in responding to the OfS's assessment. Some argued that both options would be equally burdensome, and small providers would be disadvantaged relative to larger providers. Respondents were concerned about multiple visits that could take place under option 1, but also about the larger investigations that could be undertaken following option 2.

## **the importance of context and the whole-provider focus**

529. According to many respondents, option 2 provided the benefit of a holistic review of all indicators below a minimum numerical threshold, which would ensure quality and general improvement in a provider. Despite some respondents acknowledging this might result in increased workload for a provider selected for assessment, it was argued that the OfS's need to ensure compliance with condition B3 and level up the performance of the sector would be much better met through this option. According to these views, this wider assessment of a provider under scrutiny would provide a rounded assessment and improve overall outcomes, and also increase providers' reputation and public confidence in the sector.

## **A targeted approach would provide a more useful evaluation**

530. Respondents who favoured option 1 suggested that a more targeted approach to assessment, focused on the indicator that was identified through the prioritisation process would be more useful. According to these respondents, this option would prompt concrete and focused action by the provider selected. They also suggested that this could facilitate improvement across the sector because there would be evidence of what the OfS had taken into consideration in relation to performance below a particular indicator or split indicator. A few respondents said that this narrower approach could make regulatory action easier for the OfS, improving its effectiveness, and therefore have a wider impact on a higher number of providers.

## **Relationship to prioritisation**

531. A significant number of respondents expressed caveats to their support for one option or the other by suggesting that the OfS should consider the relationship of each option to its approach to prioritisation. Some respondents argued that the assessment should be consistent with the OfS's prioritisation approach, and so could not give a clear view before the approach to prioritisation was finalised. Many suggested that if thematic areas or aspects of provision were prioritised, option 1 would be more suitable, whereas if severe breaches were prioritised, option 2 would make more sense.

## **Our response**

532. Respondents' comments about the potential benefits and drawbacks of the two approaches we proposed to assessment were helpful. We agree that the decisions we make about prioritising indicators and split indicators will have a bearing on the appropriate approach to assessment. For example, if we choose to focus on a particular subject as part of our prioritisation, the reasons for doing so may not apply to a provider's other subjects. Further, we consider that expanding all assessments to cover all of a provider's indicators and split indicators below a relevant numerical threshold may not be an effective use of the provider's or the OfS's resources in all cases (though it may be warranted in some cases). We therefore agree with respondents who commented that it would not be appropriate to always adopt option 1 or option 2, and that we should be open to using different approaches depending on the circumstances of the case.

533. We have therefore decided to determine the scope of our assessment on a case-by-case basis, for a provider selected through the prioritisation process (set out in the yellow box below paragraph 518 ). For example, the scope of the assessment could be:

- a. Focused only on the indicators or split indicators that were identified through the selection of prioritised categories.

- b. Focused only on the outcome measure for which the indicator or split indicator was identified. For example, if we selected a provider for assessment in relation to its full-time first degree continuation outcomes for its business and management courses, we could decide to extend our assessment to include any other full-time first degree continuation indicators that were below the minimum numerical threshold.
- c. An assessment of some or all of the provider's indicators or split indicators that were below a relevant minimum numerical threshold, whether or not these were identified through the selection of prioritised categories.

534. When making decisions about the scope of an assessment we will consider the prioritisation factors that we have set for that given year and the intervention factors set out in the regulatory framework.

## Responses to question 11

**Question 11:** Do you agree or disagree with our proposals for considering the context of an individual provider when assessing compliance with condition B3?

535. Respondents were asked whether they agreed or disagreed with our proposals for considering the context of an individual provider when assessing compliance with condition B3. A large majority of respondents agreed with the proposals for considering the context of an individual provider when assessing compliance with condition B3, while 7 per cent disagreed with them and 7 per cent declared that they didn't know.

536. The key points made by respondents included:

- a. Requests for more information and transparency about the consideration of context to ensure consistent and accurate judgements.
- b. Views about the importance of benchmark values in considering compliance with condition B3.
- c. Support for the introduction of consideration of historical performance as part of the assessment of compliance with condition B3.
- d. Suggestions for additional contextual factors that the OfS should incorporate into its assessment, such as regional context, significant differences in performance between courses, and employment sectors.

## Further information and transparency about the use of context

537. A common theme was the view that the process to consider contextual factors as part of the assessment of condition B3 was not sufficiently clear. Respondents suggested that it would be important to understand the type of context that would be 'accepted', and that the OfS should ensure a consistent and transparent consideration of context across providers, to achieve equal weightings and fair judgements. Some respondents suggested that judgements about contextual factors should include expert peer reviews and opinions.

## **Our response**

538. We have been clear that a provider can submit anything that it considers is relevant contextual information. We have published alongside this consultation response Regulatory advice 20, which sets out how we will make our judgements. We consider that the guidance is sufficiently clear for a provider to understand the steps we will take to ensure consistent and reliable judgements. We have set out our consideration of responses asking for more a more detailed list of relevant contextual factors in paragraphs 489 to 490.
539. We do not consider that it is appropriate in the context of assessments of student outcomes to seek additional expertise as a matter of course.
540. We are minded to publish the outcomes of assessments of condition B3 to supplement providers' understanding of how our approach will operate in practice. We will confirm our final position when we make decisions about our approach to publication later in 2022 (see Proposal 4 for more detail about our approach to publication).

## **Use of benchmarking**

541. Some respondents set out views about the importance of using benchmarking, which they suggested is a sensible and fair approximation of a contextual assessment, and can provide a more accurate picture of the capacity of providers to deliver positive student outcomes.
542. Some respondents suggested that the OfS should use benchmark values in a more determinative way. For example, one respondent suggested that the OfS should only take regulatory action where a provider is materially below its benchmark value. Respondents suggested that this would offer providers more certainty about whether the OfS would consider contextual factors sufficient to justify their outcomes.

## **Our response**

543. We agree that benchmarking is a valuable tool for understanding a provider's performance in context. We proposed in the consultation that our approach to assessing compliance with condition B3 would include consideration of evidence of a provider's performance in relation to benchmark values (where these are available) when assessing the context in which it is operating. This means that our assessment of individual providers would normally consider whether we have strong statistical evidence that a provider's performance is below a numerical threshold but above its individual benchmark. This is now set out both in the guidance underpinning condition B3, which forms part of the regulatory framework (see paragraph 20(a) in Annex b), and in Regulatory advice 20, which we have published alongside the revised condition.
544. We note respondents' suggestions that we should include a more determinative test relating to a provider's benchmark values. Our analysis indicates that a very limited number of providers are delivering outcomes for their students below our numerical thresholds but in line with or above the relevant benchmark value. This would be likely to mean that if we adopted a determinative test using benchmark values, we might expect most providers below a numerical threshold to be found to be non-compliant.
545. We anticipate therefore that respondents would expect us to continue to consider the wider contextual factors we have set out in our proposal. Given that these include consideration of benchmark values, we take the view that our proposed approach does provide a sufficiently strong mechanism for considering the information that benchmarking provides, without further additions to the guidance.

## Consideration of qualitative information and historical performance

546. Respondents supported the use of qualitative information and the consideration of a provider's historical compliance with other conditions of registration when assessing compliance with condition B3. They suggested that this would enable the OfS to understand a provider's current capacity to deliver positive student outcomes and understand the context of its current performance.
547. However, these respondents also argued that a qualitative approach to contextualisation is necessary, not only in terms of historical performance, but also in terms of a provider's ability to present and deliver an updated action plan to improve student outcomes. Respondents were in favour of a less prescriptive and more principles-based approach to assessing contextual information, and highlighted the importance of qualitative information and narratives in assessing compliance.
548. A few respondents suggested that these qualitative aspects to understanding a provider's performance and informing regulatory action could include students' and graduates' views, including from the student submission for the TEF assessment.

## Our response

549. We set out in Regulatory advice 15 (on our approach to monitoring and intervention) that while we make judgements about a provider's compliance with individual conditions of registration, we also consider how and where risk of non-compliance in one area may also signal increased risk for other conditions.<sup>38</sup> Understanding the pattern of risk across a provider's whole risk profile is therefore an important part of our monitoring approach. This applies to our approach to assessing compliance with condition B3. In practice, this may mean that we take historical compliance and wider compliance with other conditions of registration into account when making decisions about which providers to prioritise for assessment. We may also consider this information, and other regulatory intelligence, to understand a provider's performance before making a provisional decision about compliance with condition B3. We may use submissions made as part of the TEF assessment process or other data sources, for example student and graduate views, as part of our regulatory intelligence.
550. We set out in our proposed approach to assessment (Annex F in the consultation document) that we may also place reliance on a provider's compliance with other conditions of registration when making judgements about the credibility and sustainability of actions it has committed to take to improve student outcomes. We do not consider that it is necessary to make further amendments to address the points made in response to this question.

## Suggestions for additional contextual factors

551. Many respondents identified specific factors that the OfS should incorporate into its assessment of compliance, as they took the view that these had been overlooked in the

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<sup>38</sup> We note for the avoidance of doubt that Regulatory advice 15 is supplementary to the regulatory framework, and is applicable to the extent that it does not conflict with the regulatory framework and the approach to regulating student outcomes that we are adopting as a result of decisions set out in this document. Regulatory advice 15 is available at <https://www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/>.

consultation document. For example, respondents asked for consideration of regional context, significant differences in performance between courses, and employment sectors.

552. Several respondents referred to the importance of local labour markets, a provider's role in contributing to its local economy and community, and the skills landscape in the area, as context relevant to a provider's performance. Similarly, several respondents identified the importance of the context for specific courses, such as postgraduate courses, where students have a wide range of motivations and aims for their studies, and argued that this may have a direct effect on the likelihood of those students achieving positive outcomes.
553. A few respondents identified examples relating to particular subjects delivered within small and specialist institutions, and also particular courses in larger providers. They argued that these would benefit from a subject-specific approach to contextual factors, before any regulatory action was taken. These included music conservatoires or creative art and design providers, but also theology courses, or agriculture, food and related subjects. Respondents identified split indicators where the sector average falls below the numerical threshold. For example, the data dashboards we published alongside our consultation showed that the sector average for progression outcomes for full-time first degree students of agriculture, food and related studies was 59.7 per cent and the proposed numerical threshold was 60 per cent. Respondents asked for more information about how the OfS would treat performance in these areas.

## **Our response**

554. We set out in the proposed condition and in our proposed approach to assessment that providers will be able to submit information that is relevant to the context in which they are operating to inform our judgements about whether that context justifies the outcomes delivered for students.
555. We note respondents' suggestions of various factors that they thought should be included in our list of contextual factors we would consider during assessment. We have responded to these below. In general, we consider that our wider policy intention not to restrict the information that we may consider during our assessments by producing a long and more prescriptive list of contextual factors is relevant to our responses to all the suggestions.
556. The approach set out in Regulatory advice 20 states that we will consider 'Any external factors the OfS considers to be outside the provider's control that may reasonably be judged to have affected its past performance.' This could include 'regional or localised issues that provide evidence of performance different from established patterns'. We expect that, where there is evidence of the impact of these factors on a provider's performance, we would be able to consider regional context and employment sectors.
557. Our guidance on the contextual factors we would consider during assessment also states that we will consider 'evidence of particular course or profession attributes that are unique to that provider, or a small group of similar providers, and result in performance consistently below a numerical threshold, but that may otherwise be considered positive outcomes'. This will enable us to consider the points made by respondents in relation to creative arts, theology, agriculture and other subjects where this may apply.
558. We note respondents' request for further information about how we would treat performance for providers where the sector average for a subject was below the threshold. We note that in many of the examples given the number of students, both in total and at individual providers, is relatively low. We expect that the points we have made about assessment of small

providers in paragraphs 367 to 370 will be relevant to our consideration of such performance. In addition, we expect that our prioritisation approach would allow us to adopt an approach that would assess the providers with indicators furthest below a threshold or with the most students for a particular subject. We consider that, if we had particular regulatory interest in a subject of study, this approach will allow us to take a view across the sector on the relevance of particular contextual factors. For example, this might include understanding how particular employment trends in an industry may affect all providers offer a particular subject.

559. We therefore consider that the list of contextual factors included in our approach to assessment is sufficiently broad to enable a provider to submit evidence in relation to all of the points made in the consultation responses, if these are relevant to its performance. In addition, as we have set out in our assessment process, a provider will have the opportunity to raise these and any other points of contextual information that it considers relevant to its performance both during initial engagement with us at the start of an assessment and during the formal representations process, should we make a provisional decision that there has been a breach of the condition. We therefore do not intend to add any further contextual factors following consideration of the consultation responses to this proposal.

## Decision

560. We have considered the points made by respondents in relation to Proposal 5 and have addressed these in detail above.
561. We have decided to adopt the approach set out in Proposal 5. We have decided to adopt the following changes.
562. We have included one additional category to the list of contextual factors we may consider, to provide an additional steer on information that may be relevant to our assessments of indicators and split indicators for the progression student outcome measure.
563. We have included wording in Regulatory advice 20 to indicate that the initial engagement period would 'normally' be four weeks, to allow us to accommodate circumstances where more time is appropriate to engage with a provider when we are assessing multiple indicators or split indicators.
564. We made suggestions in our proposals for different factors that we could take into account when prioritising providers for assessment. We have decided to set out our general approach to prioritisation in our Regulatory advice on regulating student outcomes. This is set out in the yellow box following paragraph 518.
565. We have decided to determine the scope of our assessment on a case-by-case basis, once a provider is selected via the prioritisation process. Broadly, the scope of the assessment could be:
- a. Focused only on the indicators or split indicators that were identified through the prioritisation approach.
  - b. Focused only on the outcome measure for which the indicator or split indicator was identified. For example, if we identified a provider for assessment in relation to its full-time first degree continuation outcomes for its business and management courses, we could widen the assessment to include any other full-time first degree continuation indicators that were below the minimum numerical threshold.

- c. An assessment of some or all of the provider's indicators or split indicators that were below a relevant minimum numerical threshold.

566. Adopting our proposals in this way means that we will:

- a. Conduct assessments of providers selected through our prioritisation approach in autumn 2022 (see Proposal 8 for more information about timing of implementation).
- b. Publish Regulatory advice 20 to provide guidance about our assessment approach, which will expand on the guidance provided in the regulatory framework for condition B3.

# Proposal 6: Addressing statistical uncertainty in the assessment of condition B3

## Questions relating to Proposal 6

**Question 12:** Do you agree or disagree with the proposed approach to using statistical measures when considering a provider's performance in relation to numerical thresholds?

**Question 13:** Do you have any suggestions for additional steps the OfS could take to provide greater clarity about the impact that the proposed approach to statistical confidence may have for individual providers?

## What we proposed

567. Proposal 6 set out our proposed approach to dealing with statistical certainty in our assessment of condition B3.
568. We proposed to use indicators for each provider as the first part of our assessment of compliance with initial and ongoing condition B3. As described, for each of these indicators there is a range in which each provider's underlying performance could be said to lie. We proposed a general policy that we will place more weight on an indicator the more assured we are that a provider's underlying performance is below our numerical threshold. We explained that we will have more confidence the closer we are to 100 per cent statistical confidence that this is the case.
569. In addition, we explained that in order to apply this general policy in practice, we propose to use four different indicative categories that describe the strength of statistical evidence which we would use to guide regulatory judgements. These categories are deliberately not discrete, as they describe the strength of statistical evidence, which is on a continuous scale, and are designed to avoid arbitrary divisions. We proposed to determine the strength of statistical evidence on a case-by-case basis. The four categories are as follows:
- a. Around 99 per cent statistical confidence would provide compelling statistical evidence on which to make regulatory judgements.
  - b. Around 95 per cent or higher statistical confidence would provide very strong statistical evidence on which to make regulatory judgements.
  - c. Around 90 per cent or higher statistical confidence would provide strong statistical evidence on which to make regulatory judgements.
  - d. Around 80 per cent or higher statistical confidence would provide probable statistical evidence on which to make regulatory judgements.
570. We proposed to use these levels of statistical confidence during our assessment of condition B3. In general, we propose that we would normally:
- a. Begin an assessment of compliance with condition B3 where we have a minimum of strong statistical evidence (i.e. around 90 per cent or higher statistical confidence).

- b. Take more intrusive regulatory action where we have at least very strong statistical evidence (i.e. around 95 per cent or higher statistical confidence) of student outcomes being below a numerical threshold.

571. We described in our proposals that these different levels of statistical confidence will inform our judgements about whether to undertake an assessment of compliance with ongoing condition B3, whether we would be likely to find a breach of the condition, and what kind of intervention or sanction we might impose where this is the case. However, we proposed applying regulatory judgement in each case rather than setting a determinative level of statistical confidence to decide when and how we act.

572. We explained that, for example, in our proposed assessment process we would generally expect to undertake an assessment where we have strong statistical evidence that an indicator is below a numerical threshold. This would normally mean that we expect to have around 90 per cent statistical confidence that a provider's underlying performance for that indicator is below the numerical threshold. However, we may judge that it is appropriate to undertake an assessment if we have, for example, 88 per cent statistical confidence. In making this judgement we proposed that the following factors may be relevant:

- a. We would be more likely to rely on evidence in which we may have lower statistical confidence, the further a provider's performance is from a numerical threshold.
- b. Where a provider's performance in a range of indicators is below relevant numerical thresholds, these may collectively be of sufficient concern that the statistical confidence we require for each individual indicator will be lower.
- c. We will have regard to our PSED. This may mean that we choose to rely on evidence in which we may have lower statistical confidence where a provider's performance in relation to students who share protected characteristics is below a numerical baseline.

## Responses to question 12

**Question 12:** Do you agree or disagree with the proposed approach to using statistical measures when considering a provider's performance in relation to numerical thresholds?

573. Respondents were asked whether they agreed or disagreed with the proposed approach to using statistical measures when considering a provider's performance in relation to numerical thresholds. The majority of respondents (70 per cent) agreed with the proposed approach to using statistical measures when considering a provider's performance in relation to numerical thresholds, while 17 per cent disagreed and 13 per cent declared that they didn't know.

574. Points made by respondents regarding this proposal included:

- a. Comments that small datasets are subject to statistical uncertainty, and the implications this has for small providers.
- b. Highlighting that the statistical uncertainty of data requires careful communication.
- c. Disagreement with the proposed measure of statistical uncertainty.

- d. A suggestion that the OfS should take a holistic approach to assessment where there is not statistical confidence in the data.
- e. A suggestion that the proposed approach to using statistical measures is subject to the statistical problem of multiple comparisons.

## **Statistical uncertainty of small datasets and implications for small providers**

575. Some respondents commented that the statistical uncertainty associated with small datasets could lead to unfair judgements about performance. Respondents particularly took the view that there may be larger fluctuations in data from year to year based on the outcomes of a small number of students and were concerned that such volatile data may not fully represent the quality of small providers. Furthermore, many respondents identified a particular impact of the proposal on small providers, because of its potential to deter partnership arrangements and specialist provision. In light of those comments, we have considered the likelihood that potential partners would draw negative conclusions about the performance shown in the dataset of smaller providers and that providers would be less willing to deliver specialist provision with small numbers for the same reason. There were also points about statistical uncertainty creating additional regulatory burden and complexity for providers because the OfS would need to seek additional contextual information to understand performance in these circumstances.

## **Our response**

576. We agree that there are challenges associated with datasets of varying population sizes and this is particularly the case with smaller datasets. Our approach to statistical uncertainty set out in this proposal was deliberately framed to respond to this challenge and to ensure that performance in small datasets that might otherwise be judged to be negative, can be accurately interpreted. We are also aware of the potential for larger fluctuations in data within small populations and would take this into account before drawing conclusions about a provider's performance in these circumstances. We expect that in practice our approach to statistical uncertainty will mean that smaller providers, particularly those with 100 or fewer students, will be subject to regulatory action only where they are some distance below a relevant numerical threshold and, as a result, there is a high level of confidence in the data.
577. We also consider that the use of the statistical measure to support the interpretation of performance in small datasets means that there should be no disincentive in relation to partnerships or delivering specialist provision that might have smaller student cohorts. The purpose of the measure is to ensure that we can more appropriately consider performance in small datasets and where there is not strong confidence in the data we are less likely to prioritise this for assessment.
578. In general, we also think that it is important for us to balance the challenges of presenting information about smaller cohorts with our broader policy objective of identifying and intervening in areas or 'pockets' of poor performance to protect students. In our consultation, we set out a range of different approaches that we could have taken and, having reviewed these, continue to take the view that our proposed approach is the most likely to enable us to achieve our policy objectives.
579. If we excluded cohorts of, for example, fewer than 100 students, we would not be able to take regulatory action in cases where a provider was not delivering positive outcomes for those cohorts and the OfS's objective is to ensure that all students can expect a minimum

level of quality irrespective of the course or where they study. We take the view that if we were to exclude small cohorts, this would be to the detriment of students studying at small providers, or at larger providers with small pockets of provision, and would be likely to reduce confidence in the quality of providers that recruited small cohorts of students as they would fall outside the remit of our regulatory policy.

580. Having considered the comments made by respondents, including those made in support of our approach to statistical certainty, we intend to continue with the approach we proposed, as we consider that this remains the most appropriate way to deliver our policy objectives for smaller populations of students, having regard to reasonableness and proportionality.

### **Communication of the statistical uncertainty of small datasets**

581. Some respondents suggested that it would be important to ensure that statistical uncertainty was communicated effectively, to avoid unfair negative perceptions of a provider's outcomes. This comment was often present in responses making points about the statistical uncertainty associated with small datasets. Many respondents requested that data is presented clearly and fairly, for example by highlighting data limitations and cases where no action had been taken as a result of statistical uncertainty. Respondents wanted the OfS to be clear that this should not be understood as a negative outcome. However, some respondents did not agree that the provision of such explanations would be helpful, because they would be complex and not understood by students and the public.

### **Our response**

582. We remain committed to transparency as part of our regulatory activities, and we therefore agree that it is important that the data we present is as clear and accessible as possible. We are considering ways in which we can simplify the presentation of the data and the guidance we will publish to support users, and agree that guidance on interpreting statistical certainty is an important aspect of this. However, we also recognise that this data is, by its nature, complex and the need to balance simplicity with ensuring our approach remains fit for purpose and the data is presented accurately. We have explained more about our approach to publication of the data in Proposal 4.

### **Taking a holistic approach when data is unreliable**

583. Some respondents commented on the importance of ensuring that a provider's context is considered along with other qualitative evidence, and that an individualised, rather than a 'one size fits all' approach is taken in cases where available data is limited. This point was often made by respondents concerned with the statistical uncertainty of small, more volatile datasets, who in many cases agreed that our approach to considering contextual factors was an important way to address the implications of data limitations. However, some respondents suggested that taking a holistic approach could create burden for providers (as they would have to supply additional evidence), result in difficulty for the OfS in interpreting this evidence, and could create scope for subjective judgement, which we have taken to be a point about the potential for inconsistent assessments of providers with similar performance and context.

### **Our response**

584. We agree with those respondents who suggested we should not take a 'one size fits all' approach to assessing compliance with condition B3. We think this is important for a number

of reasons, including where there is limited data or where small datasets suggest greater statistical uncertainty.

585. The drafting in condition B3 deliberately excludes from its scope indicators and split indicators where there was no data or fewer than 23 students. The drafting also contains a step to understand the context for a provider (which may use both quantitative and qualitative information) in all assessments of compliance with condition B3. More information about our consideration of contextual factors is included in our response to Proposal 5.
586. We have noted the points made by respondents about the regulatory burden of supplying additional information to OfS. We have explained more about our consideration of regulatory burden paragraphs 688 to 706, and would note that we expect to limit our assessments to a small number of providers each year and that, for all other providers not selected for assessment, there is no requirement to submit additional information to the OfS.
587. We have also noted those comments suggesting that our consideration of context may result in inappropriately subjective judgements. We have considered these comments alongside other feedback that strongly supports the consideration of context in our assessment of providers, especially when data is limited. We have set out our approach to making judgments about compliance with condition B3 including consideration of context fully in Proposal 5, and consider that this approach remains the most effective for ensuring we can take full account of the wide range of contextual factors that providers put forward and that we apply a consistent approach to cases.

### **Disagreement with the approach to statistical uncertainty**

588. A small number of points were made in disagreement with the approach. These included:
- a. Disagreement with the levels at which we proposed statistical confidence should be set, because we should only act when we have higher levels of statistical confidence. In our proposals we set out that we would normally undertake an assessment of compliance where we had around 90 per cent confidence that a provider's underlying performance was below a numerical threshold. We also proposed taking more intrusive regulatory action where we had around 95 per cent statistical confidence that a provider's underlying performance was below a numerical threshold. Respondents suggested that we should have at least 95 per cent statistical confidence that a provider's underlying performance was below a numerical threshold before undertaking an assessment.
  - b. Disagreement with considering statistical confidence on a continuous scale, which was argued to introduce uncertainty in the sector about the actual levels used and to lead to inaccuracies in assessments. Some respondents suggested we should restrict regulatory intervention to data where we had at least 95 per cent statistical confidence, especially for progression indicators because of the likelihood of varying response rates to the GO survey. These respondents were of the view that no outcome measure where statistical uncertainty suggested underlying performance may be above the threshold should be subject to scrutiny.

### **Our response**

589. We have considered comments suggesting we should adjust proposed levels of statistical confidence to require an even higher level of statistical confidence to determine when we would normally undertake an assessment of compliance with condition B3. We note that

some respondents thought that we should not undertake any assessment unless we have 100 per cent statistical confidence that a provider's underlying performance for an indicator was below a relevant numerical threshold. Our consultation proposals are set out in paragraph 569. We do not intend to depart from those to require higher levels of statistical certainty before we would normally undertake an assessment of compliance with condition B3, or to limit our interventions to data where we have at least 95 per cent statistical certainty or higher, regardless of the indicator we are assessing (as some respondents suggested we should have more statistical confidence when assessing progression indicators). We think the likely result of doing that would be an unhelpful narrowing of the circumstances in which the OfS would normally begin an assessment or take action for a breach of condition B3, and this is not in the interests of students because such a policy would likely have the effect of limiting and reducing the OfS's regulatory activities in this context. This could result in far fewer providers being subject to regulatory action as a result of performance close to numerical thresholds. This could also result in more students studying for longer at providers with performance that is poor relative to our numerical thresholds. That would not be conducive to the OfS's objective of ensuring a minimum level of quality at all providers to protect students' interests. Therefore, we consider that there is value in the OfS having greater discretion in this area and that the approach to statistical confidence that we proposed is appropriate, having regard to reasonableness and proportionality.

590. Our approach will offer us appropriate assurance that we can have confidence where a provider's underlying performance may fall when we make assessments of compliance with condition B3. For these reasons, we intend to adopt our proposed approach, including that we will apply regulatory judgement in each case rather than setting a determinative level of statistical confidence to decide when and how we act. We intend to adopt the approach to making that regulatory judgement as set out in the consultation and above, which for the same reasons we consider appropriate having regard to reasonableness and proportionality.
591. We also think that restricting regulatory intervention to cases where we have at least 95 per cent statistical confidence (or otherwise using discrete categories of statistical confidence) would result in arbitrary 'cliff edges' where two providers with very similar performance could be subject to different regulatory action. For example, this approach could lead to two providers with the same continuation, completion or progression rates being subject to different regulatory action if we had 94 per cent statistical confidence for one provider and 96 per cent statistical confidence for another. We consider our approach to statistical confidence protects against such cliff edges, because it is informed by different indicative categories that describe the strength of statistical evidence, are deliberately not discrete and are set on a continuous scale to avoid arbitrary divisions. Therefore, we remain of the view that our proposed approach to statistical confidence is appropriate and we have decided to adopt it.

### **Addressing the statistical issue of multiple comparisons**

592. A small number of respondents thought the proposed approach to using statistical confidence levels would be insufficient to deal with the issue of multiple comparisons. This arises where a user considers increasing numbers of indicators at the same time. The nature of the issue is that the greater the number of indicators considered then the chances of one, or more, of them meeting our confidence levels due to chance increases.
593. These respondents further expressed disagreement with the OfS's proposal not to make adjustments to take account of this issue when constructing student outcome indicators. They argued that the OfS should not expect users who wish to make multiple comparisons to

account for the increasing chances of false positives by themselves. This was because of a perception that this cannot be performed by inexperienced data users. Lastly, respondents called either for the introduction of statistical adjustments to account for multiple comparisons or the assessment of providers' compliance based on fewer statistical comparisons.

## **Our response**

594. We have considered the small number of comments on the approach we described for presenting student outcome and experience measures as one that does not make any statistical adjustments for multiple comparisons. We note that the consultation outlined our intention to explain the impact of making multiple comparisons on statistical confidence, and guide users that they should be more conservative in their interpretation of statistical uncertainty the more comparisons they are making. We have considered respondents' suggestions that multiple comparisons should be accounted for within our calculations, and their view that guidance may be insufficient to help users understand and compensate for multiple comparisons.
595. We note that programmatic adjustments for multiple comparisons would normally have the effect of widening the confidence interval calculated for each of the statistics that are being compared. This is to limit the chances of one or more of them meeting our confidence levels by chance alone. We also note that wider confidence intervals (as indicated by wider shaded bars in our presentation of the indicators) are interpreted as signifying lower confidence about the likely location of true underlying performance for each indicator.
596. We continue to take the view expressed in the consultation, that the number of comparisons that different users might make within and across the full set of available data points is unpredictable, and likely to vary substantially. We therefore consider that it would not be appropriate or proportionate to adjust for multiple comparisons in a programmatic way through our calculations of statistical uncertainty, given that to do so would require making an arbitrary assumption about the number of comparisons that each user will make. While an arbitrary adjustment may reduce the risk of users making incorrect assumptions as a result of statistical variation, we consider that it would simultaneously increase the risk that good statistical evidence is overlooked because users would be presented with artificially wider distributions of the statistical uncertainty associated with each indicator. In technical terms, while an arbitrary multiple comparisons adjustment may limit the extent of false positive results, it may also increase the extent of false negatives. We consider that this would be a particular issue where users were considering an indicator in isolation, or looking across a smaller number of indicators than were accounted for by the arbitrary adjustment.
597. We confirm, as set out in our consultation proposals, that interpretation of these indicative categories should be informed by awareness of the number of indicators being considered, and the potential for false positive results, particularly when looking across the performance of a provider. We have revised the guidance in relation to condition B3 to make clear that in undertaking compliance assessments, we may consider matters relating to the interpretation of statistics. We expect that this will include drawing on statistical expertise within the OfS to consider issues relating to multiple comparison where we consider this to be necessary. We also note the following features of our assessment approaches, which will further mitigate the issues raised.

- a. Our prioritisation approach and our decisions on the scope of assessments of ongoing condition B3 will clearly limit the number of indicators and split indicators we consider in one assessment:
- b. Each indicator will be reviewed on its own merit rather than in relation to multiple indicators or split indicators at the same time.
- c. Consideration of context for an individual provider will provide us with an opportunity to consider the implications of multiple comparison where necessary.

## Responses to question 13

**Question 13:** Do you have any suggestions for additional steps the OfS could take to provide greater clarity about the impact that the proposed approach to statistical confidence may have for individual providers?

598. Respondents were asked whether they had any suggestions for additional steps the OfS could take to provide greater clarity about the impact that the proposed approach to statistical confidence might have for individual providers. The majority of respondents provided either no answer to this question (41 per cent of respondents), declared they had no suggestions (25 per cent of respondents) or had an answer that related to another matter (11 per cent of respondents).
599. The points that were made were limited, but included requests for:
- additional explanations
  - examples of how the proposed approach would work in practice
  - the approach to be explained in an accessible way to non-technical audiences.

### Explanations of the approach and the data

600. Respondents requested additional explanations about how the proposed approach to statistical confidence would work in practice and how the data presented should be interpreted, given that this is a technical subject matter requiring, in the view of respondents, a level of specialist expertise. It was suggested that these are presented as part of a clear guidance document and accompanying explanations in data dashboards.

### Provision of examples of the proposed approach

601. Another theme in responses was a request for the OfS to publish examples (such as worked examples and case studies) illustrating how it will use statistical confidence in its assessments and decisions about whether to take regulatory action in response to non-compliance with B3. Respondents said this would help providers to understand how the proposed approach, which was described as nuanced and complex, would be applied in practice.

### Accessibility to a non-specialist audience

602. Other respondents suggested that it was important to ensure that the proposed approach to statistical confidence is explained in a way that is accessible to non-expert audiences with no

statistical training. Respondents making this argument tended to find the current presentation of results complex. Many were from smaller providers and thought they did not have the expertise and capacity within their provider to easily understand the data. Some respondents further suggested that the OfS should test understanding of its approach to statistical confidence with students, to ensure correct interpretation.

## **Our response**

603. We have considered the suggestions made by respondents to support the clarity and accessibility of the data and its presentation to a range of audiences. We have responded to similar comments made in relation to Proposal 4, where we have set out the steps we are minded to take as a result of this feedback. We understand that statistical confidence can be a complicated concept for non-specialist users and are keen to ensure that we present this in a way that is helpful and accessible. As part of the consultation, we published technical documents providing more information about our approach, and we are minded to publish further guidance to support both specialist and non-specialist users of conditions B3 indicators, to accompany the final workbooks. In developing these materials, we will consider suggestions from respondents that we should test understanding of our approach to statistical confidence with students.<sup>39</sup>

## **Decision**

604. We have considered the points made by respondents in relation to Proposal 6 and have addressed these in detail above.

605. We have decided to adopt the approach set out in Proposal 6 without changes.

606. This means that we will use a non-determinative approach to considerations of statistical certainty, including the use of different levels of certainty to ensure our interventions are reasonable and proportionate.

607. We have decided (see Proposal 1) to make changes to the drafting of the guidance for condition B3 to remove any uncertainty that we will be able to draw on statistical expertise on relevant issues, including the effects of multiple comparison, when making assessments of compliance with condition B3.

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<sup>39</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/outcome-and-experience-data/).

# Proposal 7: Taking regulatory action when a breach is identified

## Questions relating to Proposal 7

**Question 14:** Do you agree or disagree with our proposals to impose an ‘improvement notice’ where we find a breach of condition B3?

**Question 15:** Do you agree or disagree with our proposals to take account of a provider’s compliance history in relation to condition B3 for the purpose of determining eligibility for other benefits of OfS registration?

## What we proposed

608. We did not consult on our general approach to monitoring and intervention or the use of our enforcement powers as set out in HERA and the regulatory framework. We did, however, make a specific proposal about how we intend to use our power to impose specific ongoing conditions of registration when we find a breach, or increased risk of a future breach, of condition B3.
609. We proposed that our general position would be that, wherever we identify a breach of ongoing condition B3, we would normally expect to impose a specific ongoing condition of registration unless it would be reasonable and proportionate to take more intrusive regulatory action, for example to protect the interests of students or taxpayers. We proposed that we may also impose a specific condition of registration in response to an increased risk of a future breach of the condition. We would normally expect specific ongoing conditions in these circumstances to act as an ‘improvement notice’.
610. These proposals did not limit our discretion to take any enforcement action on the basis set out in HERA and described in the regulatory framework and in Regulatory advice 15, or to prevent us from imposing other requirements on a provider through additional specific conditions. Finally, we set out additional actions the OfS could take where we make a formal finding of a breach of conditions B3, including our consideration of compliance with conditions B3 in determining eligibility for other benefits of OfS registration, such as participation in the TEF, eligibility for degree awarding powers or university title, and eligibility for OfS grant funding.

## Responses to question 14

**Question 14:** Do you agree or disagree with our proposals to impose an ‘improvement notice’ where we find a breach of condition B3?

611. Respondents were asked whether they agreed or disagreed with our proposals to impose an ‘improvement notice’ where we find a breach of condition B3.
612. Over three-quarters (76 per cent) of respondents agreed with the proposed use of improvement notices when a breach of condition B3 has been identified, while 15 per cent disagreed and 9 per cent declared that they didn’t know. However, the majority of those who

agreed requested additional information and suggested potential improvements. The points made included:

- a. Requests for additional information about improvement notices.
- b. Comments about the potential impact of an improvement notice on the reputation of a provider.
- c. Comments about the potential impact of regulatory action on small providers.
- d. Questions about when improvement notices would be removed.

## **Requests for additional clarification**

613. A large number of respondents requested further information about improvement notices and what would constitute a breach of condition B3. Respondents sought further information about the process of imposing an improvement notice. For instance, some respondents were unclear about the type of wording that would be included in an improvement notice, and therefore had reservations about its publication, while others asked about the circumstances in which the OfS would take more intrusive regulatory action than imposing an improvement notice. Respondents also asked about the type of 'pre-emptive' actions (for example, actions to improve student outcomes such that the provider's performance would be above a numerical threshold in future) that the OfS would take into account, and noted that the timelines for delivering the first cycle of assessments may prevent providers from taking such action before OfS involvement.
614. Respondents also requested further information and transparency about the timing and duration of each stage in the assessment process, to allow them to plan ahead and manage their resources efficiently if they were prioritised for assessment. Comments here related to both the overarching assessment process and the length of time allowed for interactions between OfS and a provider subject to assessment.
615. A further request was for further information about the terminology used in the proposal for improvement notices. Many of these comments related to the ways in which the OfS and providers could identify when the requirements set out in an improvement notice had been met, or when the OfS would consider more intrusive action. Specifically, a few respondents sought more detailed information about how a provider would demonstrate the sustained improvement in an indicator that we proposed to include in an improvement notice. Others wanted more information about how the OfS would identify conduct that was ongoing when considering whether to escalate to more intrusive action.

## **Our response**

616. In developing our approach to assessing compliance with condition B3, we have reflected on feedback received in earlier consultations which did not support a determinative and fixed approach to intervention. We agree that the diversity of the sector, and the wide range of contextual factors and circumstances that we expect to encounter as part of our assessments, mean that it is important that we retain flexibility and the ability to apply regulatory judgement in our assessments and decisions. We consider this to be the most appropriate way to respond effectively to the particular circumstances of an individual provider. This being the case, we do not plan to set out standard wording or definitions for improvement notices, or a determinative list of appropriate actions through which a provider

could demonstrate improvement, because we think these are best considered on a case-by-case basis.

617. We noted responses that asked whether a provider could take ‘pre-emptive action’ to avoid a circumstance in which the OfS might find that it had breached condition B3. Our assessment guidance says that we will be likely to place weight on ‘actions a provider has taken, or will take, to improve its performance and the extent to which those actions appear credible and sustainable’. This means that if a provider is able to demonstrate that it has identified performance that is of concern and has taken actions that have delivered, or are capable of delivering, a sustained improvement in outcomes for its students, we may consider that when determining whether there has been a breach and what action we should take as a result. We consider that it would be positive for students and the wider reputation of higher education if a provider that is below a numerical threshold takes action to improve its performance ahead of the OfS undertaking an assessment. We note comments from some respondents that it will be difficult for them to identify and take appropriate action before the first assessment cycle in 2022, given the timeline that we have set out for implementation. However, we have balanced these points against those from other respondents that providers already have in place processes for identifying courses with poor performance and taking action as a result. In addition, we consider that providers will have generally been aware of our intention to impose numerical thresholds since November 2020 and will specifically have been aware of the proposed values for those numerical thresholds since January 2022.
618. We will decide the final numerical thresholds in September 2022, which will be determined using the approach to setting numerical thresholds that we have decided to adopt. We consider that the changes that we have made to our specifications for constructing student outcome measures will not have a significant effect on the sector averages or sector distribution. We therefore expect that the numerical thresholds we will set and publish in September 2022 will not be any higher than those that we consulted on in January 2022 and any adjustments we make to the numerical thresholds on this occasion will be downwards. We are taking this approach on this occasion in light of the fact that this is the first time the OfS will be introducing numerical thresholds for quality under this new policy approach to assessing condition B3. However, for the avoidance of doubt, when numerical thresholds are reviewed and set in the future, they may remain at the same level, or be adjusted upwards or downwards as appropriate, having regard to the data available and other relevant considerations at the relevant time. This timeline means that providers can consider their own performance in relation to the highest values at which the numerical threshold values may be set.
619. While we recognise providers’ preference for firm timelines for assessments, we do not propose to set out a fixed timeline for the different stages of the assessment process. We anticipate that the cases we assess will be of varying complexity and that some will take longer to resolve than others. We have, however, indicated in Proposal 8 a broad timeline for the 2022 assessment cycle, wherein we expect to conduct the majority of assessment work between October and December 2022.
620. Finally, we have decided to clarify that wherever we identify a breach of ongoing condition B3, we would normally expect to impose a specific condition of registration, unless after having regard to considerations about reasonableness and proportionality we decided it was appropriate to take more intrusive regulatory action.

## Potential impact on the reputation of providers

621. Some respondents took the view that a published improvement notice would have an adverse effect on the reputation of a provider, leading to financial difficulties for the provider and possibly unintended consequences for students. Respondents considered that reputational damage would lead to fewer enrolments and thus reduced income, adversely affecting the quality of education. There were also points about an adverse impact on students as a result of reputational damage to a provider, including potentially worsened employment opportunities since an improvement notice could diminish the value of the degree offered, consequently making employers reluctant to recruit future graduates from affected providers. One proposed solution to limiting such reputational damage was that the OfS should agree the wording of an improvement notice in collaboration with the provider, while others suggested publishing an action plan alongside an improvement notice to provide context for the actions that the provider had committed to take.

## Our response

622. We recognise that, where a provider is not delivering positive outcomes for its students, we may take regulatory action that could affect its current or future income or affect its reputation. The action we take will be determined on a case-by-case basis and will have regard to our general duties, including that the actions are transparent, accountable, proportionate and consistent. We take the view that actions that had a negative effect on a provider would likely be proportionate, given the risks to students and taxpayers that arise when a provider delivers weak outcomes for students.

623. We currently publish details of specific conditions we have imposed and do not consider that the publication of specific conditions for condition B3, in the form of improvement notices, introduces a new risk for providers. We take this view having had regard to our general duty that our actions are transparent, accountable, proportionate and consistent. We also consider that this information is a matter of public interest that should therefore be available to stakeholders outside the provider.

624. We note suggestions that the OfS should agree the wording of an improvement notice in collaboration with the provider. We will consider matters relating to publication further when we take our final decision on our approach to publication.

625. Finally, we note the suggestion that the OfS should publish the actions a provider intends to take to improve its performance, in addition to any details contained in an improvement notice. We agree that there is value in a provider being transparent with its students and others about the steps it is taking to improve outcomes. We consider that, in most instances, the most appropriate avenues for communicating these plans will be through the provider's own channels rather than via the OfS.

## Potential impact on small providers

626. Respondents took the view that an improvement notice would have an adverse impact on small providers. Specifically, there was a view that an improvement notice in relation to higher education courses would have a disproportionate effect on a further education college where higher education might be a small part of its overall offering. According to respondents, smaller providers are particularly vulnerable to the effects of reputational damage, as their financial situation is more precarious and it can be harder for them to win back public confidence. Some respondents also suggested that small providers often offer

alternative career paths and courses that may not be delivered by larger providers. As a result, those respondents asserted, limiting the offering of small providers may limit the diversity of provision available. We have taken this to mean that imposing an improvement notice on a small provider may result in reduced recruitment, potentially leading to the closure of a particular course, of the entirety of its higher education provision, or of the provider itself, thus reducing diversity of provision in the sector and choice for students.

## **Our response**

627. As set out in paragraph 622, we expect that there will be circumstances where we may take action that leads to a provider suffering loss of current or future income or damage to its reputation, and that in some cases this will impact small providers or further education colleges.
628. We have set out details of our approach to assessment, including the impact of statistical certainty on small datasets and the consideration of contextual factors, and consider that this approach will ensure that we will only take action in circumstances where we have an appropriate level of confidence that performance does not satisfy the condition. We therefore do not accept that if we found a breach of condition B3 this would be disproportionate or unreasonable for any provider, including smaller providers, to take action to resolve that breach. We also consider that it is appropriate that the provider bears the costs of doing so. We also believe that students at smaller providers should receive equivalent protection from poor performance as those at larger providers, including through the regulatory action that we take.
629. However, we also wish to draw respondents' attention to paragraph 168 of the regulatory framework, which sets out the factors that we will take into account when deciding whether it is appropriate to intervene in a given case. These factors will affect when and how we will intervene, and several of these factors would be relevant to smaller providers, in particular our consideration of the likely severity of a breach.
630. We also note that the publication of an improvement notice may have a negative effect on a provider's reputation. In general, we consider that this is likely to be appropriate, given the risk to students. However, we will consider these issues in the round when we make final decisions about what material we should publish in relation to condition B3.

## **Removal of improvement notices**

631. Some respondents also suggested that there could be a time lag between a provider's actions and the delivery of improved student outcomes. Respondents commented that providers would be publicly 'under an improvement notice' until the outcomes of their actions were visible in their indicators, thus incurring potential financial and reputational harm despite having taken appropriate action to improve performance. Respondents therefore sought further information about how and when the OfS would remove an improvement notice and reach a judgement that the requirements of the notice had been met. Respondents asked that this be clearly set out within each improvement notice. There were suggestions about removing an improvement notice if significant measures had been taken by a provider, and making sure that a notice was removed immediately after the appropriate outcomes are delivered.

## Our response

632. We agree that the cyclical nature of higher education and data reporting can mean that the effects of a provider's improvement actions may not be evidenced in improved student outcomes data for some time. However, we also expect that this will vary depending on the causes of poor performance and the nature of the actions needed. In each case, we will consider an appropriate timescale in which we would require improvements to be delivered.
633. An improvement notice will say specifically what is required by when, and we will monitor the provider's performance in line with these requirements. We will then decide at an appropriate time whether the requirements in the improvement notice have been met. Decisions about whether an improvement notice has elapsed or is no longer in force will depend on the precise drafting of the improvement notice, but we will make this clear to the provider.

## Responses to question 15

**Question 15:** Do you agree or disagree with our proposals to take account of a provider's compliance history in relation to condition B3 for the purpose of determining eligibility for other benefits of OfS registration?

634. Respondents were asked whether they agreed or disagreed with our proposals to take account of a provider's compliance history in relation to condition B3, for the purposes of determining eligibility for other benefits of registration. The consultation explained that the benefits of registration for these purposes are degree awarding powers and university title, and that reference to 'compliance history' was limited to findings made by the OfS to the effect that a provider is breaching, or has breached, condition B3. Over three quarters (77 per cent) of respondents agreed with these proposals, while 14 per cent disagreed with them and 9 per cent declared that they didn't know.
635. The points made by respondents who were not in agreement with the proposal included:
- a. Requests for further information about how a provider's compliance history would be taken into account when determining eligibility for other benefits of OfS registration.
  - b. A suggestion that sanctions applied to past performance would not be effective because they could make it harder for a provider to make the improvements necessary to return to good standing.
  - c. A suggestion that any breaches identified should be followed by discussions with a provider, to allow it to understand the nature of its breach and the actions it might need to take to resolve concerns about its performance.

## Compliance history

636. Many respondents asked for further information about the use and definition of a provider's compliance history when determining eligibility for other benefits of registration. Specifically, some respondents commented that only recent non-compliance should be relevant. They also asked whether the quantity and severity of past non-compliance would be evaluated, and if so, how much weight the OfS would place on this when determining eligibility for other benefits of OfS registration. Respondents also asked for further information about eligibility for the benefits of registration. For example, respondents sought further information about

how the OfS would treat compliance history if a provider sought to change registration category or merged with another provider to create a new entity.

637. Respondents suggested that providers with a good compliance record (aside from a breach of condition B3) should be treated with more leniency when determining eligibility for other benefits of OfS registration because they have 'proven that they can be trusted to implement improvements where needed'. Some respondents also requested that the OfS consider the relevance and severity of any previous compliance issues in determining regulatory actions, especially where non-compliance had affected only a small proportion of a provider's students.
638. Some respondents agreed with the proposed approach to the impact of a provider's compliance history, since they believed that it was fair and promoted equality, transparency and accountability in the sector. They suggested that they agreed with the links between compliance with condition B3 and TEF eligibility as a logical approach.

## **Our response**

639. We understand that some respondents were keen to have more detailed information about the proposed approach to taking account of compliance history for the purpose of determining eligibility for degree awarding powers and university title.
640. We have decided to adopt our proposed approach to actions we will take if we make a final decision that there is, or has been, a breach of condition B3. We have set out the approach we have adopted in Annex C. In relation to respondents' comments regarding the relative weight that we place on non-compliance, we would have regard to the intervention factors set out in paragraph 167 of the regulatory framework and consider, in particular, the proportionality of taking this approach. This is not a new approach for the OfS and is set out in detail in paragraph 167 of the regulatory framework.
641. In light of the comments received and other considerations, we have decided to change the policy proposals we consulted on to clarify that a provider's 'compliance history' means compliance decisions made by the OfS to the effect that at least one of the following is true:
- revised initial condition of registration B3 has not been satisfied
  - the provider is breaching, or has breached, revised ongoing condition of registration B3.
642. This means that we will only take into account compliance decisions made from the date revised initial and ongoing condition of registration B3 come into force, and therefore would not take into account findings made by the OfS in relation to the original version of initial and ongoing condition B3. We have taken this decision so that the effects of a breach of condition B3 under our new approach to regulating student outcomes are limited to the period in which this approach was in operation.
643. In relation to taking into account compliance history in mergers or acquisitions, we have also decided to change the policy proposals we consulted on to clarify certain matters relating to the purposes of using compliance history and in respect of when a provider will be treated as being a new entity or operating a new business. Our revised policy position is that where a provider needs to make a fresh application for registration, for example because it wishes to change registration category, or where a merger or acquisition takes place, we will take the following approach:

- a. Where the provider seeking registration is either the same entity, or is a new entity operating the same or substantially the same higher education business as the previous entity, we will take into account the compliance history of the previously registered provider for the purposes of considering matters relating to degree awarding powers and university title.
- b. Where the provider seeking registration is a genuinely new entity that is not operating the same or substantially the same higher education business as the previous entity, we will treat that provider as a new provider for the purposes of considering matters relating to degree awarding powers and university title. This will mean that the previous provider's track record cannot be transferred to the new entity and we will not take such records into account when considering matters relating to degree awarding powers and university title in respect of the new entity.

644. We have decided to make these changes to our policy position on mergers and acquisitions to:

- a. Provide clarity that we will only use compliance history for purposes relating to degree awarding powers and university title.
- b. Help clarify when a provider will be treated as being a new entity or operating a new business, in order to better reflect our aim of ensuring that a provider cannot take advantage of a previous entity's track record without also being responsible for that previous entity's compliance history.

## Potentially retrospective elements of our proposals

645. Respondents suggested that the imposition of sanctions based on past performance would be counterproductive, since a provider may already have taken steps to improve its performance. Respondents were keen to ensure that the OfS would take account of such improvement measures that have already been taken. Respondents suggested that action in relation to past performance would only increase the likelihood of future breaches because of the impact on a provider's resources.

## Our response

646. We note the points about taking regulatory action in relation to student outcomes that are in the past. Our approach uses the most current data on student outcomes that is currently available. We consider that this approach to assessing student outcomes is appropriate because we can only measure outcomes after they have been achieved by students. We also consider that the importance of assessing the quality of higher education by reference to such outcomes (and the OfS's powers to do so) has been made absolutely clear by legislative changes made to section 23 of HERA by section 18 of the Skills and Post-16 Education Act 2022.

647. However, we do recognise that providers may already have taken steps to improve performance and, as set out in paragraph 641, we consider that, if providers that are below a numerical threshold take action to improve their performance ahead of the OfS undertaking an assessment that will be positive for students and the wider reputation of higher education. This is why, as set out in our proposals, our approach **will** consider any information about credible and sustainable actions to improve student outcomes in our assessment of compliance.

## **Breaches should be followed by discussion with a provider**

648. The final theme in responses to this question, raised by a very small number of respondents, was agreement with the use of a provider's compliance history and a request to accompany this with close cooperation between the OfS and a provider found to have breached condition B3. Respondents suggested that this approach would allow a provider to understand the nature of its breach, the reasons the OfS decided that there was a breach, and the actions the provider may need to take to resolve concerns about its performance.

## **Our response**

649. We have set out in Proposal 5 the approach we will take to engaging with providers during the assessment process, and that any provisional and final decisions will set out our reasons for determining that a provider has breached B3. Furthermore, any improvement notice will set out the actions a provider must take in response to the breach. We consider that this will provide sufficient information to allow a provider to understand the nature of the breach, the reasons we have decided that there has been a breach and the actions a provider must take.

## **Decision**

650. We have considered the points made by respondents in relation to Proposal 7, and have addressed these in detail above.

651. We have decided to adopt the approach set out in Proposal 7 with the following changes:

- a. We have decided to change our approach to clarify that a provider's 'compliance history' means compliance with decisions made by the OfS in relation to revised condition B3. This means that we will only take into account compliance decisions made from the date the revised initial and ongoing condition B3 comes into force. This means we would not take into account findings made by the OfS in relation to the original version of the initial and ongoing condition B3.
- b. We have decided to change our approach to clarify certain matters relating to our use of compliance history in relation to mergers and acquisitions, including when a provider will be treated as being a new entity or operating a new business.

## Proposal 8: Timing of implementation

### Questions relating to Proposal 8

**Question 16:** Do you agree or disagree with the proposals for the implementation of the proposed approach to regulating student outcomes? If you disagree, do you have suggestions for an alternative timeline?

### What we proposed

652. In our consultation, we proposed indicative timing for the implementation of the proposed approach as follows:

- a. Revised condition B3 and associated guidance comes into effect around July 2022.
- b. Publication of data for all indicators, including final numerical thresholds based on updated data, occurs by around September 2022.
- c. The OfS identifies providers initially selected for assessment in the first year of operation of our new approach through the proposed prioritisation process by around October 2022, although we will continue to monitor compliance with condition B3 on an ongoing basis and further providers may be selected for assessment throughout the year if necessary.
- d. For cases initially selected for assessment in the first year of operation of our new approach in or around October 2022, the OfS requests for information from providers would generally take place in or around October and November 2022.
- e. For cases initially selected for assessment in or around October 2022, for which we make a provisional decision that there has been a breach of condition B3, we would generally expect to issue these provisional decisions in or around December 2022, with any final decisions expected to be reached in or around early 2023.

653. In the first year of operation of our new approach (i.e. following the publication of data in September 2022) we anticipate that we would be more likely to use improvement notices to address identified breaches of condition B3.

654. After the first year of operation, we anticipate that we would operate an annual cycle which would consist of the following broad steps:

- receipt of data from HESA and ESFA
- creation and publication of B3 indicators
- identification of prioritised cases
- assessment and requests for information from providers
- decision-making

- subject to final decisions on our approach to publication, we may also publish decisions in relation to compliance with condition B3.

## Responses relating to Proposal 8

655. Respondents were asked whether they agreed or disagreed with the proposals for the implementation of the proposed approach to regulating student outcomes and whether they had any suggestions for an alternative timeline.
656. Almost three-quarters (73 per cent) of respondents disagreed with the proposals for the implementation of the proposed approach to regulating student outcomes, while 19 per cent agreed with them and 8 per cent declared that they didn't know. The majority of those who disagreed made points that overlapped with response to other questions, such as the timing of the implementation and the impact of the pandemic.
657. The points made by respondents that are not covered elsewhere in this document included:
- a. Comments that additional time is needed for providers to understand their performance as shown in the indicators and to respond to this.
  - b. Comments that there is a disproportionate regulatory burden on small providers because of a smaller number of staff, compared with larger providers which would have to deal with multiple regulatory activities over a short period.
  - c. A suggestion that the pandemic means that providers are focusing resources on returning to normal higher education delivery, and should remain focused on this.
  - d. A request that assessments of condition B3 should be undertaken before TEF submissions.
  - e. A request that the OfS should implement a trial period.

## Additional time

658. Many respondents suggested that additional time was needed for providers to be able to understand the OfS's new requirements, examine their indicators and respond to any instances where performance is below a numerical threshold. Respondents commented about the overlap of the proposed timeline for condition B3 with other regulatory obligations, for example, changes to data submission processes through Data Futures, the Higher Education Students Early Statistics (HESES) survey and variations to access and participation plans. Respondents also commented that the proposed timeline coincided with high levels of activity for providers at the start of a new academic year. Respondents reported that many of the same employees would be involved in all of these activities, especially at smaller providers.
659. As a solution, some suggested an extended timescale of six weeks instead of four, to allow a provider selected for prioritisation to have the opportunity to engage with the OfS, conduct its own analysis of the indicators and prepare contextual information for assessment. Other respondents suggested a period of at least three months between the release of indicators and the start of assessments, or allowing a full academic year for providers to understand their performance before the OfS initiated any regulatory action. One respondent suggested that the latest data be made available to providers in September 2022, but that

implementation be delayed until 2023-24 to give providers time to engage with the data to inform any actions and interventions.

660. Finally, some respondents commented that any existing or live applications for registration with the OfS would have been made on the basis of existing requirements. They suggested that these applications should therefore not be subject to any revised initial condition of registration.

## **Our response**

661. We proposed a timeframe for implementation that would allow those providers prioritised for assessment four weeks to respond with contextual information after they receive the final indicator dashboards we will send to them. We note the comments made in responses about the volume of activity that providers will be undertaking at that time, and have set out in Proposal 5 our decision to amend our approach so that we may allow longer than four weeks for initial engagement if we are assessing compliance in relation to multiple indicators or split indicators (see paragraph 498).
662. We also note some suggestions that implementation should be delayed. However, we still consider that proceeding broadly as planned is appropriate, because our approach will prioritise addressing the worst performance in the sector and therefore will allow us to take swift regulatory action where this is appropriate. It is therefore in the interests of students, taxpayers, and the sector in general that we implement our approach to regulating student outcomes in 2022. We therefore intend to continue to implement condition B3 according to the timelines in our proposals, with the extension of initial engagement. This means that we expect to publish final numerical thresholds and provide final indicators to providers in late September. The majority of assessment activity and provider engagement would take place between October and December 2022.
663. We have decided that the revised ongoing condition of registration B3 will come into effect from 3 October 2022 and apply to all higher education providers on and from that date, in a manner which reflects whether they were registered on or before, or after, 3 October 2022. We consider that this gives sufficient time for providers to have engaged with their data before the condition comes into effect. We consider that it is appropriate to apply this condition to all providers because we wish to ensure a minimum level of protection for all students on all courses. For reasons explained above, we consider that there is a strong student and public interest in the OfS taking regulatory action where a provider is not delivering positive outcomes for its students.
664. Our general monitoring of compliance with this revised ongoing condition will start from 3 October 2022. Revised initial condition of registration B3 will come into effect from 3 October 2022 and apply to new registration applications made on or after 3 October 2022.
665. Transitional arrangements for initial condition of registration B3 will apply to applications for registration that are live at any time between 26 July 2022 and 2 October 2022. This includes any provider that makes a new application for registration during this time, including, for example, an application for registration in a different category of the Register, or as a result of a merger or acquisition. Original initial condition of registration B3 will cease to apply to a provider with an existing application on the date a final decision is issued to that provider. We consider that this recognises that providers will have made an application for registration based on existing requirements at the time of their application. We also consider that this gives clarity to providers that may be considering whether to apply for registration. See the

notice we have published alongside this document for further and precise information about the implementation and transitional arrangements for both the revised initial and ongoing condition of registration B3.

666. We note respondents' views on the time needed to engage with and analyse the indicators we will provide in relation to condition B3. Our initial view is that we will have sufficient resources to assess up to 20 providers in 2022. We will confirm this view when we make decisions about prioritisation in September 2022. This means that the majority of providers will have until at least spring 2023 (when the second cycle of assessment will begin) to engage with and understand their data. Those providers selected for assessment in autumn 2022 would need to understand their data in relation to the indicators and split indicators in scope of the assessment and be prepared to engage. All providers are currently subject to condition B3, and we expect that many providers are already engaging, and therefore familiar, with the same types of data as part of their own internal processes to monitor the outcomes of their students with a view to improving any areas of weaker performance. In considering respondents' views about our proposed timescales, we also noted the number of responses stating that providers already have processes in place to understand and respond to data about their courses. We take the view that these processes should support providers in engaging with us, should we undertake an assessment of compliance with condition B3.

### **Regulatory burden for small providers**

667. Another common theme was the impact that the proposed timeline would have on small providers. In particular, it was argued that, should the proposals be implemented on the basis of the proposed timeline, a small team of employees would have to deal with multiple regulatory activities that would be overlapping over a short period. Respondents suggested that this level of activity was not manageable and would result in reduced quality of engagement with the OfS. A small minority of respondents also suggested that the new datasets and dashboards would also add to a small provider's regulatory burden as it would have fewer staff to engage with the data before the planned implementation. Those who identified concerns about regulatory burden for small providers suggested delaying implementation to enable providers to familiarise themselves with their data.

### **Our response**

668. We recognise that the introduction of new regulatory approaches creates some burden on all providers, regardless of size, as they adjust to the new approach. We also recognise that smaller providers may have more limited resources, and therefore took steps to produce data dashboards for providers of all sizes. We note that many respondents welcomed the detail in these dashboards. Where respondents suggested that the proposals created regulatory burden, we consider that responses did not suggest alternatives that would resolve this situation, and that a further delay in implementing condition B3 would not necessarily resolve this issue. We also note that a provider is required, by condition E2, to have adequate management and governance arrangements to continue to comply with its conditions of registration. We therefore do not consider that the proposals create a disproportionate regulatory burden.
669. However, we have taken steps in response to this consultation that will address some of the impact of implementation that respondents identified for smaller providers.
- a. In Proposal 4, we have set out some of the steps we are minded to take to simplify the presentation of data and provide guidance for users, to support all providers to

understand the indicators as we implement our new approach to regulating student outcomes. We also expect that small providers will have fewer data points to consider, as they are likely to offer a more limited number of levels of study or have very small cohorts (indicators with fewer than 23 students are not within scope of condition B3).

- b. The indicators that we propose to use for the purposes of condition B3 will be generated from existing individualised student data. We will create indicators for each provider that will allow it to consider its own performance in relation to our numerical thresholds. We anticipate that providers will incorporate these indicators into their existing monitoring mechanisms. However, we are deliberately not creating a specific obligation that providers should do this. We also consider that providing these indicators will assist smaller providers in particular in understanding their performance, especially where they have very limited data analysis capacity and so have previously not been able to generate relevant indicators for themselves.

670. We consider that these mitigations mean that the timeline does not adversely affect small providers in a way that is disproportionate and that the students' and taxpayers' interests in implementing this aspect of our regulation in 2022 outweighs the suggested benefits of delaying implementation.

## **The impact of the pandemic**

671. Respondents reported that many providers are still recovering from the impact of the pandemic and, as a result, the implementation of the proposals should be delayed by up to a full academic year. Of those concerned about the impact of the pandemic, some suggested that some providers are dealing with ongoing resource implications of returning to a more normal approach to delivering higher education. In addition, some respondents suggested that if the implementation takes place as proposed, the impact of the pandemic on providers' outcomes data should be considered and taken into account. One respondent suggested establishing numerical thresholds only after there has been at least one year of stability for students in full-time study.

## **Our response**

672. We note comments that refer to the substantial impact of the pandemic on the higher education sector, for both providers and students. We also note that this has affected different providers in different ways. However, we do not consider that delaying implementation would address the broader points made in relation to resource implications for providers and we would expect providers to now be operating with more stability than was the case during the pandemic.

673. We note points made about the impact of the pandemic on providers' performance shown in the indicators. We do not consider that we could practically and reliably identify a point when the impact of the pandemic was no longer reflected in the data. Instead, we set out our proposals to consider contextual factors (see Proposal 5) to understand any impact on the individual providers we select for assessment. We intend to consider evidenced impacts of the pandemic in our assessments. We think there is significant student and taxpayer interest in implementing condition B3 as soon as practicable and we consider that this approach is more likely to meet our policy objectives than a delay in implementation.

## Timing of B3 assessment in relation to the TEF exercise

674. Some respondents suggested that the proposed timeline would mean that a provider might commit significant resources and time to prepare a TEF submission, only to be later informed that it is in breach of condition B3 and so not eligible to participate in the TEF. Respondents argued that the effort to produce a TEF submission would be wasted in these circumstances. Respondents were of the view that this would have an adverse effect on a provider's financial position and would increase regulatory burden.
675. There were also suggestions that some providers may need to commit resources to preparing TEF and B3 submissions simultaneously, which would create burden for them. Furthermore, a few respondents suggested that if TEF outcomes were completed before B3 assessments, new students might select their provider based on the TEF award, only later to discover that the provider was in breach of condition B3 in relation to one or more aspects of its provision. Some respondents suggested that delaying the TEF implementation to allow for the first cycle of B3 assessment to be completed may be an appropriate solution.

## Our response

676. We have considered the points that some respondents made about the parallel timelines for the implementation of condition B3 and the TEF. We have explained more about our approach to this in the outcomes to the TEF consultation. In summary, we consider that this issue is likely to affect no more than 20 providers (this reflects our initial view of the number of cases we will have resources to prioritise for assessment in 2022). We recognise that the outcome of these assessments could affect eligibility of those providers for TEF and we will discuss this with relevant providers as appropriate.
677. We have separately made decisions to extend the timescale for TEF submissions, and we therefore consider that it will be possible for a provider to complete its TEF submission and to engage with any assessment for conditions B3. Overall, we do not consider that this is sufficient reason to delay the implementation of the revised condition B3.
678. As we will operate an annual cycle of assessments for condition B3, and TEF will operate on the basis of a four-yearly cycle, it is possible that we may make a formal finding that there is a breach of condition B3 in a later assessment cycle and that may have an impact on a provider's TEF award. We take the view that it is unlikely to be appropriate for a provider to continue to hold a TEF award in these circumstances, because it is not consistent for a provider to maintain an award of excellence while not meeting our minimum expectations of performance. We have set out our reasons for this decision in our response to the TEF consultation.

## Implement an initial trial period

679. Some respondents suggested that the proposals introduce significant changes in the sector and suggested that these should be tested first. A trial period or moratorium on regulatory interventions in response to breaches in 2022-23 was suggested, as this would give providers time to understand and familiarise themselves with the changes, while also providing the OfS with evidence of whether the proposal achieves its intended aims.

## Our response

680. Our approach represents a change in the way we regulate student outcomes, and it will be necessary for providers to familiarise themselves with this approach. However, we do not

consider that a trial period is an effective tool for introducing these changes, because it would not provide a sufficiently strong basis for taking regulatory action where we identified that a provider was not delivering positive outcomes for students. Nor do we consider a moratorium period on interventions to be appropriate, as it would be likely to result in a situation where we identified performance that was unacceptably weak, but would be unable to take appropriate action to protect those students.

681. Instead, we have set out our approach to prioritising cases for assessment, and our initial view is that we will have resources to assess no more than 20 providers in relation to condition B3 in 2022. We have also noted comments from elsewhere in the consultation about the time it may take a provider to implement actions to improve its performance before their impact on student outcomes is visible in the indicators. In response to this point, we note that we generally intend to use improvement notices, rather than the more intrusive sanctions available to us, in the first year of operation. On balance, we therefore consider that the likely effect of a trial period would be an unreasonable delay in full implementation.
682. However, we will review our approach to ensure it remains fit for purpose, and expect to identify improvements we could make as we progress with future cases. We have established review periods for the thresholds we have set (see Proposal 3), and will intend to take steps to evaluate the effectiveness of different aspects of our approach over the first two years of implementation.

### **Other points raised**

683. A series of other points were made in response to this proposal, which we have covered under other sections of this document, including the following:
- a. The timescales provided for responding to the consultation. These points are responded to under the overarching themes section.
  - b. Points about the accuracy of data, if providers were not allowed additional time to ensure its accuracy. We have set out our reasons for not introducing an additional delay in the timeline for data accuracy revisions in proposal 4.

### **Decision**

684. We have considered the points made by respondents in relation to Proposal 8 and have addressed these in detail above.
685. We have decided to adopt the approach set out in Proposal 8.
686. We have decided that the revised initial and ongoing condition of registration B3 will come into effect on 3 October 2022. We have published a notice of determination, which sets out all the relevant implementation dates and transitional arrangements for different descriptions of provider. This covers transitional arrangements for initial condition of registration B3 that will apply to applications for registration that are live at any time between 26 July 2022 and 2 October 2022. This includes any provider that makes a new application for registration during this time, including, for example, an application for registration in a different category of the Register, or as a result of a merger or acquisition.
687. We will adopt the timeline set out in our proposals with the first cycle of assessment taking place in Autumn 2022. Our initial view is that we will have sufficient resources to assess up to 20 providers in this cycle.

# Considering regulatory burden on registered providers

## Steps the OfS is taking to manage the impact of the proposals in this consultation

**Questions relating to** Error! Reference source not found.

**Question 17:** Is there anything else we could consider that would reduce regulatory burden for providers while regulating minimum requirements for student outcomes?

688. The points made by respondents and not included elsewhere in this document included the following:

- a. To reduce regulatory burden the OfS could reduce the number of indicators and granularity of the data.
- b. There should be a consistent approach to data across different assessments, such as TEF and in relation to APPs.
- c. Further information about the OfS's was needed to support providers' understanding, in particular the relationship between regulation through APPs, condition A1 and condition B3.

689. Other points that were made in response to this question, which we have covered under other sections of this document, included:

- a. Disproportionate burden on smaller providers. We have responded to points specifically made in relation to smaller providers throughout our response to each proposal, but in particular under Proposal 7 and Proposal 8.
- b. The time allowed for responding to the consultation. We have responded to these points in overarching themes.
- c. A request for additional and more user-friendly supporting material such as datasheets, interactive dashboards and workbooks, which would significantly reduce regulatory burden, especially among providers with small data analysis teams, and would also increase transparency and reproducibility of the indicators and thresholds. We have responded to this point in more detail under Proposal 4 and Proposal 6.
- d. Suggestion from a small number of respondents that the OfS should consider how to avoid duplication of regulation in particular in relation to data returns from other bodies, including Ofsted and professional, statutory and regulatory bodies (PSRBs). We consider points in relation to Ofsted in Proposal 1, and have considered responses in relation to PSRBs below.
- e. Similarly, a small number of respondents suggested that timings are considered for data returns for TEF, HESES and HESA. We consider this point in Proposal 8.

## Number of indicators and data granularity

690. Many respondents suggested that regulatory burden would be reduced if the OfS assessed fewer indicators and the analysis required less data granularity. Some respondents suggested focusing on the areas of most significant risk. Some respondents suggested that the proposed number of split indicators and the level of data granularity would require significant training and preparation for the data analysis teams of providers, which are usually not sufficiently large to accommodate this additional work, especially in smaller providers. A proposed solution to this was to establish priority and secondary indicators, although respondents did not suggest which indicators or split indicators should be prioritised. Respondents considered that this approach would allow for improvement notices to address only specific split indicators. In addition, there was a view that using the proposed split indicators might result in the same students being included in the assessment of different indicators. One respondent suggested that in the first year of implementation the OfS should consider only provider-level data and take action in respect of those providers failing to deliver positive outcomes in their dominant mode of delivery. This could be followed by phasing in, for example, subject-level data in year two, and student characteristics in year three of implementation.

## Our response

691. We respond in more detail to the number of indicators in the section on overarching themes. We also consider the effect on smaller providers in Proposal 8. We note comments that suggest regulatory burden would be reduced with a smaller number of indicators based on less granular data. We consider that while granularity in the data does add burden, this is appropriate having regard to reasonableness and proportionality because it allows us to identify pockets of poor performance that would not be visible in a more simplified, and less granular, dataset. In a large provider these pockets can affect larger student numbers than the whole student population at a smaller provider, and therefore we consider that the need to protect students and taxpayers and enforce breaches of condition B3 where appropriate outweighs arguments in favour of reducing burden through a simpler approach.
692. We considered respondents' suggestions for prioritising our regulatory focus on provider-level indicators in the first instance, before moving on to subject and student characteristics split indicators in future assessment cycles. We consider that our approach to prioritisation, set out in Proposal 5, will have a broadly similar effect to that proposed by respondents. We note that some respondents took the view that we should not prioritise individual subject areas in the first assessment cycle. We disagree with this view, because there are larger numbers of students studying in some subject areas across the sector and in individual providers. This means, for example, that the number of students on full-time business and management or computing first degree courses at larger providers is frequently significantly larger than all the students studying at all levels of study in other providers. We therefore think that excluding subject areas from the first assessment cycle would likely prevent us from tackling significant pockets of provision where providers are delivering student outcomes below our numerical thresholds.
693. We note the points raised about the extent to which providers understanding our regulatory approach and we respond to this broader point in relation to understanding the data under overarching themes (paragraphs 66 to 72). In particular, we are committed to providing information and tools to assist providers in understanding their data through the first year of implementation.

694. We note that some respondents suggested that the use of split indicators would result in students being double-counted because we would regulate their outcomes at both an indicator and split indicator level. We accept that individual students will contribute to multiple split indicators because of the courses they study and their own personal characteristics. We have designed our approach to allow us to identify where these different characteristics show that a provider is not delivering positive outcomes for particular groups of students or courses. However, when deciding whether to undertake assessments of whether a provider is compliant with condition B3, we will give consideration to any previous breaches and the indicators or split indicators that informed our decision. In practice, this will mean that we would not normally envisage considering whether a provider was compliant in relation to a split indicator, where we have found that provider to be in breach in relation to an indicator from which that split indicator is derived – e.g., we would not normally expect to assess compliance with full-time first degree continuation outcomes and then assess full-time first degree continuation outcomes for business and management courses. However, we do consider that we may, if necessary to protect student interest, undertake a compliance assessment for a split indicator that shares students with another split indicator that has already been subject to a compliance assessment; e.g., we may separately assess compliance with full-time first degree continuation outcomes for business and management courses and full-time first degree continuation outcomes for disabled students.

### **Consistency across different assessments**

695. Many respondents suggested that significant regulatory burden was created because of overlapping information requests from the OfS for different types of assessment, often using different definitions for the same indicators. Specifically, the majority of responses on this theme requested a common format for data for condition B3, the TEF and APPs. One proposed way to achieve this was through a secure data portal, allowing access for a provider to all relevant data. Lastly, one response requested consistency with approaches in the devolved nations.

### **Our response**

696. We set out proposals in the accompanying consultation on constructing student outcome and experience indicators on the application of a single set of definitions across all of our regulatory activities, including use of the same measures and data definitions within our regulation of access and participation. Wherever possible, we use consistent definitions and approaches to data when it is used in our functions. We expect this consistency to minimise the burden of understanding these definitions, and in using the resulting data outputs to fulfil regulatory requirements.

697. However, each of the regulatory activities which respondents identified (condition B3, the TEF and APPs) relate to different student populations – for example, our approach to assessing APPs and the TEF do not consider postgraduate courses. This means that, while we will use consistent definitions, the data points generated may be different for different processes. We consider this appropriate, because the alternative would either be to significantly extend the scope of the data supporting our approach to the TEF and APPs, or to limit the data available to assess compliance with condition B3. We do not consider that it would be appropriate to limit the scope of condition B3 to undergraduate study only, simply in order to match the student population assessed in the TEF or as part of APPs. This would artificially reduce protection for students on postgraduate courses. We do not have scope to

expand the coverage of APPs as these are governed by specific statutory provisions. We have set out in our response to the consultation on the TEF our reasons for not extending the coverage of the TEF to include postgraduate students at this stage.

698. We intend to implement our proposed approach of consistently applying the student outcome and experience measure definitions across our functions for quality and standards (condition B3 and TEF) and access and participation. We will also consider with the funding and regulatory bodies for the devolved nations the potential to use the same definitions within published information published for prospective students, through annual publications of National Student Survey responses and Discover Uni website.
699. We intend to implement condition B3 as set out in this document, and this will not result in any immediate changes to the data returns we require providers to make to meet current regulatory requirements. This means that providers are already subject to these data requirements or equivalent data requirements, and we see no evidence that they are disproportionately burdensome. However, we identified in the consultation two specific areas where we expect our proposals would at some point require an increase in the data submitted by individual providers:
- individualised data about students studying through a partnership arrangement where a registered provider validates the courses of an unregistered provider
  - individualised data about students studying on TNE courses.
700. In each case we have committed to further consultation about the detail and potential timing of returning this data.

### **Additional clarifications on regulatory processes**

701. A significant proportion of responses to this question suggested that there is significant regulatory burden generated as providers seek to understand our approach to regulating student outcomes. Respondents asked for further information about the relationship between condition B3 and APPs and the metrics and indicators that will be used for these.

### **Our response**

702. Our regulation of quality and standards and access and participation is designed to be mutually reinforcing. We have announced our intention to consult on future reforms to our approach to access and participation plans, and that consultation will deliver on our commitment that our access and participation regime will focus on equality of opportunity and good student outcomes, and will continue to be fully integrated with our regulation of quality and standards. This commitment was set out in our strategy, which was published in March 2022 following consultation.
703. We expect to consult further on our approach to access and participation plans in the autumn. The data indicators that we use as part of our access and participation plan approval process will use the same definitions as those for equivalent indicators used for regulating student outcomes.
704. We note the points raised about understanding our regulatory approach and respond to this broader point about understanding the data in the section on overarching themes (see paragraphs 66 to 72). In particular, we are committed to providing information for providers

through the first year of implementation as one of several measures to reduce the potential impact.

### **Duplication of regulation in particular in relation to data returns from professional, statutory and regulatory bodies**

705. One respondent suggested that the proposed approach to regulation of student outcomes would result in duplication of regulation for providers, and argued that some PSRBs already set requirements in terms of learning outcomes.

### **Our response**

706. We recognise that there are PSRBs that use different measures of student outcomes as part of their accreditation approach. We consider that we cannot rely on the approaches of different PSRBs to set minimum expectations across the sector as a whole, because they use a variety of different approaches to set requirements and have different powers to enforce non-compliance with those requirements. We recognise that providers may generate relevant evidence about their outcomes when reporting to a PSRB. We expect that where the OfS assesses a provider for the purposes of condition B3 in relation to a course that is also accredited by a PSRB, this information may usefully inform the evidence the provider submits in our engagement with it.

# Annex A: Section 2 of the Higher Education and Research Act 2017

## 2. General duties

1. In performing its functions, the OfS must have regard to –
  - a. the need to protect the institutional autonomy of English higher education providers,
  - b. the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,
  - c. the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,
  - d. the need to promote value for money in the provision of higher education by English higher education providers,
  - e. the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers,
  - f. the need to use the OfS's resources in an efficient, effective and economic way, and
  - g. so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be –
  - h. transparent, accountable, proportionate and consistent, and
  - i. targeted only at cases in which action is needed.
2. The reference in subsection (1)(b) to choice in the provision of higher education by English higher education providers includes choice amongst a diverse range of—
  - a. types of provider,
  - b. higher education courses, and
  - c. means by which they are provided (for example, full-time or part-time study, distance learning or accelerated courses).
3. In performing its functions, including its duties under subsection (1), the OfS must have regard to guidance given to it by the Secretary of State.
4. In giving such guidance, the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers.
5. The guidance may, in particular, be framed by reference to particular courses of study but, whether or not the guidance is framed in that way, it must not relate to—
  - a. particular parts of courses of study,
  - b. the content of such courses,

- c. the manner in which they are taught, supervised or assessed,
  - d. the criteria for the selection, appointment or dismissal of academic staff, or how they are applied, or
  - e. the criteria for the admission of students, or how they are applied.
6. Guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of a particular course of study.
7. Guidance given by the Secretary of State to the OfS which relates to English higher education providers must apply to such providers generally or to a description of such providers.
8. In this Part, 'the institutional autonomy of English higher education providers' means –
- a. the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,
  - b. the freedom of English higher education providers –
  - c. to determine the content of particular courses and the manner in which they are taught, supervised and assessed,
  - d. to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and
  - e. to determine the criteria for the admission of students and apply those criteria in particular cases, and
  - f. the freedom within the law of academic staff at English higher education providers –
  - g. to question and test received wisdom, and
  - h. to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.

## Annex B: Revised condition B3 and revisions to the OfS's regulatory framework

### Scope and application

B3.1 This condition applies to the quality of higher education provided in any manner or form by, or on behalf of, a provider (including, but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider).

B3.2 This condition applies as an initial and general ongoing condition of registration for each **relevant provider** and as a general ongoing condition of registration for any provider that is not a **relevant provider**.

### Requirement

B3.3 Without prejudice to the principles and requirements provided for by any other condition of registration and the scope of B3.1, the provider must deliver positive outcomes for students on its **higher education courses**.

B3.4 For the purposes of this condition, delivering positive outcomes means that either:

- m. in the OfS's judgement, the **outcome data** for each of the **indicators** and **split indicators** are at or above the relevant **numerical thresholds**; or
- n. to the extent that the provider does not have **outcome data** for each of the **indicators** and **split indicators** that are at or above the relevant **numerical thresholds**, the OfS otherwise judges that:
  - x. the provider's **context** justifies the **outcome data**; and/or
  - xi. this is because the OfS does not hold any data showing the provider's numerical performance against the **indicator** or **split indicator**; and/or
  - xii. this is because the OfS does hold this data but the data refers to fewer than the **minimum number of students**.

### Definitions

B3.5 For the purposes of this condition:

- a. '**combination of mode and level of study**' means a specified mode of study combined with a specified level of study, as set out in the **technical documents**.
- b. '**context**' includes, but is not limited to:
  - xiii. factors that may explain the reasons for a provider's historical performance;
  - xiv. actions a provider has taken, or will take, to improve its performance, and the extent to which those actions are **credible**.
- c. '**credible**' includes, but is not limited to, consideration of:
  - i. a provider's track record of improving outcomes for its students;
  - ii. the nature of a provider's plans, including whether they are likely to generate sufficient improvement in the provider's performance; and
  - iii. whether a provider has demonstrated that it will invest sufficient resources to deliver a sufficient improvement.

- d. **'designated data body'** means:
  - i. the body designated under Schedule 6 to the Higher Education and Research Act 2017 for the purposes of sections 64 and 65 of that Act; or
  - ii. if there is no such body, the OfS.
- e. **'higher education course'** is to be interpreted:
  - i. in accordance with the Higher Education and Research Act 2017; and
  - ii. so as to include, for the avoidance of doubt:
    - A. a course of study;
    - B. a programme of research;
    - C. any further education course that forms an integrated part of a higher education course; and
    - D. any module that forms part of a higher education course, whether or not that module is delivered as an integrated part of the course.
- f. **'indicators'** means measures of the extent to which, for each **combination of mode and level of study**, students achieve positive outcomes in respect of:
  - i. continuing in their studies;
  - ii. completing their studies;
  - iii. progressing into managerial or professional employment, or further study; and
  - iv. any other areas as determined by the OfS,as defined in the **technical documents**.
- g. **'minimum number of students'** means the minimum number of students set by the OfS in the **technical documents**.
- h. **'numerical thresholds'** means the numerical thresholds set by the OfS in the **technical documents** in respect of the **indicators** and **split indicators**.
- i. **'outcome data'** means data that the OfS considers is appropriate for showing a provider's numerical performance against an indicator or a split indicator, including but not limited to:
  - i. Data sourced from the **designated data body**;
  - ii. Data sourced from the Education and Skills Funding Agency; and
  - iii. Data in respect of higher education provided in any manner or form by, or on behalf of that provider (including but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider).

- j. **‘relevant provider’** means a provider for which, in the judgement of the OfS, **outcome data** exists in respect of the five year period preceding the date of the provider’s application for registration.
- k. **‘split indicators’** means the **indicators** broken down into further indicators on the basis of the following:
  - iv. specified student characteristics, including disability, ethnicity and sex;
  - v. students’ year of entry or qualification;
  - vi. subject type;
  - vii. course type;
  - viii. provider partnership and teaching arrangements; and
  - ix. any other bases as determined by the OfS,as defined in the **technical documents**.
- l. **‘technical documents’** means one or more document published by the OfS from time to time which contain detail about the definitions in this condition.

## Summary

**Applies to:** All registered providers (subject to B3.2).

**Initial or general ongoing condition:** Initial and general ongoing condition.

**Legal basis:** Section 5 of HERA.

# Guidance

## Condition B3.1

1. The reference to higher education provided ‘in any manner or form’ includes any higher education course (whether or not that course is recognised for OfS funding purposes, or any other purpose), at any level, and with any volume of learning. This means, for example, that postgraduate research courses, the study of modules or courses leading to microcredentials, and apprenticeships are included within the scope of this condition. It also includes courses provided face-to-face, by distance learning, or a combination of delivery approaches.
2. This condition applies to any higher education provided ‘by, or on behalf of, a provider’. This includes higher education provided to students who are registered with a registered provider, taught by a registered provider or studying for an award of a registered provider (or where these services are provided on a registered provider’s behalf). This includes UK-based and non-UK-based students, and courses delivered through partnership arrangements both within the UK and internationally.
3. The reference to ‘including, but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider’ means that a provider is

required to comply with the provisions of this condition where it is the awarding body for a course, whether or not that provider has any other role in the design or delivery of that course.

4. Where a provider is not the awarding body for a course, this condition applies to a course the provider itself delivers, or which is delivered on its behalf, regardless of the identity of the awarding body, whether or not that awarding body is registered with the OfS, or the nature of any partnership agreement. For the avoidance of doubt, this means for example, that a provider delivering, or allowing another provider to deliver, courses leading to a qualification awarded by Pearson is responsible for compliance with this condition in relation to those courses. Similarly, a provider delivering, or allowing another provider to deliver, courses leading to a qualification awarded by another higher education provider, whether that awarding provider is located in England or elsewhere, is responsible for compliance with this condition in relation to those courses.
5. In practice, these provisions may result in more than one registered provider being responsible for compliance with this condition in relation to the same course.
6. While this condition, in principle, applies to any higher education within the scope of B3.1, the scope of a provider's obligations under the condition is set by B3.3 and B3.4. The effect of B3.3 and B3.4 is that a provider is required to deliver positive outcomes only in the areas covered by the 'indicators' and 'split indicators' (which are defined by the OfS in technical documents from time to time). By way of a hypothetical example, if the OfS defined the indicators and split indicators so as not to cover students on courses delivered through transnational education, a provider would not be required by the condition to deliver positive outcomes for those students. The OfS may decide to make changes to the definitions of the indicators and split indicators in the future, and this would have the effect of changing the scope of a provider's obligations under the condition.

## **Condition B3.2**

7. A provider applying for registration with the OfS would only need to satisfy condition B3 as an initial condition if it is a 'relevant provider'.
8. A provider is a 'relevant provider' if, in the judgement of the OfS, data showing the provider's performance against the indicators or split indicators exists, and that data relates to any time during the five-year period preceding the date of the provider's application for registration. This data could relate to higher education provided in any manner or form by, or on behalf of, that provider. This would cover, for example, data about a provider teaching courses under a subcontractual arrangement with a lead provider, where that data was collected from the lead provider rather than the delivery provider. It could also cover data collected from an entity which no longer exists, for example where a provider has merged with, or divided from, another provider or where a provider has changed its legal name.
9. Where a provider is not a 'relevant provider', the initial condition would not apply and the OfS would conduct its usual registration process without assessing the provider in relation to initial condition B3.
10. All registered providers are subject to condition B3 as a general ongoing condition.

## **Condition B3.3**

11. This paragraph sets out the overall requirement of condition B3, which is that a provider must deliver positive outcomes for students on its higher education courses.

12. The reference to ‘higher education courses’ in this condition is to be understood in accordance with the Higher Education and Research Act 2017.

### **Condition B3.4**

13. This paragraph explains the meaning of the overall requirement set out in B3.3, namely that a provider must ‘deliver positive outcomes’ for students on its higher education courses.
14. The OfS will consider a provider to be ‘delivering positive outcomes’ if it is performing at or above each of the numerical thresholds that the OfS has set in relation to the ‘indicators’ and ‘split indicators’. The indicators and split indicators are measures of the extent to which a provider is achieving positive outcomes for its students in a range of areas. The OfS will assess a provider against the numerical thresholds using data it considers is appropriate, including but not limited to data sourced from the designated data body and/or the Education and Skills Funding Agency. In making this assessment, the OfS will consider whether there is sufficient statistical evidence to support a view that a provider’s performance is at or above a relevant numerical threshold.
15. Where the OfS cannot be satisfied that a provider is performing at or above a relevant numerical threshold on the basis of the data, the OfS will consider whether the context in which the provider is operating nevertheless justifies the provider’s outcomes, in that they nevertheless represent positive outcomes for its students. Paragraphs x-x below contain an illustrative non-exhaustive list of examples to demonstrate how the OfS might reach a judgement about a provider’s context.
16. Where the OfS does not hold any data on a provider’s performance against an indicator or split indicator, or where the OfS does hold data but it refers to fewer students than the minimum number set in technical documents published by the OfS, the OfS will not assess the provider’s performance against that indicator or split indicator and this will not prevent the provider from satisfying the condition. The minimum number set out in the technical documents is set by the OfS with the primary aim of preventing individual students from being identified from a provider’s data.
17. The OfS will publish a document which contains detail about the definitions of the indicators and split indicators. Where the OfS decides that it is likely to be necessary to add, amend or remove one or more indicators or split indicators, it will consult on those changes.
18. The OfS has determined and published an approach to setting numerical thresholds. The OfS will use that approach to determine and publish numerical thresholds that will apply in relation to each indicator and split indicator. Where the OfS proposes to change the numerical thresholds or it otherwise considers it appropriate to seek views, it will consult. For the avoidance of doubt, when the OfS reviews numerical thresholds, it expects to use the same approach to setting numerical thresholds that it has decided to adopt. The OfS does not intend to consult on that approach unless it proposes to change the approach itself or otherwise considers it appropriate to seek views on the approach.
19. The OfS has published a document, Regulatory Advice 20<sup>40</sup>, setting out the approach it will take to assessing a provider’s compliance with this condition. Paragraphs 23 to 36 below provide a summary of the main features of that approach. Where the OfS decides that it is

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<sup>40</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

likely to be necessary to make material changes to that approach, it will consult on the revised content of that document.

20. The following is an illustrative non-exhaustive list of examples to demonstrate the factors the OfS may consider, and the approach the OfS may take, in determining whether the context in which a provider is operating justifies the provider's outcomes. These factors fall into two broad groups:

- a. Factors that may explain the reasons for a provider's historical performance.
- b. Actions a provider has taken, or will take, to improve its performance, and the extent to which those actions are credible.

21. The OfS may consider the following factors which relate to a provider's historical performance:

- a. Evidence of a provider's performance in relation to benchmark values (where these are available). The OfS may test how an individual provider's outcome data compares to those of other providers for its specific student population using OfS individual provider benchmarks. The OfS will consider whether it has sufficient statistical evidence that a provider's performance is below a numerical threshold but above its individual benchmark. The OfS is likely to choose to place limited weight on evidence from benchmarking data where a provider makes a large contribution to its own benchmark. For the avoidance of doubt, the OfS will not treat a provider's performance against benchmark values as determinative of whether it satisfies condition B3.
- b. Any external factors the OfS considers to be outside a provider's control that might reasonably be judged to have affected its past performance. When considering a provider's context, the OfS consider external factors where a provider can evidence the impact of those factors on its outcome data. For example, this might include:
- c. The evidenced impact of the coronavirus pandemic on a provider's performance and whether such impact is broadly consistent with that for other providers.
- d. Regional or localised issues that provide evidence of performance different from established patterns. For example, an evidenced rapid change in employment trends in a local area may be relevant to our decision about whether to take regulatory action where a locally recruiting provider was not able to continue its previously positive progression rates.
- e. Evidence of particular course or profession attributes that are unique to that provider, or a small group of similar providers, and result in performance consistently below a numerical threshold, but that may otherwise be considered positive. For example, a provider may have courses that are designed to provide access to a particular profession, but that profession is not classified as managerial or professional in the way the indicator has been constructed. The OfS may consider this positively where graduates report through the Graduate Outcomes survey that they are using the skills developed on their course or where graduates are demonstrating above average earnings in Longitudinal Education Outcomes data.

22. The OfS may consider the following factors which relate to actions that a provider has taken, or is planning to take, to improve its performance:
- a. Evidence that a provider no longer delivers, or no longer plans to deliver, courses that are included in the indicators, and the reasons for ceasing the delivery of such courses. For example, the OfS would consider whether a provider had identified poor performance on its courses and taken a strategic decision to cease delivery of those courses. In assessing compliance with the condition in these circumstances, the OfS would interrogate the timing and a provider's rationale for taking that action and would consider whether the provider had:
    - i. Taken action to improve its performance before the OfS's interest.
    - ii. Supported its students.
    - iii. Drawn lessons from its under-performance and applied, or had an intention to apply, those to its other courses.
    - iv. Not sought to evade regulatory action by closing courses with weak performance and launching new courses in their place.
  - b. Evidence of any actions a provider has already taken to improve its performance in relation to numerical thresholds, and the effectiveness and sustainability of those actions. This could include instances where a provider could demonstrate that its aggregate performance for a particular indicator for the past four years was below the relevant numerical threshold because of performance in an earlier year – and that performance showed significant and sustained improvement in the most recent years.
  - c. Evidence of a provider's plans to improve its performance in relation to numerical thresholds, and the credibility and sustainability of those plans. The OfS would expect to see evidence of the actions a provider had already committed to taking to improve performance in the areas in which it had identified concerns. The OfS would consider whether a provider is able to demonstrate that it has credible and sustainable plans that are likely to sufficiently improve performance in an appropriate timescale. In determining credibility and sustainability, the OfS may consider the following factors:
    - d. A provider's track record of improving outcomes for its students.
    - e. The nature of a provider's plans, including whether they are likely to generate improvement in the outcomes identified as of concern.
    - f. Whether a provider has demonstrated that it will invest sufficient additional resources to deliver a sufficient improvement in outcomes and its ability to sustain that investment over a relevant period of time. In making this judgement, the OfS may seek additional information about the costs of proposals and consider the OfS's own assessments of a provider's financial viability and sustainability.

## **Assessing compliance for providers seeking registration**

23. The OfS will assess a provider's compliance with this initial condition itself and will not commission the designated quality body to undertake assessment activity. It will undertake this

assessment through the following broad steps. Further details are set out in associated regulatory advice (Regulatory advice 20).<sup>41</sup>

24. The OfS will review a provider's outcome data and consider whether it is satisfied that it has sufficient statistical evidence that the provider's performance against each of the indicators and split indicators is at or above the relevant numerical thresholds. The provider's outcome data will be assessed on the basis set out in a document published by the OfS which includes the OfS's approach to statistical confidence, including the principle that the closer the OfS is to having 100 per cent statistical confidence in the evidence, the stronger it will likely judge that evidence to be. In undertaking this review, the OfS may also consider, where appropriate, other matters relating to the interpretation of statistics.
25. Where the OfS is satisfied that a provider's performance against each of the indicators and split indicators is at or above the relevant numerical thresholds, it will determine that the provider has satisfied initial condition B3.
26. Where the OfS cannot be satisfied from a provider's outcome data that its performance is at or above each relevant numerical threshold, the OfS will consider whether there is evidence available to the OfS that the provider's context means that any outcome data that is not at or above a relevant numerical threshold is justified, in that it nevertheless represents positive outcomes for students. The OfS will seek further information about contextual factors from a provider where the OfS considers it appropriate to do so.
27. If, after following the step above, the OfS is not satisfied that there is context that means a provider's performance is justified, it will inform the provider that it has taken a provisional decision that the provider has not satisfied initial condition B3. The OfS will consider representations from the provider before reaching a final decision.
28. Where the OfS does not hold any data on a provider's performance against an indicator or split indicator, the OfS will not assess the provider's performance against that indicator or split indicator and this will not prevent the provider from satisfying the initial condition.
29. Where the OfS holds data on a provider's performance against an indicator or split indicator, but that data refers to fewer students than the minimum number set by the OfS in the technical documents, the OfS will not assess the provider's performance against that indicator or split indicator and this will not prevent the provider from satisfying the initial condition.
30. Where a provider, or another legal entity that the OfS considers to be operating substantially the same higher education business, has previously been registered, a history of non-compliance with ongoing condition B3 is likely to result in a judgement that initial condition B3 is not satisfied.
31. Where the OfS considers this initial condition to be satisfied, but that there is an increased risk of a future breach of the general ongoing condition, or a relevant wider regulatory concern, it may impose one or more specific ongoing conditions of registration and will also consider whether additional monitoring requirements are appropriate, for example, a requirement to report additional matters as reportable events.

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<sup>41</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

## Information gathering, assessment of evidence and enforcement

32. The OfS will prioritise its assessment and enforcement activity for this ongoing condition. The OfS will publish the general approach that it will take to prioritisation in guidance. It may also choose to publish information about its specific approach in any given academic year.
33. In addition to this prioritisation process, the OfS will use its general risk-based approach to monitoring as set out in the regulatory framework to identify providers for which an assessment of compliance with this condition is considered to be appropriate, whether or not that provider is, or is likely to be, selected by the prioritisation process.
34. For a provider selected for assessment, the OfS will take the approach set out in Regulatory advice 20.<sup>42</sup> The OfS will assess a provider's compliance with this condition itself and will not commission the designated quality body to undertake assessment activity. Broadly, this approach consists of the following steps:
  - a. The OfS will review a provider's outcome data and consider whether it is satisfied that it has sufficient statistical evidence that the provider's performance against each of the indicators and split indicators is below the relevant numerical thresholds. The provider's outcome data will be assessed on the basis set out in a document published by the OfS which includes the OfS's approach to statistical confidence, including the principle that the closer the OfS is to having 100 per cent statistical confidence in the evidence, the stronger it will likely judge that evidence to be. In undertaking this review, the OfS may also consider, where appropriate, other matters relating to the interpretation of statistics.
  - b. Where performance below a relevant numerical threshold is identified, the OfS will then consider whether there is evidence available to the OfS that the provider's context means that any outcome data that is below a relevant numerical threshold is justified, in that it nevertheless represents positive outcomes for students. The OfS will seek further information about contextual factors from a provider where the OfS considers it appropriate to do so.
35. Having completed its assessment, the OfS will reach a view about a provider's previous and ongoing compliance with the condition. Where the OfS takes the view that there is or has been a breach of the condition, it will write to the provider to set out the reasons for its provisional decision and the evidence it has used to reach this view. The provider is able to submit any further information it considers relevant in a representations process and the OfS will consider this before reaching a final decision.
36. Where the OfS has decided that there is, or has been, a breach of this condition, it will consider the use of the full range of its enforcement powers. This includes the imposition of a monetary penalty, suspension of elements of a provider's registration, for example its access to student support funding or OfS public grant funding, or deregistration. The OfS is likely to require improvement, to mitigate the impact of poor performance on students, or to incentivise future compliance by this and other providers. The OfS will follow any statutory consultation process as it takes enforcement action.
37. Where the OfS considers there to be an increased risk of a future breach or a relevant wider regulatory concern, it may impose one or more specific ongoing conditions of registration and

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<sup>42</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

will also consider whether additional monitoring requirements are appropriate, for example, a requirement to report additional matters as reportable events.

38. Where there is, or has been, a breach of this condition, or the OfS has imposed a specific condition of registration, the ways in which the OfS may take this into account include, but are not limited to, the following ways:
- a. A provider's eligibility to participate in the TEF. The OfS will set out in its TEF guidance the way in which a provider's current and previous compliance with this condition may be taken into account in determining eligibility to participate in the TEF.
  - b. A provider's existing TEF rating. The OfS will set out in its TEF guidance the way in which a provider's current and previous compliance with this condition may affect any existing TEF rating.
  - c. Regulation of degree awarding powers. Where the OfS makes a final decision that there is, or has been, a breach of this condition, or where the OfS imposes a specific condition of registration due to regulatory concerns under this condition, it will take that into account in the following ways:
    - d. Where there is a finding that a breach of this condition has taken place or is ongoing, the OfS will consider using its power under section 16 of HERA to suspend the aspects of the provider's registration that relate to the authorisation of DAPs and would be likely to suspend the provider's eligibility to be authorised for new or extended degree awarding powers..
    - e. Alternatively, without using the power under section 16 of HERA, in circumstances where a finding has been made that a breach of this condition has taken place or is ongoing, the OfS may decide that the provider is not suitable to be authorised for new or extended DAPs. In a similar way, the OfS may also decide that the provider is not suitable to be authorised for new or extended DAPs where the OfS has imposed a specific condition of registration due to regulatory concerns relating to this condition.
- The OfS would take this approach whether or not the authorisation sought is to gain new powers, or extend existing powers, for example by time, level or subject.
- f. Regulation of university, and university college, title. Where the OfS makes a final decision that there is, or has been, a breach of this condition, or where the OfS imposes a specific condition of registration due to regulatory concerns under this condition, it will take that into account in the following ways:
    - g. Where there is a finding that a breach of this condition has taken place or is ongoing, the OfS will consider using its power under section 16 of HERA to suspend the aspects of the provider's registration that relate to the authorisation of university or university college title and would be likely to suspend the provider's eligibility to be authorised for university or university college title.
    - h. Alternatively, without using the power under section 16 of HERA, in circumstances where a finding has been made that a breach of this condition has taken place or is ongoing, the OfS may decide that the provider is not suitable to be authorised for university or university college title. In a similar way, the OfS may also decide that the provider is not

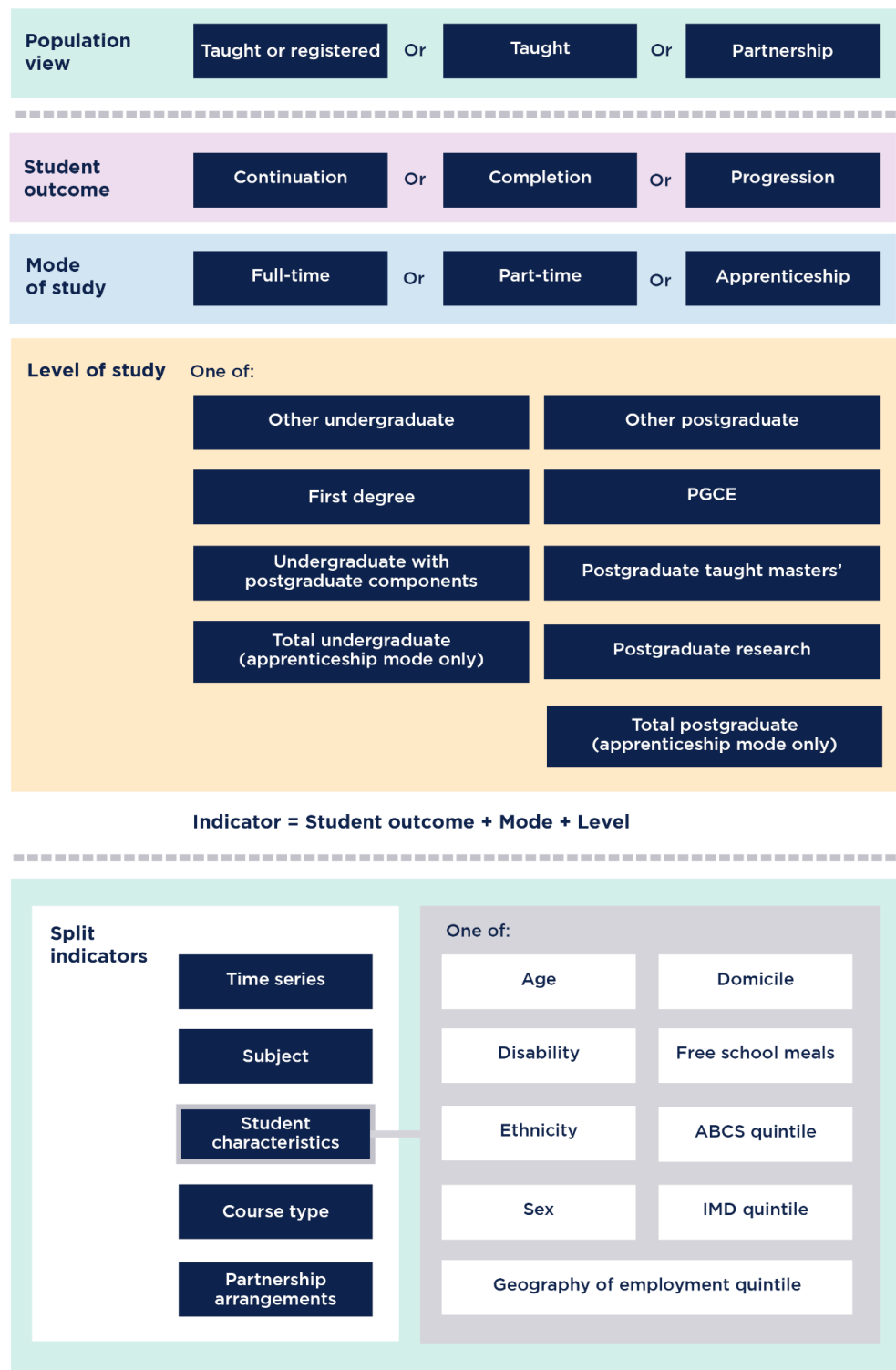
suitable to be authorised for university or university college title where the OfS has imposed a specific condition of registration due to regulatory concerns relating to this condition.

- i. The criteria for allocation of OfS public grant funding. In accordance with any separate OfS policies on matters relating to public grant funding, the OfS may decide to take account of a provider's current and previous compliance with this condition in determining allocations of some types of OfS public grant funding.

# Annex C: Proposed data reporting structure for condition B3

1. Figure B1 provides a visual representation of the reporting structure we propose using to create indicators and split indicators for our student outcome measures.

Figure B1: Reporting structure for indicators



Note: 'ABCS' = 'Associations Between Characteristics of Students'; 'IMD' = 'Index of Multiple Deprivation'.

## Annex D: Other actions the OfS may take where it makes a formal finding of a breach of condition B3

1. This annex sets out the actions that the OfS will take after 3 October 2022 if it makes findings to the effect that:
  - a. Revised initial condition of registration B3 has not been satisfied; or
  - b. A provider is breaching, or has breached, revised ongoing condition of registration B3.
2. This means that we will only take account of compliance decisions made from the date revised initial and ongoing condition of registration B3 came into force.

### The TEF

3. We have set out in our separate consultation response, the way in which a provider's current and previous compliance with the B conditions, including condition B3, would be taken into account in determining eligibility to apply for and retain a TEF award.<sup>43</sup> The reason for this is that we may not consider it appropriate for a provider to obtain a TEF award that signals 'teaching excellence' if there is or has been a breach of our minimum expectations for student outcomes. We consider that holding a TEF award in those circumstances could have the potential to mislead students and others about the OfS's view of the quality of a provider's courses and its compliance history.

### Degree awarding powers

4. Where the circumstances set out in paragraph 1 apply, we will take that into account in the following ways:
  - a. We will consider using our power to suspend the aspects of the provider's registration that relate to the authorisation of DAPs. We would be likely to suspend the provider's eligibility to be authorised for new or extended degree awarding powers.<sup>44</sup> In any decision to impose a suspension we would explain the steps the provider is required to take in order for the suspension to be lifted.
  - b. Where the conduct that led to the finding of a breach is ongoing, we would be likely to decide that the provider is not suitable to be authorised for new or extended DAPs.
  - c. Where the conduct that led to the finding of a breach is not ongoing, we would be likely to decide to investigate further to determine whether that conduct has recurred such that we would consider there to be a new breach or an increased risk of a future breach.
  - d. Where we have previously identified an increased risk of a future breach, we would be likely to decide to investigate further to determine whether our concerns have been resolved or whether there is a new breach.

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<sup>43</sup> See Proposal 5 in our response to the TEF consultation, which is available at [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/).

<sup>44</sup> In this context 'new' means powers that the provider has not previously held, whether or not it seeks to hold those powers on a probationary basis.

5. We would take this approach whether or not the authorisation sought is to gain new powers, or extend existing powers, for example by time, level or subject. We would have regard to the intervention factors set out in paragraph 167 of the regulatory framework and consider, in particular, the proportionality of taking this approach.
6. Where we consider, exceptionally, that it is in the interests of students for a new or extended authorisation to be made (for example, because a provider's existing time-limited authorisation is due to expire), we would consider authorising a limited extension of the provider's existing powers. This would allow it time to take the steps necessary for the suspension to be lifted, or to resolve the issues that resulted in the finding of the breach.
7. The reason for this approach is that a provider that has breached our minimum expectations for student outcomes would, in our view, be unlikely to be able to exercise its own degree awarding powers securely. If we were to authorise DAPs in these circumstances, we would be exposing students to the risk that the provider would not be able to retain those powers, and so would not be able to award the qualifications for which students had registered. That situation would also damage the reputation of the English higher education sector.
8. Where a provider needs to make a fresh application for registration, for example because it wishes to change registration category, or where a merger or acquisition takes place, we will take the following approach:
  - a. Where the provider seeking registration is either the same entity, or is a new entity operating the same or substantially the same higher education business as the previous entity, we will take into account the compliance history of the previously registered provider.
  - b. Where the provider seeking registration is a genuine new entity that is not operating the same higher education business as the previous entity, we will treat that provider as a new provider for DAPs purposes. This will mean that the previous provider's track record cannot be transferred to the new entity and we will not take such records into account when considering matters relating to DAPs.<sup>45</sup>
9. This approach is designed to ensure that a provider cannot take advantage of a previous entity's track record for DAPs purposes without also being responsible for that previous entity's compliance history.
10. Similarly, where a provider with DAPs merges with one or more other providers, we will take into account the compliance history of each provider as we determine whether the new entity should be authorised for DAPs.
11. This approach to DAPs does not affect our ability to take enforcement action, (for example to vary a provider's authorisation to restrict its ability to award degrees, or to revoke a provider's existing authorisation). Nothing in this approach limits our discretion to take such enforcement action on the basis set out in HERA. A provider's compliance history in relation to condition B3 is likely to be relevant evidence in decisions about any such enforcement action.

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<sup>45</sup> A provider that has been delivering higher education for less than three years does not have a sufficient track record to apply for full DAPs authorisation. It may instead apply for authorisation on a probationary basis.

## University title

12. Where the OfS makes a final decision that there is, or has been, a breach of condition B3, we will take that into account in the following ways:
  - a. We will consider using our power to suspend the aspects of the provider's registration that relate to the authorisation of university or university college title. We would be likely to suspend the provider's eligibility to be authorised for university or university college title. In any decision to impose a suspension we would explain the steps the provider is required to take for the suspension to be lifted.
  - b. Where the conduct that led to the finding of a breach is ongoing, we would be likely to decide that the provider is not suitable to be authorised for university or university college title.
  - c. Where the conduct that led to the finding of a breach is not ongoing, we would be likely to decide to investigate further to determine whether that conduct has recurred such that we would consider there to be a new breach or an increased risk of a future breach.
  - d. Where we have previously identified an increased risk of a future breach, we would be likely to decide to investigate further to determine whether our concerns have been resolved or whether there is a new breach.
13. We would have regard to the intervention factors set out in paragraph 167 of the regulatory framework and consider, in particular, the proportionality of taking this approach.
14. The reason for this approach is that a provider that is not satisfying our minimum regulatory requirements for student outcomes would, in our view, be unlikely to be able to exercise its own degree awarding powers securely. The secure exercise of DAPs is central to the award of university title and therefore in such cases we would not wish to authorise the use of university or university college title. That situation would also damage the reputation of the English higher education sector.
15. Where a provider needs to make a fresh application for registration, for example because it wishes to change registration category, or where a merger or acquisition takes place, we will take the following approach:
  - a. Where the provider seeking registration is either the same entity, or is a new entity operating the same or substantially the same higher education business as the previous entity, we will take into account the compliance history of the previously registered provider for the purposes of considering matters relating to the use of university, or university college, title.
  - b. Where the provider seeking registration is a genuine new entity that is not operating the same or substantially the same higher education business as the previous entity, we will treat that provider as a new provider for university, or university college, title purposes. This will mean that the previous provider's track record cannot be transferred to the new entity and we will not take such records into account when considering matters relating to university, or university college, title in respect of the new entity.

16. This approach is designed to ensure that a provider cannot take advantage of a previous entity's track record for university, or university college, title purposes without also being responsible for that previous entity's compliance history.
17. Similarly, where a provider with university, or university college, title merges with one or more other providers, we will take into account the compliance history of each provider as we determine whether the new entity should be authorised for university, or university college, title.
18. This approach to university and university college title does not affect our ability to take enforcement action, (for example, to revoke a provider's existing authorisation for university title). Nothing in this approach limits our discretion to take such enforcement action on the basis set out in HERA. A provider's compliance history in relation to condition B3 is likely to be relevant evidence in decisions about any such enforcement action. To be eligible to apply for university or university college title, a provider must have authorisation to grant taught awards (other than foundation degree only DAPs) or research awards on an indefinite basis.

## **OfS public grant funding**

19. As set out in the OfS's terms and conditions of funding, regulatory action taken in the event of a breach of a condition of registration could result in changes to grant allocations and payments.<sup>46</sup>
20. Further, the OfS may in the future consult on proposals to take account of a provider's current and previous non-compliance with condition B3 in determining future eligibility and allocations of some types of OfS public grant funding. The reason for this is that we may not consider it appropriate for a provider to receive public funding if it has breached, or is at increased risk of breaching, our minimum expectations for student outcomes. Allocating funding in those circumstances would mean that taxpayers' money was being allocated to providers that were not providing high quality higher education courses.

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<sup>46</sup> You can find the OfS's terms and conditions of funding at [www.officeforstudents.org.uk/publications/terms-and-conditions-of-funding-for-2021-22/](https://www.officeforstudents.org.uk/publications/terms-and-conditions-of-funding-for-2021-22/).

# Annex E: Matters to which we have had regard in reaching our decisions

## The OfS's general duties

21. The OfS has had regard to its general duties as set out in section 2(1) of HERA; in making the decisions set out in this document. These general duties are reproduced in Annex E. We consider that the approach that we have decided to adopt is particularly relevant to general duties (a), (b), (c), (d), (e) and (g), which relate to: institutional autonomy; quality, choice and opportunities for students; competition where this is in the interests of students; value for money; equality of opportunity in connection with access to and participation in higher education; and best regulatory practice.
22. In making the decisions in this document, we have given particular weight to (b), (d) and (e): promoting quality, choice and opportunities for students; value for money; and equality of opportunity.

### **General duty b): the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers**

23. Our approach to regulating student outcomes is designed to contribute to delivery of our regulatory objectives. These objectives reflect the things that are of significant importance to all students: high quality courses, positive outcomes, and the ongoing value of their qualifications.
24. In deciding to adopt our approach to regulating student outcomes, we have had regard to the need to promote quality and greater choice and opportunities for students. In general, we consider that students making choices about what and where to study need to be confident that the regulatory system ensures that they can choose from a range of providers and courses that meet minimum regulatory standards.
25. Our approach will mean we continue to set minimum expectations in relation to quality through condition B3. We have had regard to general duty b) when making these decisions. We have also had regard to consultation responses that suggest that our approach will not promote quality, for example respondents suggested that:
- a. The measures we have chosen to adopt would not promote quality because they are too narrow (we consider this point in paragraphs 52 to 64).
  - b. Our approach to setting minimum numerical thresholds does not take account of 'value added' or 'learning gain'. Respondents argued that the effect of this may be that providers that are delivering 'quality higher education' may fall below the numerical thresholds we set (we consider this point in paragraph 57).
  - c. Our approach to including validated-only provision in the scope of the condition would not promote quality because the validating provider is not fully responsible for student outcomes at the validated provider (we consider this point in paragraph 90).
26. As we have set out in this document, we disagreed with respondents' views that these matters would mean that our approach will not promote quality. In reaching these views we have considered the alternatives available to us, for example not regulating student outcomes

as part of our approach to regulating quality and standards. We consider that these alternatives would do less to promote quality in the provision of higher education than the approach we have chosen to adopt.

27. We have also had regard to general duty b) insofar as it relates to promoting choice for students. In general, we consider that opportunities for study, and therefore 'choice', cannot be meaningful if students are able to choose low quality courses delivering weak outcomes, or to continue on such courses, because the regulatory system has endorsed such performance by a failure to impose minimum expectations capable of protecting those students.
28. A number of respondents to the consultation suggested that our proposals would have a negative effect on student choice because our approach to setting minimum numerical thresholds would result in providers choosing to close courses. Respondents also argued that our regulatory action would result in a negative impact on student choice because:
  - a. providers would be required to close courses following OfS regulatory action
  - b. our action would have a negative effect on perception of particular providers or courses and as such students would not wish to study on those courses.
29. We accept that our approach may, ultimately, result in a number of students being unable to choose to attend a particular course at a particular provider in the ways described by respondents above. In deciding to accept this and nonetheless proceed with our approach we have balanced the different aspects of general duty b). In other words, we have had to decide whether to place more weight on 'quality' or 'choice'. We consider that it is right that we ultimately place more weight on 'quality' in these circumstances.
30. However, we consider that we have continued to place some weight on promoting choice and opportunities in our decision to adopt an approach which has the following features:
31. We will take into account the particular context of a provider when making judgements about whether a provider has delivered positive outcomes for its students. This may include matters which are relevant to student choice.
32. Our approach to enforcement is deliberately escalatory. This means that providers will have the opportunity to improve before we take the most intrusive regulatory action. This means that our actions are likely to only have the most negative effect on student choice where we have the most significant concerns about quality.
33. We will have regard to the intervention factors set out in paragraph 167 of the Regulatory Framework and our general duties when taking regulatory action in relation to non-compliance with condition B3. This means that we will give specific consideration to student choice when deciding how to act in response to non-compliance. This may result in us choosing to take different regulatory action in response to non-compliance if the effect on student choice would be disproportionate when balanced against our concerns regarding the quality of the provider's higher education provision.
34. We intend to monitor the effects of our proposals, this may include different approaches to understanding the effect on student choice.

#### **General duty d): the need to promote value for money in the provision of higher education by English higher education providers**

35. We have placed weight on this general duty in making decisions to adopt the approach to regulating student outcomes set out in this document.
36. We take a general view that value for money in the provision of higher education is important for both students and the taxpayer. Students normally pay significant sums for their higher education and incur debt for tuition fees and maintenance costs. Investing in a higher education course that delivers weak outcomes is unlikely to represent value for money for students. Similarly, the taxpayer contributes significantly to higher education through the provision of government-backed student loans and, for some providers, public grant funding. This investment is unlikely to represent value for money if, for example, courses are of low quality, continuation rates are low and students do not proceed to managerial and professional employment or further study. To protect the interests of students and taxpayers, our view is that it is appropriate to regulate quality and standards in the way described in this consultation to ensure that student and taxpayer investment is focused on providers and courses that deliver positive outcomes.
37. We have specifically placed weight on the need to promote value for money in making decisions about the methodology for setting minimum numerical thresholds. This methodology allows us to consider value for money when determining the threshold values.

#### **General duty e): the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers**

38. We have extensively discussed our consideration of the effect of our proposals on equality of opportunity in our response to Proposal 1. We have placed weight on this general duty in making decisions to adopt the approach to regulating student outcomes set out in this document. We accept that there may be circumstances in which our proposals have a negative effect on equality of opportunity for specific cohorts of students at individual providers, however we take the view that, overall, the effect of the proposals is positive.
39. In general, our approach to regulation is designed to promote equality of opportunity in connection with access to, and participation in, higher education. This means that we are concerned with ensuring that students from underrepresented groups can access higher education, and also to succeed on and beyond their courses. In determining the groups falling within the definition of 'underrepresented groups', the OfS has given due regard to students who share particular characteristics that are protected under the Equality Act 2010, as well as students who are otherwise underrepresented or disadvantaged.
40. We have placed weight on this general duty in adopting our approach to regulating student outcomes when deciding that the approach should aim to ensure that students from all backgrounds are able to expect to achieve positive outcomes when attending a registered provider. We have adopted an approach which applies to all providers, regardless of the type of students they recruit and in doing so we placed weight on the need to promote equality of opportunity. We consider alternatives, such as setting different numerical thresholds for different types of providers or student. Our view is therefore that an approach to regulating student outcomes that resulted in setting separate numerical thresholds for students from underrepresented groups that were lower than those set for their peers would not represent equality of opportunity for such students. We also take the view that this approach should

extend to not setting numerical thresholds lower for particular types of providers or course solely on the basis that they recruit students from particular backgrounds. We have therefore decided to implement the policy in the regulatory framework and set numerical thresholds, take a provider's context into account, but not vary numerical thresholds for a provider that recruits students from underrepresented groups.

41. We recognise that in adopting our approach we are creating regulatory pressure for some higher education providers that recruit significant numbers of students from underrepresented groups and have performance below the numerical thresholds we may adopt. Our position is that if such providers are to recruit students from underrepresented groups, they must do so having understood the commitment they are making to support their students to succeed, irrespective of their backgrounds. This will include removing or minimising disadvantages suffered by students from underrepresented groups, and to take steps to meet the needs of students from underrepresented groups that are different from other students. Where providers fail to do this, and we see low continuation and/or completion rates, or disappointing levels of progression to relevant employment or further study, even where those providers may offer opportunities for students to enter higher education, we do not consider that this represents genuine and meaningful choice and opportunities for students which promotes equality of opportunity in connection with access to and participation in higher education.
42. We accept that there may be circumstances where our regulatory approach either directly or indirectly results in providers changing their behaviour (for example by closing courses or lower academic standards) such that some cohorts of students face greater challenges in accessing and succeeding in higher education. We have discussed in paragraphs 180 to 190 how we have balanced our judgement with regard to our general duty to promote equality of opportunity for all students. This includes considering the effect on past and future students as well as those currently studying with a provider.

### **Other general duties**

43. In deciding to adopt the approach set out in this document, we consider general duties (a), (c) and (g) important, but have given less weight to these.
44. The OfS is required to have regard to the need to protect institutional autonomy. It does not, however, have an absolute obligation to protect the autonomy of providers. We have decided to adopt a principles- and outcomes-based approach to setting minimum expectations for student outcomes. Our requirements for student outcomes in the revised condition B3 have been expressed in relation to an overarching principle: the provider must deliver positive outcomes for students on its higher education courses. We go on to provide more certainty for providers about the performance required because we have set clear numerical thresholds. In that sense, the general approach set out in the regulatory framework and expanded on in this document attaches weight to institutional autonomy. In particular, we considered institutional autonomy in adopting an approach to assessing compliance with condition B3 that will consider the actions that a provider has taken, or is proposing to take, to improve outcomes for students. We consider that this will give considerable scope for providers to determine the necessary actions to meet our minimum expectations for students.
45. But we are giving weight to autonomy insofar as this is consistent with the need to protect the interests of students and, in particular, students from underrepresented groups. Where the quality of a provider's courses is of concern, including where the outcomes delivered for its students are below our numerical thresholds, we have taken the view that its autonomy is

likely to carry less weight than the interests of current and future students. We have been clear we will focus regulatory attention where it is needed most and so we expect that the majority of providers, in particular those with most or all of their indicators and split indicators above our numerical thresholds, will have a significant amount of autonomy in relation to the delivery and quality of their higher education courses. Furthermore, prior to any assessment that the OfS undertakes, providers will have autonomy to address performance that is below our numerical thresholds and we will take such actions into account

46. The OfS is required to have regard to the need to encourage competition, where that competition is in the interests of students and employers. Competition could be encouraged by removing regulatory barriers such that any provider is able to compete for students, or that partnership arrangements were allowed to persist, regardless of the outcomes delivered for students. However, we have not adopted this approach because such competition would not be in the interests of students or employers. We consider that the role of the regulator in this context is to set minimum expectations for student outcomes, to ensure that students can choose from a variety of providers and courses that meet that minimum regulatory standard.
47. Our approach will mean that a new provider seeking registration does not need to demonstrate that it has delivered positive outcomes for students where it has not submitted data to either HESA or the ESFA takes account of the context of providers that have not previously delivered higher education and is designed to encourage competition by reducing regulatory barriers for such providers.
48. We have considered the principles of best regulatory practice and, in particular, considerations of proportionality. We consider the approach set out in this document to be proportionate and appropriate in ensuring that the OfS can protect the interests of students and balance this with the interests of providers. We have given particular consideration to the proportionality of our proposals, to ensure that regulatory attention is focused on those providers that represent most regulatory risk. In particular, we had to regard to the principle that our activities should be transparent, accountable, proportionate and consistent when making the following decisions:
49. That a transitional period should be in place before the revised condition B3 comes into effect. This will ensure that current applicants for registration will be assessed against the conditions of registration that were in place when they submitted their application and registered providers have sufficient time to understand the new regulatory approach set out in the condition.
50. That we should adopt a clear prioritisation framework and scope for our assessments. This will enable registered providers to understand when they may be need to engage with us and what the parameters of that engagement may be.
51. That we should change our approach to clarify certain matters relating to our use of compliance history when considering mergers and acquisitions, including when a provider will be treated as being a new entity or operating a new business.
52. To publish regulatory advice that offers additional guidance for providers on how we will set numerical thresholds and how we will assess the initial and ongoing conditions of registration.

## **The Public Sector Equality Duty**

53. We have had regard to the Public Sector Equality Duty set out in section 149 of the Equality Act 2010. This requires the OfS to have due regard to eliminating unlawful discrimination,

foster good relations between different groups and take steps to advance equality of opportunity.

54. Protecting and promoting quality and equality of opportunity are at the heart of our work. When a student embarks on a higher education course it has the potential to be a life-transforming event – an enriching academic experience that paves the way for rewarding options in the labour market and a fulfilling life. Students pay a significant price for these opportunities, through their time and effort, as well as in financial terms. This is why the OfS is focused on ensuring through our regulation of quality and standards that all students, whatever their background and characteristics, can have confidence that they will receive a high quality higher education and positive outcomes. At the same time, we are taking steps through our regulation of access and participation to reduce the gaps in equality of opportunity between students from underrepresented groups and other students, before, during and beyond their time in higher education.
55. We have considered whether there may be any tension between our approach in relation to student outcomes and equality of opportunity. Our view is that meaningfully extending equality of opportunity means providing all students irrespective of their characteristics with the opportunity to benefit from their higher education. This is only possible if they are able to have positive outcomes that meet rigorous requirements set by the regulator. If a subset of students, particularly those who share protected characteristics, is not provided with sufficient support to achieve such outcomes, they have not had a genuine opportunity to benefit from higher education, and therefore have not experienced meaningful equality of opportunity.
56. We have considered matters relevant to equality of opportunity throughout this document, and in particular in relation to decisions relating to Proposal 1. We consider that while there are elements of our approach that may have a negative impact on a limited number of students with protected characteristics, we take the overall view that the effect of our approach is positive.
57. We will continue to have due regard for our obligations under the Equality Act 2010, as we implement our approach.

## **Guidance issued by the Secretary of State**

58. We have had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically 'Guidance to the Office for Students – Secretary of State's strategic priorities (31 March 2022)'.
59. We consider the following aspects of that guidance to be some of the relevant content to our approach to regulating student outcomes.

## **Quality**

- a. 'We must not "bake in" an acceptance of lower quality for certain students because they are from disadvantaged or underrepresented groups.'
- b. '...it is our clear and firm expectation that the OfS will use the new outcome thresholds to identify providers with unacceptable levels of performance and challenge them. In the event that they cannot convincingly explain and justify their student outcomes data, then this should provide the basis for generating robust regulatory investigation and action. In cases where low and unacceptable quality is confirmed, action should include, where

appropriate, financial penalties and ultimately the suspension or removal of the provider from the register (and with it, access to student finance).'

- c. 'take into account that part-time and distance-learning provision, as well as high quality provision at Level 4 and 5, play an essential role in levelling up the country and providing retraining opportunities for those who have sometimes been less successful in their first experience of education. Further education colleges have a critical role in the government's efforts to expand high quality provision at level 4 and 5. Provision in these areas is currently undergoing considerable change and new and innovative approaches are expected.'
- d. 'In addition to its existing priorities for quality regulation, we would like the OfS to focus most on some larger providers with university title, and full time Level 6 provision in some subject groupings.'
- e. 'Given the number of providers currently with performance below the proposed numerical thresholds that the OfS is consulting on, we would expect a significant number of investigations to be initiated as a result of the B3 condition in due course. As noted above, our priorities for investigation are:
- f. larger providers with university title which are below proposed numerical thresholds either for the whole provider, or multiple subject areas; and
- g. a set of investigations focused on a major subject grouping with large numbers of students and high variation in outcomes, such as Computer Science or Law, with the intention to drive up the quality of those courses across the sector as a whole; and
- h. providers where OfS has long-standing concerns about quality which are confirmed or strengthened by numerical data on student outcomes'
- i. 'We want to be clear that, when the proposals for student outcomes are introduced, providers delivering high quality provision should not be subject to additional administrative burden: the approach should be proportionate, risk-based and focused on low quality provision. We welcome the OfS's intention that the new regulatory regime will be fully implemented and operational no later than September 2022.'

### **Lifelong loan entitlement (LLE)**

- j. ensuring that the LLE is supported by an appropriate regulatory regime, fully equipped to support radically different, flexible arrangements, measuring quality using metrics that are meaningful in the new system and which interact positively with our admissions regime.

### **Reducing regulatory burden**

- k. 'Risk based regulation and reducing bureaucracy' which asks the OfS to "sure that reg burden is proportionate...reduce burden on providers of responding to the OfS's requirements [and]....consider ways in which [OfS] can work with the sector to communicate more clearly its expectations'.

60. We have had regard to this guidance when:

- a. We made decisions about our prioritisation framework, insofar as this framework offers us the opportunity to make future decisions about which courses to prioritise for regulatory action. We expect to have regard to this guidance when we make final decisions about which providers will be prioritised for the Autumn 2022 cycle.
  - b. We decided to adopt a risk-based approach that would result in no additional administrative burden for high-quality providers. We gave effect to this by:
  - c. Adopting an approach that used existing data returns to create our student outcome measures.
  - d. Drafting the revised condition such that a provider with performance above a relevant numerical threshold would not be required to submit any information to the OfS in relation to its compliance with condition B3.
  - e. Choosing to limit the number of providers that will be subject to assessment in a given year. For example, in the first assessment cycle we expect no more than 20 providers will be assessed.
  - f. Committing to consulting further if we consider that it may be appropriate to extend the higher education courses covered by are student outcome measures or if there are additional student outcome measures which should be included in our approach.
61. We had regard to the guidance from the Secretary of State when deciding that we should to develop appropriate measures for students studying on modular courses. We will consult on any future changes to our approach to regulating student outcomes in light of the effects of the LLE once details of the policy are confirmed by Government

## **The Regulators' Code**

62. We have had regard to the Regulators' Code.
63. We have considered Section 1 which discusses the need for regulators to carry out their activities in a way that supports those they regulate to comply and grow. We consider that our approach to risk-based regulation of student outcomes, focused only on addressing performance below our minimum numerical thresholds is the least burdensome available approach to delivering our policy objectives. We have considered in this document consultation responses we received that argued that our approach should consider the size of providers (see paragraphs 364 to 369) and reduce the number indicators which we use in our approach (see paragraphs 66 to 72).
64. We have considered Section 2 which discusses the need for regulators to provide simple and straightforward ways to engage with those they regulate and hear their views. We have had regard to this section when setting out our approach to assessment which explicitly includes engagement with providers prior to decision making about compliance.
65. Section 3 of the code is particularly relevant, which discusses the need to base regulatory activities on risk:
66. Paragraph 3.1 provides for regulators to use an evidence-based approach to determine priority risks and allocate resources where most effective.

67. Paragraph 3.2 provides for regulators to consider risk at every stage of the decision-making process and choose the most appropriate type of intervention, using a targeted approach.
68. Paragraph 3.5 provides for regulators to review the effectiveness of their activities and make necessary adjustments accordingly.
69. We consider these paragraphs to be particularly relevant to our decisions to adopt an approach to setting minimum numerical thresholds which is data-led. We have also had regard to this section of the Regulators Code when making decisions about our approach to assessment and prioritisation. We consider that our approach particularly encapsulate these aspects of the code.
70. We have considered section 4 of the Regulators Code which discusses sharing information about compliance and risk. We particularly had regard to this element of the code when adopting our approach to regulating apprenticeships and considering our response to respondents' comments about publishing information about compliance with condition B3.
71. We have considered section 5 of the Regulators Code which discusses ensuring clear information, guidance and advice is available to help those we regulate meet their responsibilities to comply. We have had regard to this section when setting out our approach to regulation in both the revised condition and in Regulatory Advice 20 which we published alongside this document. Both of these documents offer clear advice to providers both on the circumstances in which the OfS would consider them to be compliant, for example the condition and associated guidance make clear that a provider will be compliant with condition B3 if the OfS is satisfied that their performance in relation to indicators and splits indicators is above a relevant numerical threshold.

## **Code of Practice for Statistics**

72. We have taken account of this code in deciding to adopt our approach for the creation of information about student outcomes. We will continue to have regard to it as we make final decisions about whether to publish data in the future. We have committed to compliance with the code through:
73. Trustworthiness – We have set out our approach to producing statistics that describe student outcomes. We have had regard to the need to explain what judgements we have made about the data, methods, and their strengths and limitations. We have described our approach and made available our underpinning calculations to enable users to understand our proposed approach.
74. Quality – Our approach, especially our publication of the technical documents set out in the revised condition, is transparent about the methods and data sources we are proposed to use and the reasons for their selection.
75. Value – We are seeking to communicate clear information about student outcomes to support our approach to regulation. We have adopted an approach that will ensure the public can understand our approach and access the data we are using. We have considered consultation responses regarding the clarity of the dashboards we propose publishing and have made improvements to assist users. In addition, we have indicated how our approach is coherent with our approach to access and participation and to the TEF (which is subject to a separate consultation).



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