

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 dark blue.

OfS

Regulatory advice 15: Monitoring and intervention

Guidance for providers registered with
the Office for Students

Reference OfS 2020.60

Enquiries to regulation@officeforstudents.org.uk

Publication date 15 December 2020 [updated 8 July and 20 October 2021]

Contents

Introduction	2
A principles-based approach to regulation	4
Engagement with individual providers	4
Minimum baseline regulatory requirements	5
A risk-based approach to monitoring	7
Indicators	8
Reportable events.....	10
Notifications from third parties.....	10
Intervention where there may be increased risk	11
Deciding when and how to intervene.....	11
Evidence-gathering and investigation.....	12
Providing information to the OfS	13
Where there is an increased risk of a breach of a condition	14
Enhanced monitoring	14
Specific conditions of registration.....	15
Enforcement action where there is a breach of a condition	15
Specific conditions of registration.....	17
Monetary penalties.....	17
Suspension of registration.....	18
Variation or revocation of degree awarding powers or revocation of university title	18
Deregistration	19
Refusal to renew an access and participation plan.....	20
Publishing and sharing information about a registered provider	20
Annex A: Intervention factors	22

Introduction

1. The Office for Students (OfS) was established by the Higher Education and Research Act 2017 (HERA), as the independent regulator for English higher education providers. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.
2. Our four primary regulatory objectives are that 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.
3. A higher education provider in England is required to register with the OfS if it wishes to:
 - a. Access public funding, such as public grant funding or student support funding (the latter enables students to access student finance including tuition fee and maintenance loans)
 - b. Recruit international students
 - c. Award its own degrees
 - d. Call itself a university or university college.
4. 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. The conditions of registration are set out in the OfS's regulatory framework.¹ The regulatory framework explains how we will perform our various functions, to enable us to meet our regulatory objectives. All registered providers should be familiar with the content of the regulatory framework.
5. This document provides additional guidance for registered providers on how we will monitor them in relation to their conditions of registration and on 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. It replaces the previous version of our guidance 'Regulatory advice 15: Monitoring and intervention' that we published in October 2019 (OfS 2019.39). This document sets out more fully the way in which we are delivering in practice on the commitment we made in the regulatory framework that providers that do not pose specific increased risk should experience less regulatory burden, now that the regulatory framework is established.

¹ See the OfS's regulatory framework at: www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

6. This document is intended to help providers to understand and meet our regulatory requirements. It should be read in conjunction with the regulatory framework. If there are any inconsistencies between the regulatory framework and this document, then the regulatory framework will prevail.
7. In this document, we refer to other documents which provide additional information and guidance about our regulatory requirements. These are published on our website.²
8. Guidance documents that are particularly relevant to our monitoring and intervention activities include:
 - a. Guidance about matters that providers are required to report to the OfS ('reportable events') (Regulatory advice 16)
 - b. Guidance for providers about how we will treat notifications that we receive about them from third parties, including students (Regulatory advice 18)
 - c. Guidance for providers on the responsibilities of accountable officers (Regulatory advice 10)
 - d. Guidance about preparing and publishing financial statements (Regulatory advice 9)
 - e. Guidance for providers that are exempt charities (Regulatory advice 5). An exempt charity is exempt from registration with and direct regulation by the Charity Commission. The OfS is the principal regulator for those higher education providers in England that are exempt charities and for exempt charities that are closely connected with them
 - f. Guidance about how and in what circumstances the OfS might vary or revoke a provider's degree awarding powers authorisation (Regulatory advice 17)
 - g. Guidance on our approach to determining the amount of a monetary penalty (Regulatory advice 19).
9. The OfS also monitors what providers do to prevent people being drawn into terrorism under their 'Prevent' duty. We have published guidance³ for providers about how we do this.
10. A registered provider should make sure that it is familiar with the guidance documents that are applicable to its registration.

² The full list of regulatory notices and advice is at: www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/regulatory-notices-and-advice/.

³ Available at: www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/counter-terrorism-the-prevent-duty/.

A principles-based approach to regulation

11. 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,⁴ which describes principles-based regulation in more detail and provides a discussion of the benefits and challenges of such an approach.
12. Principles are flexible and adaptable and can apply across a diverse range of contexts. However, this means that they are harder than detailed and prescriptive rules to set out in a definitive way. Those being regulated may be unsure about how to comply with the principles and may seek guidance from the regulator. In turn, the regulator may respond with too much guidance which then risks creating uncertainty. We know that we need to get this balance right – between too much and too little guidance – and we want to foster honest and open dialogue with providers based on a shared understanding of our expectations. These themes are explored in more detail throughout this guidance.

Engagement with individual providers

13. The OfS's principles-based approach means that how we engage with registered providers is of particular importance. Any system of principles-based regulation must be founded on open dialogue between the regulator and the regulated about the purpose and application of the principles. The regulatory framework says that our conversations with providers will focus on regulatory issues and helping providers to understand our regulatory approach.
14. Where we identify behaviour in a provider which we consider may suggest a risk of breaching our conditions of registration, we will usually discuss this with the provider concerned first. We would expect to deal directly with a provider's accountable officer⁵ on regulatory matters and will address correspondence directly to the accountable officer. However, we recognise that, within a provider, other individuals may have delegated responsibility for particular functions, such as finance, quality and data collection, and that it may be appropriate to engage with those individuals directly if they are authorised to act on the provider's behalf.
15. Conversely, we expect a provider to notify us when it becomes aware of something that puts it at risk of breaching a condition. However, we will not generally discuss with a provider its everyday circumstances and activities, and it is not the OfS's role to advise providers about how they should run their organisations.
16. Our engagement with individual providers is intended to allow us to make appropriate regulatory decisions about managing the regulatory risk associated with that provider.

⁴ 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/.

⁵ See Regulatory advice 10: Accountable officers: Guidance for providers on the responsibilities of accountable officers, available at: www.officeforstudents.org.uk/publications/regulatory-advice-10-accountable-officers-guidance-for-providers-on-the-responsibilities-of-accountable-officers/.

17. Our view is that effective regulation in the student interest requires a degree of distance from the sector we regulate, and an ability and willingness to be a dispassionate judge of what is and – most importantly for a regulator – what is not in the student interest. However, we will seek an open and trusting relationship with the providers we regulate; a relationship that is based on mutual respect.

Minimum baseline regulatory requirements

18. Each provider is required to continue to satisfy each of the general ongoing conditions of registration⁶ that are applicable to that provider. These are set out in the letter we send to the chair of a provider’s governing body when the provider is first registered. If we wish to make any changes to the conditions that are applicable to a provider, we will follow the appropriate process and again write to the provider. We would expect each governing body to ensure that it, and the provider’s senior officers, understand the provider’s regulatory obligations as imposed through its conditions of registration.

19. Each condition sets out the minimum level, or ‘baseline’, that a provider must achieve and demonstrate to remain registered with the OfS.

Example:

The D and E conditions set out the minimum baseline requirements for financial sustainability and good governance respectively.

Conditions E1, E2 and E3 set out a qualitative baseline for management and governance – they require, for example, a provider to have in place adequate and effective management and governance arrangements to ‘deliver, in practice, the public interest governance principles that are applicable to it... provide and fully deliver the higher education courses advertised’.

Condition D sets out a qualitative baseline for a provider’s financial performance – it must be ‘viable’ and ‘sustainable’ on the basis of the definitions that underpin the condition.

20. These minimum baselines act as a consumer protection mechanism that ensures that all higher education providers regulated by the OfS offer a minimum level of assurance and performance for students. Above these minimum baselines, providers, as autonomous institutions, are free to pursue their individual missions as they see fit. The OfS does not therefore regulate through its conditions of registration in a way that seeks to drive continuous improvement. The exception to this position is in relation to access and participation plans, where we do require a provider to have in place a plan that delivers continuous improvement.

21. As set out above, the minimum baseline for a condition is expressed in a principles-based way and does not therefore set out lists of detailed requirements for providers to meet.

⁶ The conditions of registration and guidance associated with each of them can be found in the OfS’s regulatory framework at www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

Example:

Condition D does not set a minimum number of liquidity days, or limit levels of borrowing, or set the level of surplus a provider should seek to achieve each year. Instead, it expresses regulatory requirements in terms of the broad outcomes we wish to see and we adopt an approach to making judgements about individual providers that involves data and other evidence such as audited financial statements, or the availability of financial facilities. For example, a provider (regardless of its size or shape or corporate form) must be financially viable and sustainable. It is expected to determine how best to deliver that in its own context.

22. Defining regulatory requirements in a principles-based way can be challenging for providers because it may create less certainty than would be the case if we were to use prescriptive rules. The OfS publishes guidance alongside each condition in the regulatory framework to help providers to interpret the principles-based requirements contained in the condition. The guidance for each condition may contain definitions.

Example:

Condition C1 contains a definition of 'relevant guidance' about how to comply with consumer protection law.

23. The regulatory framework may also include a non-exhaustive list of behaviours that may indicate compliance or non-compliance with the condition. The intention is that these definitions and 'behaviours' assist providers in making judgements about their own compliance.

Example:

The behaviours that may indicate compliance with condition C1 include that the provider regularly reviews the adequacy and effectiveness of its policies and procedures relating to the provision of information; terms and conditions; and complaints handling. While the provider is not required to conduct such reviews, doing so may be an indication that the condition is satisfied.

Similarly, if a provider fails to comply with relevant statutory obligations, as indicated by judicial proceedings and/or steps taken by other regulators, or third parties such as Trading Standards, OIA, CMA, students or their representative bodies, that may represent non-compliant behaviour and indicate that there is a breach of Condition C1.

24. In a principles-based regulatory system it is unavoidably the case that a regulated provider will need to determine for itself the actions it needs to take to comply with regulatory requirements. We understand that this involves effort on the part of the provider and so creates regulatory burden. However, we consider that this approach allows providers the flexibility to meet our requirements in ways that they judge best for their context and students, and is more appropriate than a rigid rules-based approach for such a diverse and complex sector. Where we consider that it would be appropriate to take a more rules-based approach, for example

where we impose a specific condition for an individual provider because we have identified increased risk, we will do so.⁷

A risk-based approach to monitoring

25. In the explanations of the OfS's regulatory approach set out above, there are repeated references to 'risk'. This is because the OfS takes a **risk-based** approach to regulation. Everything that we do is designed to mitigate the risk that our four primary regulatory objectives, referred to above, are not met.
26. The OfS regulates a provider in proportion to the regulatory risk that it poses, not its size, legal form or the length of time that it has been providing higher education (although those contextual factors will be considered where they are relevant to an assessment of risk).
27. In this context, the regulatory risk posed by a provider means the risk of it breaching one or more of its conditions of registration. When assessing 'risk', we will consider the likelihood of something happening, as well as the severity of the impact (on students in particular) if it does happen. A risk may arise from issues within the provider itself, or from the environment in which the provider is operating. An obvious example of the latter is the impact of the coronavirus pandemic on the higher education sector in England.
28. During the initial registration process, the OfS assesses for each provider the risk of a future breach of each ongoing condition of registration. This assessment forms the basis of a 'risk profile' for that provider. We do not assign an overall summative risk rating or category to a provider – for example, Red, Amber or Green – at registration or through our ongoing monitoring activity. This is because each provider's risk profile is different; a summative rating would not reflect the range of risks affecting different providers, or the likelihood of such risks crystallising, and would be a blunt comparative tool.
29. Once a provider is registered, the OfS monitors it in relation to its conditions of registration. This monitoring is used to update a provider's risk profile. Although 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. Understanding the pattern of risk across a provider's whole risk profile is therefore an important part of our monitoring approach.
30. Having assessed and confirmed a provider's compliance with its conditions of registration when it is first registered, we do not systematically reassess its compliance with each condition on a repeating basis. Instead, we monitor in a more proportionate and risk-based way. Regulating in proportion to our assessment of regulatory risk is an obligation placed on us by HERA. It allows us to focus attention and regulatory burden in the places that most need it to protect students – on those providers that are performing below, or close to, the minimum baseline. Monitoring is therefore designed to provide us with signals to show where further engagement or investigation might be necessary before we decide whether regulatory risk is increased for an individual provider. This means that the providers that pose minimal regulatory risk should experience minimal regulatory burden. Conversely, those providers performing below, or close

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/.

to, the minimum baseline are likely to experience significant regulatory attention, including the use of the OfS's enforcement powers.

31. Our **general monitoring requirements** apply to all registered providers. In broad terms, we use information from existing data flows, from providers and from other organisations or persons to inform our assessment of the regulatory risk posed by a provider. More information about these **indicators, reportable events, and notifications from third parties** is set out below.
32. We understand that providers may believe that a monitoring approach underpinned by data and reporting obligations creates regulatory burden for them. However, our view is that collecting data reduces bureaucracy and burden because it enables us to act proportionately. Without data, we could not vary the intensity of our monitoring activities on the basis of risk. We would need an approach that routinely reassessed compliance with each condition for all providers, for example through a scheduled cycle of reassessment along the lines that we undertook during the initial registration process. That would create more burden than our data-led approach.

Indicators

33. Indicators are constructed from data and information flows such as student data returns and a provider's financial statements and forecasts, as well as data from other reliable sources. When used for monitoring purposes⁸, indicators help the OfS to understand a provider's performance, identify trends and anticipate future events. They form part of the overall context for assessing risk but are not used, in themselves, to determine risk or any particular regulatory outcome. Instead, we use them to signal that there is an issue that may warrant further consideration or investigation to establish whether a provider does pose increased regulatory risk in relation to one or more of its conditions of registration. We may then consider the issue further, such as by seeking additional information from the provider.
34. Indicators are likely to include, but not be limited to, the following:⁹
 - a. Overall student numbers and patterns that might suggest unplanned and/or unmanaged growth or contraction
 - b. Applications, offers and acceptances for students with different characteristics
 - c. Changes in student entry requirements and the qualifications profile of students on entry
 - d. Continuation and completion rates
 - e. TEF performance

⁸ The regulatory framework also provides for the use of student indicators, constructed from data previously submitted by a provider, as part of the assessment of student outcomes. In that context, 'indicators' have a different role and use to that described in relation to our monitoring activity referred to in this guidance.

⁹ We are currently consulting on the implementation of our approach to monitoring and intervention in relation to the conditions of registration that relate to quality and standards. We will update this paragraph as necessary following the conclusion of that consultation process.

- f. Degree and other outcomes, including differential outcomes for students with different characteristics, or where there is an unexpected and/or unexplained increase in the number of firsts and 2:1s awarded
 - g. The number, nature or pattern of student complaints to the OIA
 - h. Graduate employment and, in particular, progression to professional jobs and postgraduate study
 - i. Financial viability and sustainability indicators based on financial statements and forecasts.
35. We may obtain this data from provider data returns, such as HESA student data returns, the individual learner record (ILR) submitted by further education colleges, the graduate outcomes survey, and the Aggregate Offshore record.
36. The particular data returns required from a provider for general monitoring purposes will vary depending on a number of factors, for example the category in which it is registered or whether it is a further education or sixth form college funded by the ESFA. The complete list of the data returns that are required from providers of different types, along with the deadlines for submission, are published on the OfS's website.¹⁰
37. We write to each provider with a formal request for the data returns it is required to submit. Where we make such requests for information we are doing so using condition F3 (provision of information to the OfS) or condition F4 (provision of information to the designated data body), and the request is set out in a formal 'Notice'.
38. Whether on a routine basis or in relation to a particular issue, conditions F3 and F4 state that the governing body must provide requested information 'at the time and in the manner and form specified'. This means that a provider must follow the submission requirements and deadlines set out by the OfS in an F3 or F4 Notice. In setting these deadlines, the OfS considers what is being asked of the provider, to consider the reasonableness of the deadline. The timely submission of complete and accurate information is an essential component of the OfS's regulatory system and a registered provider's obligation to provide information under condition F3 or F4 constitutes a legally binding requirement. Where this requirement is not met in full, it is likely to constitute a breach of the condition of registration. The OfS has enforcement powers that it may use in response to a breach of a condition of registration, including the ability to impose a monetary penalty.
39. The OfS does not routinely offer extensions to deadlines for information requirements made under conditions F3 and F4. A provider that will be late submitting information should provide advance notice in writing that it will be late, identify the specific information that will be late, explaining the reasons for such lateness and setting out the actions it will take to prevent future late submission. We expect notification of late submission to be agreed by the provider's accountable officer and to include the specific date on which the provider intends to submit the required information. If a provider believes a deadline set by the OfS is unreasonable it may make representations. While the OfS will consider requests for an extension on a case by case basis, a provider that fails to request an extension until after the deadline for submission has expired may already be in breach of its conditions of registration. When considering regulatory

¹⁰ For deadlines for data submissions see: www.officeforstudents.org.uk/advice-and-guidance/deadlines/.

action in response to a late submission, the OfS will consider the circumstances in an individual case and act proportionately in considering its regulatory response.

Reportable events

40. Providers are required to notify the OfS of certain types of changes or events that would not usually be picked up by data flows alone. These 'reportable events' are an important component of our risk-based approach to regulation. Relying solely on indicators from routine data flows, or other intelligence submitted to us by students or third parties, would not allow us to maintain a reliable assessment of the risk that a provider may breach its conditions of registration.
41. Our definition of a reportable event,¹¹ set out in paragraph 494 of the regulatory framework, focuses on areas which relate directly to a provider's regulatory obligations to the OfS; specifically, its eligibility for registration, its compliance with conditions of registration and, where relevant, its compliance with the requirements for degree awarding powers and/or university title.
42. In general terms, reportable events might include, for example, that a provider is proposing to merge with another provider, or may be unable to pay its creditors as its debts fall due.
43. We have published guidance on reportable events, Regulatory advice 16.¹² This guidance includes a non-exhaustive illustrative list of examples of matters and events that may, in principle, fall within the scope of our reportable events requirements. This includes some events and matters that we have identified as 'always reportable' for all providers. These are matters that, in our judgement, a reasonable provider would always consider to be reportable. For any other events and matters, providers will need to make a judgement about whether a report is required or not.
44. We write to each provider with a formal request to submit reportable events. Again, we are doing so using ongoing condition F3 (provision of information to the OfS). The F3 Notice sets out the provider's reporting obligations in three categories:
- i. Events or matters that are always reportable for all providers, as listed in Regulatory advice 16 as may be revised from time to time;
 - ii. Any events or matters that are always reportable for that provider. Some providers have additional bespoke reporting requirements as a result of our risk-based approach to regulation. For those providers, these requirements are listed in the Notice;
 - iii. Events or matters that may be reportable because they otherwise fall within the definition of a reportable event (in paragraph 494 of the regulatory framework). These are matters for which the provider is expected to make a judgement about reporting.

¹¹ Following a public consultation in 2021, we revised our reporting requirements with effect from 1 January 2022.

¹² Regulatory advice 16: Reportable events is available at:
www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/.

This structuring reflects the structure of our guidance on reportable events referred to above. Paragraphs 58-60 below set out the provisions of condition F3 and the OfS's power to compel the production of information from a registered provider.

45. After a provider has submitted a reportable event, we will review the information and assess its credibility, reliability and completeness. We may decide that a more extensive assessment is required to establish whether a provider does pose increased regulatory risk. We may then seek additional information from the provider or from others.

Notifications from third parties

46. The OfS routinely receives information from students, their parents, staff members of a provider or other third parties. This may include complaints or whistleblowing allegations, although we do not have a direct role in dealing with individual disputes between students and providers.¹³
47. Such notifications may tell us something about a provider's compliance with its conditions of registration and may signal that there is an issue that may warrant further investigation to establish whether a provider does pose increased regulatory risk in relation to one or more of its conditions. We may then consider the issue further, such as by seeking additional information from the provider.
48. We have published separate guidance for providers,¹⁴ and information for students,¹⁵ on our approach to notifications.

Intervention where there may be increased risk

Deciding when and how to intervene

49. As set out above, we do not systematically reassess the compliance of each registered provider with each of its conditions of registration on a scheduled cyclical basis. However, the regulatory framework says that the OfS may take targeted action if it needs to establish the facts before reaching a judgement about whether there is, or is likely to be, a breach of one or more conditions of registration. Such action could be initiated each time we receive a third-party notification or each time a provider's student outcomes indicators show a downward shift. But that type of blanket approach would be unlikely to be proportionate and would risk focusing on providers and issues that do not turn out to represent significant regulatory risk.
50. Adopting a low-risk approach might mean that we investigate cases where there is evidence that suggests even a small increased risk of a breach of one of a provider's conditions of registration. A high-risk approach might mean that we investigate cases only where the evidence suggests a very high likelihood that a condition has been breached. In practice, we need to set our approach to risk between these two extremes. In doing so, it is important to

¹³ The Office of the Independent Adjudicator for higher education (OIA) is the independent body set up to review student complaints about higher education providers in England and Wales. It is usually necessary for students to have made their complaint to the university or college concerned, before complaining to the OIA. www.oiahe.org.uk.

¹⁴ See www.officeforstudents.org.uk/publications/regulatory-advice-18-notifications-about-providers-from-third-parties/.

¹⁵ See www.officeforstudents.org.uk/contact/complaints-and-notifications/.

remember that conditions are expressed as minimum baselines and our expectation is that high performing providers would normally meet these comfortably. This means that even a decrease in performance for a high performing provider may not raise concern such that a condition is breached. Conversely, a similar decrease in performance for a provider that is already operating close to a minimum baseline may raise significant concern that a condition is breached.

51. The regulatory framework (paragraph 167) sets out a range of factors (intervention factors) which we will consider when deciding when, and how, to intervene. We have set these out in Annex A to this document. They include things like how significant the increased risk (or breach) is, how the increased risk or breach came to our attention, what steps the provider is taking (or has taken) to mitigate the increased risk or remedy the breach and the likely impact on students of the increased risk (or breach) and/or any intervention by the OfS. Importantly, not all of the factors will be relevant in every circumstance and we will consider the relevant factors in the round when we are making our decision.
52. The OfS's risk-based, principles-based approach to regulation requires an open dialogue with providers and is underpinned by an expectation that a provider will bring areas of regulatory risk to our attention. It is apparent from the intervention factors that a provider's behaviour plays an important role in our assessments of when and how to intervene. For example, we may be more likely to intervene where we consider that a provider has acted recklessly or deliberately; where the issue came to light through our own monitoring activity rather than having been brought to our attention by the provider itself or where we consider that the provider is not co-operating with our enquiries.
53. When we are deciding when, and how, to intervene, we also have regard to our general duties set out in section 2 of HERA. In particular, we must have regard to the need to use our resources in an efficient, effective and economic way. We will also follow best regulatory practice by ensuring that our actions are prioritised, proportionate, targeted and transparent. This approach to intervention means that there may be circumstances in which we identify a breach of a condition and decide not to take action, for example, because it has a limited impact on students or because the provider has already taken action to rectify the problem.
54. We have published our scheme of delegation¹⁶ which sets out how we will make decisions about individual providers. Decisions may be taken by our Board, the Provider Risk Committee (a committee of the Board) or through delegations to the chief executive, directors and staff, depending upon the nature of the decision.
55. The paragraphs that follow provide further information about our approach to intervention.

Evidence-gathering and investigation

56. We expect there to be cases where the evidence the OfS already holds is sufficient to reach a provisional decision that there is a breach of a condition, or an increased risk that requires intervention. For example, a repeated failure to submit information in response to an F3 Notice by a provider might lead the OfS to determine that the condition has been breached. In such a

¹⁶ The scheme of delegation is available at: www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/.

case, the OfS would be unlikely to seek further evidence, and the provider would be invited to submit any further information it considers relevant as part of a formal representations process.

57. Where we consider that the evidence from our monitoring activities is initially less clear, we would be likely to adopt one of the following approaches:
- a. Engage with a provider to ensure it is aware of issues arising from a reportable event or third-party notification and is taking steps to address these where necessary
 - b. Gather further evidence, from a provider or from elsewhere, to help us decide whether further intervention is necessary
 - c. Use our investigatory powers in cases where engagement or further evidence increases our concerns, or where the evidence suggests that a breach of one or more conditions is likely.

Providing information to the OfS

58. To enable us to carry out our regulatory functions, we require registered providers to provide us with information. Depending on the nature of the information sought, and the circumstances in which we request it, we may simply ask the provider to send it to us. Alternatively, we may compel the production of information under condition F3 (provision of information to the OfS).
59. A request under condition F3 will specify the information we require, the time and date by which it should be sent to us, and the form and manner in which it should be sent. An 'F3 Notice' will be written in formal language, reflecting the fact that condition F3 derives directly from section 8(1)(b) of HERA and therefore imposes a statutory requirement on a provider to comply in full.
60. A provider is required to comply with our F3 requests even where we ask for personal information about individuals¹⁷ or for information which the provider may consider commercially sensitive. We are not able to sign confidentiality agreements (agreements that we will not share information with other bodies), or 'hold harmless' letters in relation to information provided to us because the information sharing requirements set out in section 63 of HERA do not allow us to be constrained in that way. However, we are subject to data protection legislation and more information about our data protection and privacy policy is available on our website.¹⁸ Paragraphs 93-98 below provide more information about our information sharing powers.
61. As set out in paragraph 39 above, we do not routinely provide extensions to the deadline for submission of information, set out in an F3 or F4 Notice. When we are seeking information from an individual provider because we are considering whether intervention may be necessary, we will take the circumstances into account to provide sufficient time for the provider to comply and will consider any request from the provider for additional time to comply with the requirements. In some circumstances, we may need to request information from a provider at very short notice where, for example, we consider there to be a serious risk of a breach of a condition of registration and where we must act quickly. In such circumstances, we consider whether the

¹⁷ The statutory basis for condition F3 does not provide any exemptions in relation to the type of information that the OfS may request and that must therefore be provided. This means that a provider would be required to submit information to the OfS relating to named individuals that would normally be subject to the provider's own data processing notices.

¹⁸ See www.officeforstudents.org.uk/ofs-privacy/.

deadline we are setting is reasonable, including by considering whether the information we require already exists in an accessible form or would have to be compiled by the provider. As set out in paragraph 39, when considering regulatory action in response to a late submission, the OfS will consider the circumstances in an individual case and act proportionately in considering its regulatory response.

62. We may decide that we need to investigate specific concerns further, for example by commissioning a data audit or other appropriate methods, or by requiring financial information submitted by a provider to be re-audited by a specified auditor. Under section 61 and schedule 5 of HERA, we also have **powers of entry and search** to investigate suspected serious breaches of a provider's conditions of registration or its OfS public grant funding or student support funding conditions. To exercise this power, we would first have to obtain a magistrate's warrant. We expect to exercise these powers rarely and only in exceptional circumstances where it appears to us that our usual investigation methods would not be effective, for example where there is reason to believe that relevant information would be destroyed or interfered with if requested in the usual way or if the provider has not complied with prior requests for information or cooperation.

Where there is an increased risk of a breach of a condition

63. Through our monitoring activity, we may identify an increased risk that a provider will breach one or more conditions of registration or identify a suspected or actual breach of a condition. We may then decide that it is necessary to impose additional requirements on the provider, which may include specific condition(s) of registration. It is likely that we will increase our level of engagement with that provider, at the same time.

Enhanced monitoring

64. The regulatory framework says that we may put in place more frequent or more intensive monitoring requirements for a provider. We have previously signalled an intention to minimise our use of enhanced monitoring requirements now that the initial registration process is largely complete.¹⁹ We may, however, still decide to impose such requirements on a provider in the following ways:
- a. An internal 'reminder' to OfS staff undertaking monitoring activity that we need to review a particular issue for a provider on a more frequent or more detailed basis. This does not require any action by the provider – the requirement is visible only within the OfS, to inform our monitoring activities – and does not generate a regulatory burden for the provider.
 - b. A requirement for a provider to submit information to the OfS that goes beyond the baseline reporting requirements for general monitoring. This requirement may require a one-off submission, such as confirmation that borrowing has been agreed by a provider's lenders, or periodic submissions, such as submission of monthly management accounts. This requirement is visible to the provider (it will be imposed through an F3 Notice) and may result in increased regulatory burden for the provider. However, the OfS will only impose this requirement if we consider it to be proportionate in the circumstances.

¹⁹ See www.officeforstudents.org.uk/publications/update-on-the-office-for-students-approach-to-regulation-and-information-about-deadlines-for-data-returns/.

Specific conditions of registration

65. We may decide to impose one or more specific ongoing conditions of registration on a provider to mitigate increased risk of a future breach of a condition. A specific condition allows us to specify action a provider must, or must not, take to mitigate regulatory risk. We would normally take a more rules-based approach to the specification of a specific condition because we would want to be clear about the precise actions a provider is required to take.
66. While HERA does not set limits on the requirements we may impose through a specific condition, the OfS will consider public law and other relevant legal principles when considering the use of its broad powers to impose specific conditions. It is not possible to set out an exhaustive list of the circumstances in which we may choose to impose a specific condition, but the following examples are provided for illustrative purposes:
- a. To require specified improvement in student outcomes and to publish information about the OfS's concerns about a provider's performance
 - b. To require appointment of independent members to a provider's governing body
 - c. To require revisions to contractual terms and conditions for students
 - d. To require a provider to co-operate with an assessment visit from the designated quality body (DQB), or with a review of management and governance arrangements (to be undertaken by the OfS or by a specified third party)
 - e. To require a provider to put in place a policy or process that it does not currently have
 - f. To require an increase in a provider's capacity and capability in financial management in the context of a business turnaround situation
 - g. To require a provider to complete, submit and implement an independent review or an action plan, for example to address concerns about its management and governance arrangements.
67. Where we are minded to impose a specific condition, we will first write to the provider, inviting it to make representations, before we make a final decision on whether or not to impose the specific condition.
68. A specific condition has the same regulatory force as the general ongoing conditions imposed on all registered providers. This means that our enforcement powers (considered below) are available if a provider does not comply in full with a specific condition.

Enforcement action where there is a breach of a condition

69. HERA gives the OfS enforcement powers to use if it appears to the OfS that there is or has been a breach of one or more conditions of registration. It has the power to:
- a. Impose one or more specific ongoing condition of registration
 - b. Impose a monetary penalty
 - c. Refuse to renew a provider's access and participation plan

- d. Suspend aspects of a provider's registration, to include suspending access to student support funding or OfS public grant funding
- e. Vary or revoke a provider's authorisation for degree awarding powers, or revoke a provider's authorisation to use 'university' in its title
- f. Deregister a provider.

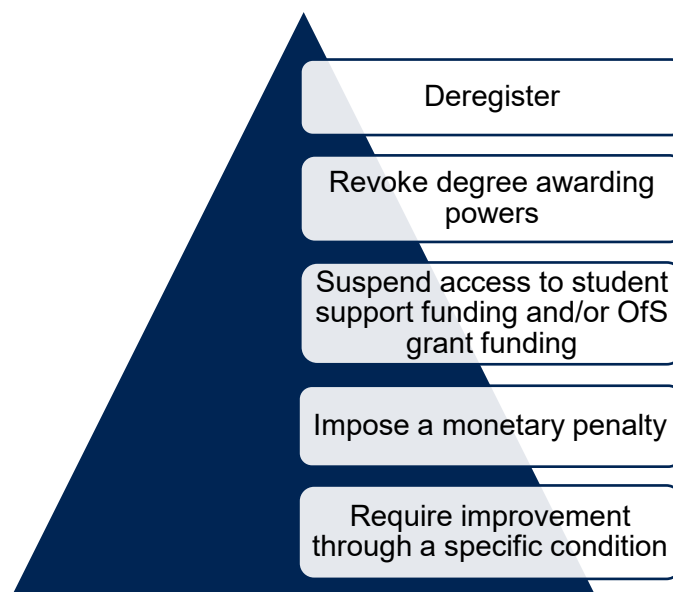
70. The regulatory framework sets out our general approach to the use of these enforcement powers and sets out the processes that we follow if we are minded to impose one or more of these sanctions on a provider. As set out in paragraph 51 above, we will have regard to the intervention factors set out in Annex A, and our general duties, as we decide whether a particular sanction would be appropriate in a provider's circumstances.

71. The primary purpose of using our enforcement powers is to ensure that a provider takes necessary actions to comply with its conditions of registration. This is particularly important because a breach of one or more conditions means that there is likely to be a material impact on a provider's students and our view is that a breach must be remedied as quickly as possible. Where a breach is not remedied in a reasonable timescale, the OfS would expect to escalate its interventions in a way that is proportionate to the provider's circumstances and the risks to students.

72. We could escalate our enforcement action, for example, as set out in Figure 1. The reason for this approach to escalating enforcement for non-compliance with regulatory requirements is to ensure that we are able to act to protect the interests of students while recognising that a number of these interventions would have significant consequences for a provider and our action therefore needs to be proportionate to the situation.

73. In practice, this would mean that a provider that breaches one or more conditions would be likely to be provided with an opportunity to improve its performance. If it does not do so, further intervention would be possible. However, the features of a particular case will always determine the approach we take and we may use sanctions in combination and a particularly serious breach could mean that we would begin our interventions higher up the escalation pyramid. The consequence of this approach is that the OfS would be willing to use its power to deregister a provider that continues to breach conditions, or where an initial breach was judged to be sufficiently serious. Such providers would therefore no longer be able to operate within the regulated higher education sector.

Figure 1: Illustrative example of escalating interventions where there has been a breach of a condition



74. Figure 1 provides an illustrative example of how we might escalate our enforcement action in an individual case. It is important to note that any action we take will depend on the facts of a specific case and will be targeted to address the issue about which we are concerned. This means that in some cases we may begin enforcement action further up the pyramid in Figure 1, or may use sanctions in combination.

75. Further information about each of our enforcement powers is provided below.

Specific conditions of registration

76. For all cases where there is a breach, we would normally expect to impose one or more specific conditions of registration to require a provider to take action to remedy that breach. Examples of specific conditions are set out in paragraph 66 above.

Monetary penalties

77. The ability of the OfS to impose a monetary penalty allows us to address the potential for a provider to gain financially by acting in breach of its conditions of registration. The use of monetary penalties also serves to incentivise compliance by all providers and allows us to take targeted action that is short of suspension of registration or de-registration.

78. Regulations²⁰ set out the maximum penalty that we can impose for each breach and the factors to which we must have regard when deciding whether to impose a penalty and the amount of that penalty. We must notify a provider of our intention to impose a monetary penalty and provide it with an opportunity to make representations to us. A provider may appeal to the First-Tier Tribunal against a decision by the OfS to impose a monetary penalty and the amount of that penalty. Under HERA, monetary penalties received by the OfS must be paid to the UK government.

²⁰ The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019.

79. We have published guidance on our approach to determining the amount of a monetary penalty, including our approach to settlement discounts. The guidance also sets out our approach to the recovery of costs that we incur in relation to the process that results in the imposition of sanctions and to charging interest for late payment of our registration fees.²¹ This guidance was published following a consultation.²²

Suspension of registration

80. Where there is a breach of one or more conditions such that we consider it necessary to reduce immediately the impact of the breach on students or taxpayers, or where previous enforcement action has not been sufficient to lead a provider to remedy a breach, we would be likely to use our power to suspend aspects of a provider's registration with the OfS.²³

81. We will usually notify a provider of our intention to suspend one or more aspects of its registration and the provider will then have an opportunity to make representations to us. However, we may suspend registration with immediate effect if we decide that there is an urgent need to protect public money. Suspension may include, but not be limited to, one or more of:

- a. Suspending a provider's access to the student support system for tuition fee payments for new students.
- b. Suspending a provider's access to the student support system for tuition fee payments for continuing students. We would not normally expect to suspend maintenance payments for current students, unless for example there were concerns about fraud.
- c. Suspending a provider's eligibility for OfS public grant funding under section 39 of HERA, to include formula and other funding, or for direct grant funding from UKRI under section 97 of HERA.

82. When we suspend a provider's registration, we will explain to it the effects of that suspension – which of the benefits of being registered will not apply during the period of suspension – and the remedial action we require it to take. For example, we may decide that the provider will not be permitted to draw down student support for new students for a particular course and is required to take steps to improve the quality of that course, during the period of suspension. We would expect to be able to target any suspension such that, for example, where a breach of a B condition related to courses in a provider's business school, the suspension would be focused on those courses rather than on courses in other subject areas.

Variation or revocation of degree awarding powers or revocation of university title

83. Some registered providers hold degree awarding powers (DAPs) and may also be authorised to use the protected term 'university' in their name. The OfS has the power to vary or revoke degree awarding powers, and to revoke university (and university college) title. HERA sets out

²¹ 'Regulatory advice 19: The OfS's approach to determining the amount of a monetary penalty' is available at www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/.

²² Our analysis of the responses to the consultation and our policy response is available at www.officeforstudents.org.uk/publications/consultation-on-ofs-approach-to-monetary-penalties/.

²³ Our approach to suspension of registration is set out in paragraphs 182-187 of the regulatory framework.

in sections 44, 45 and 58 the circumstances in which we may exercise these powers and the process that we must follow to do so.²⁴

84. We would expect to be able to target any variation of the authorisation of degree-awarding powers such that, for example, where a breach of a B condition related to courses delivered through partnership arrangements, or in a particular subject area, the variation would be focused on those courses. This would be likely to involve one or more of:

- a. Varying a provider's authorisation to place a time limit on it.
- b. Varying a provider's authorisation to prevent it from awarding qualifications through partnership arrangements.
- c. Varying a provider's authorisation to prevent it from awarding qualifications in some subjects, or for some levels of study.
- d. Revoking a provider's authorisation.

85. A consequence of revoking a provider's authorisation to award degrees is that it no longer meets OfS's eligibility criteria to use the term 'university' in its title. In these circumstances we would therefore expect to revoke authorisation to use that title.²⁵ Revocation of university (or university college) title is possible if any of the condition in section 58 of HERA are satisfied.

Deregistration

86. We are able to **deregister** a provider in certain circumstances, set out in sections 18-20 of HERA and explained in more detail in the regulatory framework.²⁶

87. We may decide to deregister a provider where:

- a. We have previously imposed a suspension or monetary penalty and there is a further or continuing breach of the same condition(s) (or a breach of other condition(s)); or
- b. It appears to us that there is or has been a breach of a condition of registration and our powers to impose a monetary penalty or suspension are insufficient to deal with the breach (whether or not they have been, are being, or are to be exercised in relation to it).

88. Where there is a serious breach of one or more conditions, or where previous enforcement action has not remedied a breach, we would be likely to use our power to deregister a provider.

89. We must notify a provider in advance of any intention to deregister it and the provider is then able to make representations to us. A provider may appeal to the First-Tier Tribunal against a decision by the OfS to deregister it.

²⁴ Our approach to variation and revocation of degree awarding powers is set out in paragraphs 269-277 of the regulatory framework and in Regulatory advice 17: www.officeforstudents.org.uk/publications/regulatory-advice-17-variation-and-revocation-of-daps/.

²⁵ Our approach to the revocation of university title is set out in paragraphs 296-304 of the regulatory framework.

²⁶ Our approach to deregistration is set out in paragraphs 188-196 of the regulatory framework.

Refusal to renew an access and participation plan

90. We may refuse to approve a provider's access and participation plan where we consider that the provider has failed to comply with a general provision of its current plan or with its mandatory fee limit condition.²⁷
91. Such a refusal would, usually, be a last resort. In most cases we would seek to use our other powers of intervention, for example by imposing a specific condition, where we have concerns about the provider's access and participation plan.
92. Regulations²⁸ set out the factors to which we must have regard when deciding whether or not to refuse to renew a plan, and the process that we must follow if we are minded to refuse renewal.

Publishing and sharing information about a registered provider

93. The OfS may publish information about a registered provider or share such information with third parties.
94. We are required to publish certain information about a provider on the Register²⁹ and in other circumstances. The regulatory framework says that we will normally publish further information about a provider.³⁰ In addition, we may publish data about providers as part of our publication of official statistics.
95. We are currently consulting on our approach to the publication of information about individual providers and the factors we should take into account in deciding whether and when to publish such information. This section will be updated at the end of that consultation process.³¹
96. Section 63 of HERA permits the OfS to share information about a registered provider with other persons or bodies. We may do so where we consider it to be necessary to enable us to perform one of our functions. For example, we may share information about a potential breach of consumer protection law with the Advertising Standards Agency. In deciding whether to disclose information in a particular case, we will consider the circumstances of the particular case and we will also have regard to our general duties.³²
97. We may also share information with other, specified, organisations for the purposes of the performance of their relevant functions. These bodies and their relevant functions are listed in

²⁷ Our approach to refusal to renew an access and participation plan is set out in paragraphs 197-199 of the regulatory framework.

²⁸ The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019.

²⁹ See The Office for Students (Register of English Higher Education Providers) Regulations 2017, available at: www.legislation.gov.uk/ukxi/2017/1196/contents/made.

³⁰ See the table under paragraph 72 in the regulatory framework.

³¹ See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

³² Our general duties are set out in section 2 of HERA and in paragraph 10 of the regulatory framework.

legislation³³ and include the Competition and Markets Authority, the Office of the Independent Adjudicator for higher education (the 'OIA'), Ofsted and HM Revenue and Customs. For example, we may share with the OIA information about a provider's planned closure of a campus to allow the OIA to put in place arrangements to handle any complaints made by students. In deciding whether to disclose information in a particular case, we will consider the circumstances of the particular case and we will also have regard to our general duties.

98. Section 78 of HERA also gives us specific powers to share information with the Secretary of State. Section 113 of HERA empowers the OfS to work with the devolved administrations and their funding bodies, and with UKRI.

³³ See The Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018 at: www.legislation.gov.uk/uksi/2018/607/pdfs/uksi_20180607_en.pdf [PDF].

Annex A: Intervention factors

The OfS will consider a range of factors before deciding whether to intervene, and if so, which form that intervention should take. Not all factors will be relevant in every circumstance, and the OfS will consider the relevant factors in the round when making its decision. The factors include:

- a. How significant the risk of a breach is, on the basis of its likelihood and the severity of the impact of the breach should it occur. An intervention is more likely where the OfS considers the risk of breach to be significant, or when a breach has already occurred.
- b. The actual or likely severity of the impact of a breach (either from a single instance or a number of instances). An intervention is more likely where: the impact on students is significant (e.g. student study is disrupted, there are breaches to the student contract, a large number of students are affected); the taxpayer's interests have been severely affected (costs have increased affecting value for money); or there is reputational damage to the sector as a whole (and considering fairness to providers that did comply).
- c. The impact of an intervention on students. Where the use of an intervention would have a materially negative impact on students and their experience, the OfS is more likely to decide to use enhanced monitoring or a specific ongoing conditions of registration to address the issue.
- d. The nature of the increased risk or breach and whether a particular intervention would be effective in mitigating the risk or remedying the breach.
- e. How the OfS became aware of the increased risk or breach. An intervention is more likely where the provider has not notified the OfS and the OfS has become aware from other sources, such as through its own regulatory activity, whistleblowing, or media reporting.
- f. How long the underlying causes of the increased risk or the breach have existed and the extent to which these occurred deliberately or recklessly, or whether there is dishonesty involved. An intervention is more likely where the issues are longstanding, the provider has been deliberate or reckless or where issues have been concealed.
- g. Steps taken by the provider to mitigate the increased risk or remedy the breach. An intervention is more likely to be used where a provider has not provided sufficient evidence that it has taken reasonable steps to mitigate an increased risk or prevent or remedy a breach.
- h. The likelihood that a breach could happen again, including the provider's history of regulatory compliance. An intervention is more likely to be used where a provider has a history of non-compliance or the OfS has concerns that a breach could happen again.
- i. The extent to which the provider cooperates with the OfS's investigations and enquiries. An intervention is more likely where a provider does not fully cooperate with the OfS.
- j. Any gain (financial or otherwise) made by the provider as a result of the increased risk or the breach. An intervention is more likely where a provider has gained from increased risk or non-compliance.

- k. The provider's behaviour. An intervention is more likely when increased risk of a breach or a breach is as a result of the provider acting deliberately or recklessly; failing to act, or acting dishonestly or seeking to cover-up information.
- l. The action that the regulator has taken in previous similar cases. An intervention is more likely where the OfS has intervened in a previous similar case.
- m. Any action taken by another regulator to remedy the increased risk or breach. An intervention is more likely to be used where an increased risk or a breach is not being remedied by another regulator's actions.
- n. The extent to which any increased risk or breach has created a lack of confidence in the higher education sector. An intervention is more likely where action taken by a provider or a group of providers has undermined confidence in the higher education sector and therefore affected providers that have complied.



© The Office for Students copyright 2020

This publication is available under the Open Government Licence 3.0.

www.nationalarchives.gov.uk/doc/open-government-licence/version/3/