

Consultation



The consultation closes at **1700 on 14 April 2023**.

Please submit your response by completing the online form at:
<https://survey.officeforstudents.org.uk/s/fees-investigations/>

If you require this document in an alternative format, or need assistance with the online form, please contact regulation@officeforstudents.org.uk.

Please note: this email address should **not** be used for submitting your consultation response.

Consultation on payment of fees for investigations

1. This document is a short consultation that proposes how we will determine the fee a provider under investigation by the OfS should pay on the basis of the Higher Education (Investigation Fees) (England) Regulations 2022 ('the Regulations').¹ These Regulations allow the OfS to recover the costs of conducting investigations by charging an individual provider.

Introduction

2. Section 70 of the Higher Education and Research Act 2017 (HERA) allows the OfS to charge each registered provider an annual registration fee. Section 71 enables secondary legislation to be made that provides for the OfS to charge fees for other activities and services undertaken in the performance of its functions.
3. The Higher Education (Investigation Fees) (England) Regulations 2022 ('the Regulations') came into force on 8 December 2022. They give the OfS the power to charge a fee that recovers the costs of investigating a registered higher education provider's activities.
4. This consultation provides draft guidance for providers that sets out how we propose to determine the fee payable, including:
 - a. How investigation fees will be calculated.
 - b. How the fee for an investigation will be communicated to a provider.

¹ See <https://www.legislation.gov.uk/uksi/2022/1191/regulation/3/made>.

- c. How a provider can make representations in relation to an investigation fee.
 - d. When a fee is payable.
 - e. How to pay a fee.
5. This consultation is not seeking views on the powers that the Regulations give the OfS or whether we should seek to recover the costs of our investigations. We are also not seeking views on matters relating to the OfS's approach to monitoring registered providers, which may lead to us opening or conducting investigations. The OfS operates in accordance with HERA and the regulatory framework on these matters and further information about our approach to monitoring and intervention is set out in regulatory advice 15.²
6. We may decide to conduct an investigation for a range of reasons. These include:
- if we consider that we should establish the facts or other information before reaching a judgement about whether the regulatory risk posed by a provider is increased
 - whether there is likely to be, or is, a breach of one or more ongoing conditions of registration.
7. In performing its functions the OfS is required to have regard to the general duties set out in section (2)(1) of HERA. This includes the need to consider proportionality matters. However, there is no statutory or legal requirement for the OfS to meet any particular evidential test or threshold before we can open an investigation and/or compel the production of information (using the power under condition F3). This consultation is therefore not seeking views about the circumstances that may or may not lead to opening an investigation.
8. We are inviting any comments about our proposals from higher education providers and others with an interest in these issues by **1700 on 14 April 2023**.
9. Further information about how to respond to this short consultation is set out in Annex A.

Proposals

10. Our proposed policy approach is that we will seek to recover costs for investigations on the basis set out in the Regulations. This means that we will charge a fee where, as a result of an investigation, the OfS:
- a. Finds that the provider is breaching, or has breached, any ongoing condition of registration.
 - b. Imposes a specific ongoing condition of registration on the provider.
 - c. Requires the provider's governing body to provide information on the basis of an ongoing condition of registration of the provider referred to in section 8(1)(b) of HERA.

² See www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

- d. Recommends that, in order to mitigate what the OfS considers to be the increased risk of a breach of an ongoing condition of registration of the provider, the provider should take or refrain from taking any action specified by the OfS.
11. The Regulations do not define what constitutes ‘an investigation’ and we will therefore give the word ‘investigation’ its ordinary dictionary definition and interpret it to mean ‘a careful search or examination in order to discover facts or other information’. This is consistent with the approach we described in paragraph 66 of the analysis and outcomes of our consultation on publication of information about higher education providers.³
12. An investigation may therefore be any activity where the OfS decides to explore potential regulatory concerns at a provider, for example:
- engagement with a provider
 - or seeking further information from a provider on a voluntary basis
 - or compelling the production of information through a notice issued on the basis of condition F3.
13. An investigation would include, but not be limited to, activity the OfS undertakes in response to:
- a. Indicators showing the performance of a higher education provider, for example, in relation to student outcomes or financial performance.
 - b. Reportable events from a provider as required by the OfS’s regulatory framework and set out in regulatory advice 16.⁴
 - c. Notifications from third parties about a provider.
 - d. Its judgement that there is or may be increased regulatory risk for a provider.
14. An investigation would include, but not be limited to, activity the OfS undertakes as part of any assessment of compliance with any general or specific ongoing condition of registration, for example an assessment in relation to condition B3 (student outcomes) where a provider is prioritised for assessment. It would also include any activity undertaken in relation to potential regulatory harm or that may not relate directly to the subject matter of an ongoing condition of registration.

Calculating an investigation fee

15. We are proposing that we should calculate the full extent of the costs incurred in an investigation of a provider on the following basis.
16. The investigation fee will be the total of the costs reasonably incurred by the OfS in conducting its investigation. Conducting an investigation includes:

³ See <https://www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers-analysis-of-responses-and-decision/>.

⁴ See www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/.

- a. Making and communicating to a provider a decision to conduct the investigation.
- b. Settling and communicating the findings of the investigation.
- c. Making any other decision, and engaging in any other activity, in connection with:
 - i. beginning the investigation;
 - ii. conducting the investigation;
 - iii. settling or communicating the findings of the investigation.

17. Costs to be covered include:

- a. OfS staff costs (based on the time spent on the investigation) charged at the total cost of employment of that member of staff for each hour worked (cost per hour). Cost per hour will include employer contributions for national insurance and pensions, and will represent the cost of each hour the member of staff is normally available to work (i.e. excluding annual leave entitlement and bank holidays).⁵ Any travel and subsistence costs will be charged at the actual cost incurred by the OfS including any irrecoverable VAT.
- b. Contracted out costs, and any costs associated with direct purchasing in respect of an investigation, will be based on the actual costs incurred by the OfS, inclusive of any irrecoverable VAT.

18. Costs will not include an apportionment of the underlying running costs of the OfS, as these are covered by registration fees, unless an increase in these costs arises as a direct result of an investigation.

19. We propose that the approach set out in this consultation for the calculation of costs would also apply to the calculation of costs under our powers in section 73 of HERA. These powers allow us to recover costs of investigations that lead to the imposition of a sanction. We also propose that the approach in this consultation should apply, in so far as they require any calculation of costs, to any further regulations made under section 71 of HERA.

20. The OfS can decide to waive all or part of any fee payable. We would not normally expect to waive fees in the absence of compelling and exceptional circumstances, and we will normally place particular weight on the public interest in, and the legislative aims of, the Regulations in enabling the OfS to recover its costs. However, we will consider each case on its merits and the amount that we seek to recover is likely to reflect what the OfS considers to be appropriate in the context of an investigation's outcomes.

21. A provider will be sent a notification of the investigation fee. This will set out how it has been calculated and the due date, which will be not less than 30 days from the date of notification. Representations about the fee may be made by the provider. A provider will be allowed not less than 14 days to submit representations.

⁵ For the avoidance of doubt, the OfS will still include any hours worked by staff and contractors at weekends and on Bank Holidays in the calculation of its costs.

22. The full draft guidance can be found at Annex B. Costs would be recovered only for investigations that begin after we have published final decisions following this consultation.

Reasoning for our proposals

23. These proposals would, if implemented, result in the OfS recovering costs from an individual provider relating to an investigation into it. This would happen where the outcome of the investigation resulted in the OfS:

- a. Finding that the provider is breaching, or has breached, any ongoing condition of registration.
- b. Imposing a specific ongoing condition of registration on the provider.
- c. Requiring the provider's governing body to provide information through a notice issued on the basis of ongoing condition F3.
- d. Assessing that there is an increased risk of a breach of an ongoing condition of registration and communicating to the provider that in order to mitigate this risk it should take or refrain from taking action specified by the OfS.

24. There is a strong public interest in the OfS being able to fund its investigatory activities. Higher education providers that wish to register with the OfS must satisfy the conditions of registration. These conditions set out the minimum requirements that providers must meet to become and stay registered with the OfS. As a risk-based regulator we do not systematically reassess a provider's compliance with each ongoing condition of registration on a repeating basis. Instead, we use data and other regulatory intelligence to provide us with signals to help target investigatory activities at potential areas of increased regulatory risk.

25. Charging an individual provider that is subject to investigation for the investigatory activity we undertake is consistent with our risk-based approach – a provider is less likely to face additional costs of regulation if it does not present any compliance or other concerns that result in investigatory activity. Similarly, if a provider is investigated by the OfS but we do not find any regulatory concerns (and therefore do not impose requirements or recommend that the provider takes action as a result of an investigation) the effect of the Regulations is that it will not bear any costs of the investigation.

26. If we did not seek to recover the costs of our investigatory activity for an individual provider this activity would have to be paid for through the annual registration fee. This would increase the cost of regulation for all registered providers. We consider that it is fairest if the costs of investigatory activity are borne by the individual provider subject to investigation.

27. Our experience of regulating suggests that investigatory activity can be long and complex, particularly if a provider seeks to challenge our actions. Providers have a legitimate right to challenge decisions the OfS makes but we consider it would not be fair for the costs of such a process to be paid for by all providers, rather than by the individual provider concerned.

28. If we did not seek to recover costs from individual providers relating to investigatory activity we would be limited in the number of investigations that we would be able to undertake. The current registration fee is not sufficient to cover such costs, alongside the costs of all the other

functions required and expected of the OfS. Although we anticipate that the sector might prefer a regulatory system with limited investigatory activity, we do not consider that this would be in the interests of students or taxpayers because in the event of significant regulatory concerns we would be unable to respond because of a lack of resources. Being unable to actively regulate through investigatory activity would also have the potential to undermine confidence in the regulatory system as a whole which could be damaging for the reputation of the sector, in particular with international stakeholders.

29. We have considered whether we should limit the use of our fee charging powers to investigations where the outcome is particularly serious, where there is a finding of a breach or where we impose a specific ongoing condition of registration. We do not consider this to be an appropriate approach because providers might take the view that this would incentivise the OfS to decide to make formal regulatory interventions and reach judgements of non-compliance rather than pursue engagement and less intrusive interventions.
30. We have also considered whether we should seek to recover only the costs of investigations in relation to providers above a certain size, for example, in terms of turnover or number of students. We have discounted this approach because we do not consider this would be fair to other providers. We do not regulate on the basis of a provider's size, but on the basis of the regulatory risk it poses. If we took this approach, we would be unable to recover any costs for investigatory activities into some providers, even if there were significant regulatory concerns. The smallest providers receive a subsidy in relation to the cost of regulation because they do not have to pay an annual registration fee. We consider that it is fairest that a provider that is subject to investigation should bear those costs, regardless of its size.
31. As we have the ability to waive all or part of an investigation fee, we consider that it is more appropriate to make decisions on a case-by-case basis. As set out in paragraph 20, we would not normally expect to waive fees in the absence of compelling and exceptional circumstances.
32. In relation to the calculation of an investigation fee we have considered whether we could exclude national insurance and pension costs in the calculation of OfS staff time. This would have the effect of reducing the costs we seek to recover from a provider and would mean that investigatory costs would not be fully funded. We consider that this would artificially limit the amount of investigatory activity that we might be able to undertake, which would not be in the interests of students, taxpayers, or compliant providers.
33. Another alternative approach we have considered would be to limit the calculation of costs for all providers subject to investigation. We could, for example, recover only a certain percentage of costs rather than the full amount. We have also considered limiting the calculation of costs in different ways for different providers. We could, for example, seek to recover 90 per cent of costs for providers above a defined size and 75 per cent for providers below a defined size. Such an approach would mean that no provider would pay the full cost of an investigation with some of the costs covered by annual registration fees. We have discounted this approach because we consider it is more appropriate and consistent with our risk-based approach to regulation that the full costs of an investigation should be borne by the provider subject to that investigation.

34. If implemented, our proposals would ensure that there is a consistent approach to the calculation of costs that would apply to the recovery of costs under both section 71 and section 73 of HERA.⁶

35. We will review the policy approach to fee recovery in 18 to 24 months following its introduction.

Matters to which we have had regard in making our proposals

General duties

36. In making these proposals we have had regard to our general duties set out in section 2 of HERA. We have placed particular weight on general duty (f) which requires the OfS to have regard for using its resources in an efficient, effective and economic way and suggests that the OfS should use the powers provided in the Regulations to maximise the amounts recovered. Recovering the full costs of investigations would mean that the OfS is able to resource investigatory activity in the interests of students, in particular supporting the promotion of quality, equality of opportunity and value for money.

37. In relation to general duty (g), which refers to best regulatory practice, calculating the full cost of investigation and recovering those costs from a provider subject to investigation, would ensure a transparent and consistent approach between providers that is targeted only where investigation is appropriate.

Public Sector Equality Duty

38. 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, fostering good relations between different groups and taking steps to advance equality of opportunity.

39. We do not consider that the calculation of costs on the basis proposed will have negative consequences for equality of opportunity because it does not have a direct connection to judgements in relation to groups with protected characteristics.

Guidance issued by the Secretary of State

40. We have had regard to statutory guidance issued by the Secretary of State on the basis of section 2(3) of HERA on 31 March 2022.⁷ This highlighted quality as one of the highest priorities of government and requested that ‘the OfS takes this work forward as rapidly as possible.’ The letter sets out an expectation that that OfS will identify and take action in relation to quality through investigatory activity. For example, it asks that we ‘implement a visible and effective inspections regime against the other B (Quality) conditions of registration, that will involve on-site inspection of 10-15 providers next year’. The emphasis on investigating and taking action on quality matters supports full cost recovery in order that a robust and sustained programme of investigatory activity can be undertaken.

⁶ In the event that further regulations are made under section 71 of HERA and require the calculation of costs, our proposals would also ensure consistency in our approach to that cost recovery.

⁷ See www.officeforstudents.org.uk/media/be054f0b-696a-41fc-8f50-218eb0e3dcab/ofs-strategic-guidance-20220331_amend.pdf.

41. Statutory guidance issued by the Secretary of State on the basis of section 2(3) of HERA on 31 March 2022 highlighted quality as one of the highest priorities of government. The focus on quality within the guidance, and asking the OfS to tackle poor quality, requires a robust approach to quality assessment. We consider that, overall, the guidance from the Secretary of State for a focus on quality weighs in favour of publication because it informs the development of our future approaches.

Regulators' Code

42. We have also had regard to the Regulators' Code. We consider that Section 5 of the code 'Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply' and Section 6 'Regulators should ensure that their approach to their regulatory activities is transparent' are particularly relevant.

43. We have produced a guidance document for consultation that sets out the approach we propose to take to the calculation of costs and arrangements for payment of these fees.

Next steps

44. We will consider responses to this consultation and publish a summary of responses. We will explain how and why we have arrived at our decisions, and how we have addressed any relevant points raised by respondents.

Annex A: How to respond

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How we will treat your response

We will summarise the responses to this consultation and publish our analysis on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details. If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy).⁸

We may need to disclose or publish information that you provide in the performance of our functions, or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

⁸ Available at www.officeforstudents.org.uk/ofs-privacy/.