

Consultation

**Office for
Students**

The logo for the Office for Students, featuring a dark blue square with a yellow square in the top right corner containing the letters 'OfS' in white.

OfS

Consultation on reportable events

**This consultation runs from 15 December 2020
to 26 February 2021.**

Reference OfS 2020.62

Enquiries to regulation@officeforstudents.org.uk

Publication date 15 December 2020

Consultation on reportable events

Since 2018, our focus has been on assessing providers seeking registration. We are now considering whether and how we should develop aspects of our approach to monitoring and intervention now that most providers are registered. We would like to hear your views on our proposals for the requirements we place on providers to report certain matters as a 'reportable event' to the OfS.

Timing of consultation	Start: 15 December 2020 End: 26 February 2021
Who should respond?	Anyone with an interest in the regulation of the higher education sector.
How to respond	Please respond by 26 February 2021 Use the online response form available at survey.officeforstudents.org.uk/s/reportableevents/
Enquiries	Email regulation@officeforstudents.org.uk Alternatively, call our regulation helpline on 0117 931 7305

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.

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About this consultation

- In response to the coronavirus (COVID-19) pandemic, we suspended some of our regulatory requirements while providers adapted rapidly to the changed environment.¹ We now plan a phased resumption. However, we do not intend to reinstate our requirements exactly as before. Instead, we will draw on our experience of the last two years and target our work to ensure that it is focused where it is most needed. This revised approach will reflect the commitment we made in the regulatory framework that providers that do not pose specific increased risk should have less regulatory burden, now that the regulatory framework is established.
- As our regulatory focus moves from the initial registration of providers (since 2018, we have registered more than 400 providers) to the monitoring of registered providers in relation to their conditions of registration, we continue to develop our approach to monitoring and intervention. Alongside this consultation, we have published updated guidance² which explains in more operational detail how the approach to monitoring and intervention set out in the regulatory framework will work in practice. We are also consulting on our approach to monetary penalties³ and the way we make decisions about the publication of information about individual higher education providers and other persons.⁴
- In this consultation, we are seeking views on our requirements for reportable events. A 'reportable event' is a standing requirement placed on each registered provider to report certain events or matters to the OfS. This requirement is imposed through a Notice issued under condition F3 which reflects the OfS's statutory power to compel the production of information. It is important that providers understand the matters that are likely to require reporting.
- The consultation sets out the background to the proposals and the reasons for them. It constitutes our consultation for the purposes of section 75(8) of the Higher Education and Research Act 2017 (HERA). In formulating these proposals, we have had regard to our general duties in section 2 of HERA, as set out in Annex F; the Regulators' Code; statutory guidance issued by the Secretary of State; and the Public Sector Equality Duty.
- The consultation questions are listed in full in Annex A.

For more information about our approach to regulation, see the regulatory framework at www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

¹ See www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/.

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

³ See www.officeforstudents.org.uk/publications/consultation-on-ofs-approach-to-monetary-penalties/

⁴ See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/

Who should respond to this consultation?

- We welcome responses from anyone with an interest in the regulation of English higher education.
- We are particularly (but not only) interested in hearing from **students and their representatives**, and **higher education providers that are registered or applying for registration**. These are the groups that may be most affected by our proposals. We welcome the views of all types and sizes of provider.

How to respond

The consultation closes at **2359 on 26 February 2021**.

Please submit your response by:

- Completing the online form at survey.officeforstudents.org.uk/s/reportableevents/

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 principles

- We are running this consultation in accordance with the government's consultation principles.⁵
- At the OfS we are committed to taking equality and diversity into account in everything we do. We have a legal obligation to have due regard to the Public Sector Equality Duty.

How we will treat your response

We will summarise and/or publish the responses to this consultation 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 policy⁶).

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

⁵ See www.gov.uk/government/publications/consultation-principles-guidance

⁶ Available at www.officeforstudents.org.uk/ofs-privacy/.

the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

Next steps

Subject to the representations received as a result of this consultation, we intend to make a decision on whether and how to take forward the proposals set out in the consultation in spring 2021.

Introduction

1. The OfS's primary aim is to ensure that English higher education is delivering positive outcomes for students – past, present and future. Our regulatory objectives reflect the things that matter most to students: high quality courses, successful outcomes, and the ongoing value of their qualifications. We use the tools in the regulatory framework to mitigate the risk that these regulatory outcomes are not delivered in practice for students from all backgrounds.
2. The OfS's regulatory approach is designed to be predominantly principles-based. Our regulatory requirements are expressed as broad principles rather than as narrow, prescriptive rules. This is because the higher education sector in England is complex and diverse. Imposing a narrow and entirely rules-based approach risks creating a compliance culture that stifles that diversity and discourages innovation, preventing the sector from flourishing. In October 2020, we published an Insight brief,⁷ which describes principles-based regulation in more detail and provides a discussion of the benefits and challenges of such an approach.
3. We also take a risk-based approach to regulation.⁸ This means that we focus regulatory attention on those providers that are at greatest risk of breaching their conditions of registration. For such a risk-based approach to work effectively, we need to assess the risk of a breach of each condition. We undertake a risk assessment when a provider is first registered and this assessment is updated as we receive new information about the provider. New information comes from four main sources:
 - a. Indicators constructed for all providers from routine data collections, for example indicators of student outcomes or indicators of financial performance.
 - b. Reportable events submitted by a provider, for example because the provider does not expect to recruit the number of students it had planned with consequences for its financial position, or a professional body has removed the provider's accreditation.
 - c. Additional information that the OfS has required from a provider, for example because the OfS has already judged that provider to be at increased risk of a breach of one or more of its conditions of registration.
 - d. Notifications about an individual provider from third parties, such as students or whistle-blowers.⁹

⁷ See OfS Insight brief – A Matter of principles: Regulating in the student interest, available at: www.officeforstudents.org.uk/publications/a-matter-of-principles-regulating-in-the-student-interest/.

⁸ We have recently published revised guidance which sets out in more operational detail how we will monitor registered providers in relation to their conditions of registration and the actions that we may take if we consider that a provider is at increased risk of breaching, or has breached, one or more of those conditions. See www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

⁹ We have also recently published guidance explaining in more detail how we use notifications as part of our risk-based approach to monitoring. See www.officeforstudents.org.uk/publications/regulatory-advice-18-notifications-about-providers-from-third-parties/.

4. Reportable events are an important component of this risk-based approach to regulation because relying solely on indicators and notifications would not allow the OfS to maintain a reliable assessment of the risk that a provider may breach its conditions of registration.
5. If the information contained in reportable events were not available to the OfS, we would need to consider whether to increase the range of information routinely collected from all providers. For example, we may need to introduce more frequent routine reporting on matters such as student recruitment and financial forecasts to ensure we understood any adverse developments for every provider in a timely manner. Relying on each provider to identify and report reportable events is therefore an important part of a proportionate, risk-based approach to regulation.
6. The judgement about whether to report a particular matter as a reportable event is for an individual provider to determine. This is because a reportable event for one provider may not be for a reportable event for another provider. For example, the threshold at which an adverse change in student recruitment becomes material to a provider's financial viability (and therefore could constitute a reportable event) will vary depending on the provider's size, business model and the amount of cash it holds. This reflects the OfS's approach as a principles-based, rather than a rules-based, regulator as it recognises that specifying an exhaustive list of events to be reported and the circumstances in which reports should or should not be made risks tick-box compliance on the part of providers. It would also mean that events that happened not to be listed but were nevertheless relevant to the OfS's assessment of risk of an individual provider's compliance with its conditions of registration might not be reported at all.
7. In this consultation, we are seeking views on the way we define a 'reportable event' in the regulatory framework and on revised guidance to help providers to understand and meet the OfS's reporting requirements.
8. The effect of these proposals is to put in place a clear definition of a reportable event and provide guidance to assist providers to understand and meet their reporting obligations. The proposals also provide scope for a more risk-based approach to imposing reporting requirements on providers on the basis of our assessment of regulatory risk. We consider that these proposals are a necessary and proportionate way to facilitate effective reporting from providers such that the OfS has the information it needs to operate its risk-based approach to monitoring and intervention. The proposals minimise regulatory burden for providers that do not represent significant regulatory risk because they allow a provider to make judgements about the materiality of a range of matters that may, in principle, be reportable. At the same time, the proposed approach would ensure that we can detect cases and act where this risk is increased.
9. In developing this consultation, we have considered alternative options for securing our objectives. These options, and the reasons why we do not propose to take them forward, are set out in Annex D.

Our proposals

The issues

10. Section 8 of HERA requires the OfS to impose a mandatory ongoing condition of registration to allow the OfS to compel the production of information from each provider. This is condition F3 (provision of information to the OfS). The regulatory framework says that we will use this condition to require a provider to report certain events or matters as 'reportable events' and this requirement is imposed on each provider through a Notice that sets out the detailed requirements. Reportable events are an important component of the OfS's risk-based approach to regulation because it would not be possible to rely only on indicators and third-party notifications to maintain a reliable assessment of the risk that a provider may breach its conditions of registration. We published further guidance on reportable events in October 2019.¹⁰
11. Our approach to reportable events is consistent with our principles-based approach more broadly insofar as a provider often needs to make its own judgement about whether a particular matter should be reported. During our regulatory activities, we have identified cases in which a provider has not reported serious matters that, in our view, were clearly relevant to our understanding of its compliance with its conditions of registration and should, therefore, have been reported. We have also seen cases of over-reporting such that trivial matters are repeatedly reported without a provider making a credible judgement about whether this is necessary.
12. Our engagement with providers and with their representative bodies suggests that some providers continue to experience difficulties in understanding our requirements, particularly in circumstances in which a provider would prefer to consider the materiality of a matter before deciding whether to report it.
13. During the coronavirus pandemic we have suspended some of our reporting requirements to allow providers to focus on immediate concerns. This has meant that we have collected a very limited range of reportable events and have focused on matters relating to a provider's short-term financial viability and its ability to continue to deliver its courses.¹¹ Our view is that this is not a sustainable position as we are not currently receiving reportable events that are relevant to compliance with the full range of conditions of registration, and to other matters of regulatory interest, and this limits our ability to operate a risk-based monitoring approach and to protect the interests of students and taxpayers.

What are we proposing and why?

Proposal 1: Amend the definition of a 'reportable event'

14. We propose to amend the definition of a 'reportable event' that is contained in paragraph 494 of the regulatory framework. The proposed revised definition is:

¹⁰ See www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/.

¹¹ See www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/

A reportable event is any event or matter that, in the reasonable judgement of the OfS, negatively affects or could negatively affect:

- a. The provider's eligibility for registration with the OfS.
- b. The provider's ability to comply with its conditions of registration.
- c. The provider's eligibility for degree awarding powers or university title, or its ability to comply with the criteria for degree awarding powers.

In interpreting 'the reasonable judgement of the OfS', the OfS will, as a matter of policy, consider whether a reasonable provider intent on complying with all of its conditions of registration and acting in the interests of students and taxpayers (rather than in its own commercial, reputational or other interests), would consider the event or matter to be material.

15. The reason for this proposal is that significant numbers of providers have reported that the current definition and the list of reportable events contained in paragraph 494 is not sufficiently clear to allow them to be confident about the matters they are required to report to the OfS. In particular, providers have asked for clarity about the basis on which the OfS will make judgements about whether a matter should indeed have been reported and about the circumstances in which they are able to make a judgement about the materiality of a particular matter.
16. The current definition of a reportable event contained in the regulatory framework is 'any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration'.
17. The proposed new definition maintains a principles-based approach but is different from the current definition in three respects. Firstly, it focuses the scope of reportable events more clearly on the issues that the OfS needs to know about because they relate to one or more of a provider's:
 - a. Eligibility for registration.
 - b. Compliance with its conditions of registration.
 - c. Eligibility for degree awarding powers or university title, and compliance with the criteria for degree awarding powers.
18. We consider that explicitly relating reportable events to these three areas allows a provider to understand the type of matters that are likely to be within scope for reporting, because they relate directly to the provider's regulatory obligations to the OfS.
19. Secondly, the test the OfS will apply to a provider's reporting decision is included in the proposed new definition. The current definition does not contain such a test and some providers had expressed concern that this made it difficult for them to make judgements about reporting with confidence. The proposed test is that the OfS will consider whether 'a reasonable provider, intent on complying with all of its conditions of registration and acting in the interests of students and taxpayers (rather than in its own commercial, reputational or other

interests), would consider the event or matter to be material'. Prioritisation of the interests of students and taxpayers above the provider's own commercial, reputational or other interests is important in a context in which we have seen examples of under-reporting, either where a clearly-relevant matter is not reported at all, or where a matter is reported in an opaque way that serves to minimise its significance. Our view is that this pattern of reporting is likely to be a result of a provider seeking to prioritise its own reputational or other interests, and to reduce the likelihood of regulatory scrutiny.

20. Thirdly, the new definition clarifies the way in which materiality should be considered by a provider in reaching decisions about what to report. The way in which the concept of 'materiality' is used in the current definition has been reported as presenting particular challenges for providers in making reporting decisions. The proposed new definition removes the concept of 'materiality' from the overarching definition and allows it to be used instead as part of the test the OfS will use to judge whether a provider has met its reporting obligations.
21. We are also proposing to make a small number of consequential amendments to the guidance contained in the regulatory framework that underpins condition F3. These amendments are shown in Annex B and are designed to ensure that the regulatory framework is consistent with the proposed new definition of a 'reportable event'.

Proposal 2: Issue revised guidance on reportable events

22. We propose to issue revised guidance on reportable events as set out in Annex C. The revised guidance is designed to achieve the following:
 - a. Implement the proposed new definition of a 'reportable event' set out in paragraph 14 above.
 - b. Set out the events or matters that the OfS considers should always be reported by all providers.
 - c. Provide guidance about our principles-based approach by setting out a non-exhaustive illustrative list of other events or matters that are likely to be reportable events, subject to a judgement by a provider in each case.
 - d. Make provision for a more risk-based approach to reportable events, such that the range of matters that a provider must always report can be varied on the basis of the OfS's assessment of risk.
 - e. Provide more extensive guidance about the way that a provider should make reporting decisions, including in relation to the materiality of some matters, and the way in which the OfS will make judgements about whether a provider has properly fulfilled its reporting obligations.
23. The reason for this proposal is to respond to requests from providers for more extensive guidance on our requirements for reportable events and to improve reporting practices across the sector. The draft guidance provides a more extensive explanation of the reasons that reportable events are an important part of the OfS's regulatory approach and the way in which a provider should make reporting decisions, including in relation to judgements about the materiality of an event.

24. Setting out a limited number of events or matters that are always reportable provides certainty in these areas for providers. These events or matters are those that are most likely to have a significant impact on a provider's eligibility for registration, its compliance with its conditions of registration, or its eligibility for degree awarding powers or university title and compliance with the criteria for degree awarding powers. More broadly, we have set out examples of type of events or matters that are likely, in principle, to be reportable to help providers to reach their own judgements about reporting, including by considering the materiality of a particular issue.

What would be the effect of these proposals?

25. The effect of these proposals would be to put in place a clear definition of a reportable event and guidance to assist providers to understand and meet their reporting obligations. Our view is that the effect of the proposed amendment to the definition of a reportable event is to improve clarity rather than to change the substantive matters that fall within the scope of our reportable event requirements. For example, a number of the matters currently listed in paragraph 494 of the regulatory framework relate directly to a provider's eligibility for registration or for degree awarding powers; for example, a sale of the provider, or a merger with another entity. However, the current definition does not make clear the link between these types of events and the reasons the OfS would wish to know about them. The proposed new definition addresses this issue.

26. Similarly, our view is that the regulatory framework could be clearer about whether a particular type of event or matter is always reportable, or may be reportable depending on the context in which it arises. We sought to provide clarification about this issue in the October 2019 guidance, but providers continued to request further clarity about materiality judgements in particular. The proposed guidance document identifies those matters that are always reportable for all providers and so removes any ambiguity about this. It also provides guidance about factors that are likely to be relevant to a provider's judgement about reporting where a matter is not always reportable. Such improved clarity will reduce regulatory burden for providers and allow them to take advantage of a principles-based regulatory system as they will need to spend less effort seeking to understand our regulatory requirements.

27. The proposed guidance also provides scope for a more risk-based approach to imposing reporting requirements, with the ability to identify further events or matters as 'always reportable' for a provider that we consider to represent increased regulatory risk. Conversely, those providers that do not represent increased risk would be subject to less extensive requirements. The effect of this element of the proposals would be to target regulatory attention on the basis of risk and to ensure that the OfS's resources are used in an efficient way.

28. Overall, we expect the effect of these proposals to be improved reporting practice across the sector which will allow the OfS to operate its risk-based approach to monitoring and intervention with confidence and so protect the interests of students.

What is the reasoning for these proposals?

29. We consider it necessary to act now to amend the definition of a 'reportable event' in the regulatory framework to make it easier for providers to understand what is required and for us to make judgements about compliance with the OfS's requirements. As the sector emerges from the immediate impact of the coronavirus pandemic we need to be in a position to return to

more normal regulatory activities and a revised approach to reportable events is an important element of this.

30. We are mindful that one of the risks of operating a principles-based regulatory system is that extensive guidance is produced in response to requests by regulated entities for more certainty about how the regulator will interpret its principles. Proliferation of guidance in this way risks over-specifying requirements such that the benefits of a principles-based approach that allow providers to make sound judgements for their own context is lost. In this context, we have considered whether additional guidance on reportable events is necessary and have concluded that it is because it is a core component of the OfS's regulatory approach.
31. Our view is that adopting the proposed approach to reportable events would provide an appropriate balance between minimising regulatory burden for providers that present the least regulatory risk, while ensuring that we have routine access to a range of information that is relevant to our regulation of individual providers.

Proposed implementation

32. Subject to the representations received as a result of this consultation, we intend to make a decision in spring 2021. If our decision is to make changes to the regulatory framework and/or to issue revised guidance, we would do so at that point.

Annex A: Consultation questions

Question 1: Do you agree or disagree with the proposed revision to the definition of a 'reportable event' in paragraph 494 of the regulatory framework? What are your reasons for this?

Question 2: Do you have any comments about the proposed consequential amendments to the guidance in the regulatory framework that underpins condition F3 (provision of information to the OfS)?

Question 3: Do you have any comments about the proposed guidance on reportable events?

Question 4: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider or course or for any particular types of student?

Question 5: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

Question 6: Do you have any other comments?

Annex B: Proposed amendments to the regulatory framework

The text that follows is reproduced from the OfS's regulatory framework published in February 2018.¹² Paragraph numbers are those from the regulatory framework.

Where the proposals contained in this consultation would result in the deletion of text from the regulatory framework, this is shown as follows: ~~deleted text~~. Where the proposals contained in this consultation would result in the addition of text to the regulatory framework, this is shown as follows: **additional text**.

No changes are proposed to the text of condition F3 (provision of information to the OfS) itself – this is shown in the yellow box below.

Condition F3: Provision of information to the OfS

Condition F3: For the purpose of assisting the OfS in performing any function, or exercising any power, conferred on the OfS under any legislation, the governing body of a provider must:

- i. Provide the OfS, or a person nominated by the OfS, with such information as the OfS specifies at the time and in the manner and form specified.
- ii. Permit the OfS to verify, or arrange for the independent verification by a person nominated by the OfS of such information as the OfS specifies at the time and in the manner specified, and must notify the OfS of the outcome of any independent verification at the time and in the manner and form specified.
- iii. Take such steps as the OfS reasonably requests to co-operate with any monitoring or investigation by the OfS, in particular, but not limited to, providing explanations or making available documents to the OfS or a person nominated by it or making available members of staff to meet with the OfS or a person nominated by it.

The requirements in paragraphs (ii) and (iii) do not affect the generality of the requirement in paragraph (i).

Summary

Applies to: all registered providers. Initial or general ongoing condition: ongoing condition.

Legal basis: Section 8 of HERA – mandatory.

Guidance

489. The information that a provider must supply to meet this condition will depend on its category of registration and the OfS's assessment of the risk for that provider.

¹² See www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

490. This condition also applies to any information held by any subcontractors that may be providing services on the provider's behalf.

491. In judging whether the governing body of a provider has provided the OfS, or a person nominated by the OfS, with such information as the OfS specifies at the time and in the manner and form specified, material that the OfS may consider includes:

- a. The quality, reliability and timeliness of information provided by the provider to the OfS, or to a person nominated by the OfS, in respect of any of the provider's conditions of registration or in respect of any of the OfS's functions.
- b. Whether the provider has properly reported 'reportable events' as defined below to the OfS **and done so on the basis of the time frame set out in the relevant F3 Notice.** ~~as soon as reasonably possible once such an event is contemplated or the provider becomes aware of it, or that it is likely to occur.~~
- c. Whether a provider in receipt of student support funding provides the information necessary for the Student Loans Company (SLC) to administer student support in line with regulations made under section 22 of the Teaching and Higher Education Act 1998. This information includes, but is not limited to:
 - i. Data related to eligible courses.
 - ii. Confirmation that the fee charged to a student correctly matches the student's course of study.
 - iii. Information about student registration and attendance.
 - iv. Information about any changes that may affect a student's eligibility for student support.
 - v. Timely information of a student's withdrawal from their course.
- ~~d. Whether the provider has reported to the OfS any information relating to the provider that a reasonable regulator in the OfS's position could regard as material to any of the matters that it regulates.~~
- e. Whether the provider has in place sufficient and appropriate resource and expertise to be able to provide reliable and timely information.

492. In judging whether the governing body of a provider has permitted the OfS to verify, or arrange for the independent verification by a person nominated by the OfS, of such information as the OfS specifies at the time and in the manner specified and has notified the OfS of the outcome of any independent verification at the time and in the manner and form specified, material that the OfS may consider includes:

- a. The substance of the actions taken by the provider to assist the OfS with the verification of information, or to provide information about the outcome of any independent verification.
- b. The findings of data audit activity carried out by, or on behalf of, the OfS or another body.

493. In judging whether the governing body of a provider has taken such steps as the OfS reasonably requests to cooperate with any monitoring or investigation by the OfS, in particular, but not limited to, providing explanations or making available documents to the OfS or a person

nominated by it or making available members of staff to meet with the OfS or a person nominated by it, material that the OfS may consider includes:

- a. The substance and promptness of the actions taken by the provider to cooperate with any monitoring or investigation by the OfS and to provide access to information, documents, systems and people as the OfS deems necessary.
- b. The credibility of any explanations given by the provider.
- c. The availability, completeness and reliability of documents provided to the OfS.
- d. The openness and honesty of members of staff with whom the OfS may ask to meet.

Reportable events

494. A reportable event is any event or matter that, in the reasonable judgement of the OfS, negatively affects or could negatively affect:

- a. The provider's eligibility for registration with the OfS.
- b. The provider's ability to comply with its conditions of registration.
- c. The provider's eligibility for degree awarding powers or university title, or its ability to comply with the criteria for degree awarding powers.

In interpreting 'the reasonable judgement of the OfS', the OfS will, as a matter of policy, consider whether a reasonable provider intent on complying with all of its conditions of registration and acting in the interests of students and taxpayers (rather than in its own commercial, reputational or other interests), would consider the event or matter to be material.

The OfS will set out in separate guidance from time to time further information about how it will apply this definition of a reportable event, including illustrative factors to assist a provider in reaching decisions about reporting. The OfS may also provide further clarification about reportable events in the drafting of Notices issued to providers under condition of registration F3.

~~494. A reportable event is any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration. Reportable events must be reported to the OfS under condition F3(i) and include, but are not limited to:~~

~~a. A change in the provider's circumstances, including but not limited to:~~

- ~~a sale of either the provider itself, a part of it, or its parent~~
- ~~a merger of the provider with another entity~~
- ~~an acquisition by the provider of another entity~~
- ~~a material change in the provider's business model, such as a move to focus on further instead of higher education~~
- ~~a change in the provider's legal status~~

~~☐ other, similar structural changes, such as the establishment of joint ventures, or the separation of the provider into multiple entities~~

~~☐ other changes resulting in a change of ownership of the provider.~~

~~b. A change of ownership. The OfS is principally, but not exclusively, concerned with situations where 50 per cent or more in the shareholding of the registered provider (or the closest equivalent, where the provider is not limited by shares) are, or may be, in common ownership. Common ownership includes:~~

~~☐ ownership by the same person or entity~~

~~☐ ownership by multiple entities themselves under common ownership or control~~

~~☐ ownership by multiple individuals or entities who, by agreement or practice, exercise their ownership rights in a co-ordinated way (and without restricting the scope of our understanding of what constitutes common ownership, we will deem people who are 'connected' to be exercising their ownership rights in a co-ordinated way)~~

~~☐ ownership by multiple individuals or entities on behalf of, or acting under the direction or in the interests of, the same third party, including a case where ownerships are held on trust for a common beneficiary, and~~

~~☐ any similar structure.~~

~~Ownership does not require beneficial ownership. A provider:~~

~~☐ must inform the OfS of any changes in ownership where 50 per cent or more of the ownership of the registered provider is in common ownership, and a change affects the majority ownership rights. This includes the creation of majority ownership rights for the first time, the transfer of majority ownership rights to a new holder, the introduction of a new entity to majority ownership rights and majority ownership rights coming to an end~~

~~☐ must inform the OfS of any change in ownership that affects 15 per cent by value or voting rights of the registered provider's shares, or closest equivalent. A provider must do so whether the change is brought about in one transaction or a series of connected transactions. A provider does not need inform the OfS of entirely unconnected transactions provided none of those transactions is individually above our notification threshold~~

~~☐ is not required to inform the OfS of changes in ownership where 50 per cent or more of the ownership of the registered provider is in common ownership, and the changes only affect less than 15 per cent by value or voting rights of the minority ownership rights.~~

~~Some examples of changes that must be reported include:~~

~~☐ where all or any part of the majority ownership rights in the provider change:~~

~~i. Example 1: there are five shareholders, each holding 10 per cent of the shares in a provider. They are business partners and act in a co-ordinated way. One shareholder sells their shareholding to the others. This must be notified.~~

~~ii. Example 2: there are three shareholders, each holding 20 per cent of the shares in a provider. They are business partners and act in a co-ordinated way. One sells a 10 per cent shareholding to a relative who is a connected person. This must be notified.~~

~~iii. Example 3: There are three shareholders, each holding 20 per cent of the shares in a provider. They are business partners and act in a co-ordinated way. One sells their shareholding to a third party. This must be notified.~~

~~where additional share capital is issued, or shares are bought back, or the voting rights that attach to existing shares are changed~~

~~where a controlling proportion of a provider's shares is directly, or indirectly such as through those of its parent organisation(s), acquired by another individual(s), partnership(s) or organisation(s).~~

~~e. A change of control. 'Control' has the meaning given by section 1124 of the Corporation Tax Act 2010, and 'change of control' means a change in control so defined. Where two or more entities or individuals, by agreement or practice, exercise their rights in a co-ordinated way, with the result that they together have control so defined, each will be treated as having control of the provider. A provider is required to notify the OfS of any change in the individual(s) or entity/ies who have control of the provider.~~

~~d. The provider becoming aware of suspected or actual fraud or financial irregularity.~~

~~e. The provider becoming aware of legal or court action.~~

~~f. The provider resolving to cease to provide higher education.~~

~~g. Regulatory investigation and/or sanction by other regulators, e.g. Charity Commission, Home Office.~~

~~h. Loss of accreditation by a Professional, Statutory or Regulatory Body (PSRB).~~

~~i. Any new partnerships, including validation or subcontractual arrangements.~~

~~j. Opening a new campus.~~

~~k. Intended campus, department, subject or provider closure.~~

~~l. Any other material events with possible financial viability or sustainability implications, including but not limited to:~~

~~a material change in actual or forecast financial performance and/or position~~

~~a material change in gearing~~

~~a material change in student numbers that was not included in the provider's financial forecasts~~

~~for a provider with a legally binding obligation of financial support underpinning its financial sustainability, a withdrawal of the obligation (including as a result of a change of control, even~~

~~where the new owner will offer a similar obligation) or a material adverse change in the counterparty's financial position or other standing that could affect its suitability as counterparty~~

~~□ the sale of significant assets~~

~~□ significant redundancy programmes.~~

Assessment

The OfS will assess, as part of its routine monitoring activities, the quality, reliability and timeliness of information supplied by a provider including through scheduled or ad hoc data audit activity. If the OfS has reason to believe that information received is not reliable, it may choose to investigate the matter. This investigation may result in additional steps to ensure compliance **with condition F3**, whether through enhanced monitoring or the imposition of specific ongoing conditions. The OfS may, for example, require the provider's accountable officer to implement an agreed action plan to improve the provider's information systems and processes and the oversight arrangements for these.

Annex C: Proposed guidance on reportable events

The proposed guidance document on reportable events can be found here:

www.officeforstudents.org.uk/publications/consultation-on-reportable-events/

Annex D: Consideration of alternative proposals

1. In formulating the proposals in this consultation we have considered alternative approaches. These are summarised below.

Make no changes to the current definition of a ‘reportable event’ or to the current guidance

2. We have considered whether it is necessary to make any changes at all to our approach to reportable events at this time. We are mindful of the context within which higher education providers are currently operating because of the coronavirus pandemic. We have made clear our commitment to reducing regulatory burden and supporting providers in the interests of students during this period.¹³ This has included limiting the number of consultations and requests for information to which providers are subject.
3. We have also reduced our reporting requirements during the exceptional circumstances of the pandemic to allow providers to focus on immediate concerns. This has meant that we have collected a very limited range of reportable events and have focused on matters relating to a provider’s short-term financial viability and its ability to continue to deliver its courses.¹⁴ Our view is that this is not a sustainable position as we are not currently receiving reportable events that are relevant to compliance with a range of conditions of registration and this limits our ability to operate a risk-based monitoring approach and to protect the interests of students and taxpayers. The government has signalled that it expects the country to begin to return to a more normal way of life in 2021 and we consider that this means that we need to have the necessary regulatory tools in place to begin to monitor providers’ performance more broadly than is currently the case.
4. We therefore wrote to providers in July 2020 setting out our intention to move back to more normal regulatory activity, and signalled that we expected to provide further guidance on our approach to reportable events. The current proposals are designed to provide clarity to providers about their obligations to report reportable events and to allow us to operate in a more risk-based way such that we can ensure that regulatory burden falls on those providers that represent the most risk. The aspects of our proposals that, in particular, deliver this are those that clarify the areas in which a provider would be expected to make a materiality judgement as part of its reporting decision, and those that set out our ability to extend the range of events or matters that are always reportable for an individual provider because our assessment of regulatory risk is increased. Our view is therefore that it would not be helpful to return to a more normal regulatory environment without making the proposed changes.

¹³ See our letter of 25 March 2020: www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/.

¹⁴ See www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/

Issue revised guidance but make no changes to the definition of a ‘reportable event’ in the regulatory framework

5. We considered whether we could achieve our aims by updating the guidance on our established policy for reportable events without making changes to the definition contained in the regulatory framework and therefore removing the need for further consultation. Recent engagement with sector bodies suggests that the root of the difficulties providers have experienced in understanding our reportable event requirements is the way that the concept of ‘materiality’ is treated in the current definition in the regulatory framework and in the October 2019 guidance and how this translates into the judgements each provider needs to make about reporting. We considered whether it was possible to address this issue through revised guidance alone, but concluded that it was not. This is because we consider it necessary to address all of the following:
 - a. the scope of the definition of a reportable event;
 - b. the matters that are always reportable, and those that may be reportable depending on the context in which they arise; and
 - c. the test the OfS will use to determine whether a provider has properly discharged its reporting obligations.

Addressing all three of these requires amendment to the definition and revised guidance and we are therefore consulting now on both.

Take a more rules-based approach to our reporting requirements

6. We considered whether we should adopt a more rules-based approach to the specification of events or matters that should be reported. The proposed guidance lists a limited number of events or matters that are always reportable by all providers and this is designed to provide clarity about those issues that are most likely to have a significant impact on a provider’s eligibility for registration, its compliance with its conditions of registration, or its eligibility for degree awarding powers or university title, or its ability to comply with the criteria for degree awarding powers.
7. We considered whether we should go further towards a rules-based approach and set parameters for reporting for some types of event. For example, it has been suggested that we set a numerical value to trigger reports of fraud. This could, for example, be a flat rate for all providers of £25,000, or a banded system that sets a value for a provider in relation to its income and expenditure. We have decided not to take this approach because it adds complexity to our requirements and would not properly accommodate the diversity of providers across the sector. For example, for instances of fraud, there are factors that would be relevant to a provider’s reporting decision that are not related to the numerical value of the fraud and we would expect a provider to consider all relevant factors in reaching a reporting decision. Our view is that we should maintain a broadly principles-based approach to reporting to allow each provider to consider its own context. To assist providers in making reasonable judgements about this, we have set out in the proposed definition of a reportable event the test that the OfS will apply in determining whether a provider has met its reporting obligations.

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

The OfS's general duties

1. In formulating these proposals, the OfS has had regard to its general duties as set out in section 2 of HERA – these are reproduced in Annex F. We consider that the proposals in this consultation are particularly relevant to general duties (a) and (g), which relate to institutional autonomy; and best regulatory practice.
2. In formulating these proposals, we have given particular weight to (g): best regulatory practice.
3. We have considered the principles of best regulatory practice and, in particular, considerations of proportionality. We consider the proposed approach set out in this consultation to be proportionate and appropriate in ensuring that the OfS can receive the information it needs from all registered providers to operate its risk-based approach to monitoring and intervention. Our proposal to amend the definition of a 'reportable event' will allow each provider to make judgements about the materiality of some matters when they make decisions about reporting. This reduces regulatory burden and means that our approach is targeted on the issues that are most likely to require regulatory attention. 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.
4. In formulating these proposals, we consider general duty (a) important, but have given less weight to this.
5. The OfS is required to have regard to the need to protect institutional autonomy. We do not, however, have an absolute obligation to protect the autonomy of providers. Our proposals generally take a principles-based approach to setting reporting requirements because using rigid rules-based mechanisms would not allow a provider to make decisions about reporting that take account of its particular context. This is particularly relevant to the elements of our proposals that clarify the use of the concept of 'materiality'. We are therefore giving weight to autonomy insofar as this is consistent with the need for the OfS to receive the information we need about an individual provider to ensure compliance with our conditions of registration.

The Regulators' Code

6. We have had regard to the Regulators' Code and our view is that the following sections are particularly relevant:
 - a. Section 1.1 says that regulators should avoid imposing unnecessary regulatory burdens through their regulatory activities and should choose proportionate approaches to those they regulate, based on relevant factors including, for example, business size and capacity.
 - b. Section 2.1 says that regulators should have mechanisms in place to engage those they regulate, citizens and others to offer views and contribute to the development of their policies.

- c. Section 3 discusses the need to base regulatory activities on risk. Paragraph 3.1 provides for regulators to use an evidence-based approach to determine priority risks and allocate resources where most effective.
- d. Section 5 notes the importance of regulators ensuring that clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply. In particular, Section 5.3 states that regulators should have mechanisms in place to consult those they regulate in relation to the guidance they produce to ensure that it meets their needs.

Guidance issued by the Secretary of State

7. We have had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically the following guidance:¹⁵
 - a. Strategic guidance to the OfS: Priorities for financial year 2018-19 (20 February 2018).
 - b. Strategic guidance to the OfS: Priorities for financial year 2019-20 (27 February 2019).
 - c. Strategic guidance to the OfS: Additional teaching grant and funding/reducing the bureaucratic burden on providers (24 September 2020).
8. We have specifically had regard to the emphasis here on the importance of clarity about our regularity requirements and the importance of taking a risk-based approach and reducing regulatory burden. For example, we have had regard to the Minister of State's request in his strategic guidance of February 2018 for the OfS 'to ensure that unnecessary regulatory burden is avoided as [you] work towards the full implementation of the regulatory framework'.
9. We have also had regard to the Minister of State's comments in her strategic guidance of September 2020, specifically that:
 - a. 'I also support the OfS's commitment to continue to act with transparency and accountability, making clear what reporting is required from which providers and why.'
 - b. 'I would like to see immediate progress... to reduce unnecessary bureaucracy: to ensure the higher education regulatory system is truly proportionate, risk-based, transparent and accountable.'
 - c. '...there is now an opportunity to consider how we can continue to reduce the bureaucratic burden on providers for the long term, enabling them to continue to focus on delivering high quality outcomes for students next year and beyond, while also ensuring you are equipped to deliver the range of functions granted to you under the Higher Education and Research Act 2017 (HERA).'
10. In developing our proposals around the reporting of fraud or financial irregularity, we have also had regard to the Secretary of State's request in his February 2019 strategic guidance, for the

¹⁵ All guidance cited is available at: www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/.

OfS to 'further develop its role relating to countering financial mismanagement or fraud, investigate concerns and taking prompt and effective action...'.

The Public Sector Equality Duty

11. We have had regard to Schedule 1, paragraph 21 of HERA, which extends the Equality Act 2010, and therefore the Public Sector Equality Duty, to the OfS. 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.
12. Through this consultation we are seeking views on any unintended consequences of our proposals, for example on particular types of provider or student. We are also seeking views about the potential impact of our proposals on individuals on the basis of their protected characteristics. Responses to this consultation will inform our assessment of the impact of our proposals on different groups.

Annex F: 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—
 - i. transparent, accountable, proportionate and consistent, and
 - ii. 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—
 - i. to determine the content of particular courses and the manner in which they are taught, supervised and assessed,
 - ii. to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and
 - iii. to determine the criteria for the admission of students and apply those criteria in particular cases, and
 - c. the freedom within the law of academic staff at English higher education providers—
 - i. to question and test received wisdom, and
 - ii. 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.



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