

# **Consultation on new requirements for the oversight of subcontractual arrangements in English higher education**

This consultation runs from **22 July** to **1 October 2025**.

**Reference** OfS 2025.38

**Enquiries to** [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

**Publication date** 22 July 2025

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

The Office for Students is proposing to implement new requirements for English higher education providers relating to subcontractual provision in the English higher education sector. This consultation sets out the background to our proposals, the reasons we are proposing to make changes and what we expect those changes to achieve.

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## Timing

Start: **22 July 2025**

End: **1 October 2025**

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## Who should respond?

We welcome the views of all types and size of provider, especially those **students, staff, academics and leaders at higher education providers** who are **engaged in subcontractual partnerships** either as a lead or as a delivery provider, and that will be engaging in any new arrangements resulting from this consultation.

We are also interested in the views of **schools and further education colleges, employers, third sector organisations, policy bodies**, and others with an interest in protecting public funding and promoting quality in higher education.

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## How to respond

Please respond by **1 October 2025**.

Please use the online response form available at <https://survey.officeforstudents.org.uk/s/consultation-on-subcontractual-arrangements/>

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## 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 policy).<sup>1</sup>

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<sup>1</sup> Available at [www.officeforstudents.org.uk/ofs-privacy/](http://www.officeforstudents.org.uk/ofs-privacy/).

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

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## Next steps

We will publish a summary of responses to this consultation in Autumn 2025. We will explain how and why we have arrived at our decisions, and how we have addressed any concerns raised by respondents. We will then set out next steps in the policy and implementation process.

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## Enquiries

Email [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

Alternatively, call our public enquiry line on 0117 931 7317.

We intend to host consultation event[s] before this consultation closes for responses. These events will provide an opportunity for you to ask any questions you may have. Dates and times will be published via OfS communication channels.

If you require this document in an **alternative format**, or you need assistance with the online form, contact [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk). (**Please note:** this email address should **not** be used for submitting your consultation response.)

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For more information about our work to date on subcontractual provision, please visit the OfS website.<sup>2</sup>

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<sup>2</sup> OfS, '[Subcontractual arrangements in higher education](#)' (Insight 22).

## Executive summary

1. Since the OfS was established as the regulator for higher education in England, we have seen significant and rapid change in some parts of the sector, including in the delivery of courses through subcontractual partnerships (or ‘franchising’).
2. This approach contributes to the sector’s diversity. But the OfS has identified problems where a university subcontracts its courses without robust oversight of its partners. In particular, we are seeing insufficient control of recruitment, admissions, student attendance and assessment in subcontractual arrangements. We are particularly concerned where these risks impact students traditionally less likely to succeed in higher education (for example, because of weak academic skills, lack of prior knowledge or limited understanding of the UK higher education system).
3. Many higher education providers already have appropriate measures in place but, in some cases, there is evidence of subcontractual arrangements significantly increasing risk for students and taxpayers. Left unchecked, this could lead to further financial and reputational issues for the sector, and a collapse of confidence in this approach.
4. We are therefore consulting on proposals for a new general ongoing condition of registration. This would require a lead provider operating through subcontractual arrangements to strengthen its oversight, and increase transparency, of this area of activity.
5. This involves the following proposals:
  - a. **Introduce a new general ongoing condition of registration (condition E8)**
    - The proposed condition would apply to all registered providers, but a provider would only have obligations under the condition if it meets certain criteria.
    - The obligations under the proposed condition would require a lead provider in a subcontractual arrangement to ensure that any risks to the interests of students and/or taxpayers posed by its existing and future relevant subcontractual arrangements are effectively identified and addressed.
  - b. **A ‘governance and control’ environment for subcontractual provision**
    - The overarching requirement is for each relevant provider to have in place oversight and control mechanisms to effectively manage risks associated with subcontractual arrangements.
    - To support the delivery of the overarching requirement, a provider would be required to maintain a comprehensive source of information covering the policies, procedures and other provisions relating to the oversight of its subcontractual arrangements.
  - c. **A provider to operate in accordance with the comprehensive source of information**
    - Our initial view is that a provider having internal policies would not be sufficient to manage the risks associated with its subcontractual arrangements unless those

policies are implemented effectively in practice, so the condition requires a provider to operate in accordance with the measures set out in its comprehensive source of information, and have appropriate capacity and resources to do so.

**d. Power of direction**

- This includes a requirement for a provider to comply with any subcontractual arrangement direction (SCD) imposed by the OfS in circumstances where we have reasonable grounds to suspect that the provider's subcontractual arrangements (either existing or future arrangements) pose significant risks to students' or taxpayers' interests.
- An SCD would likely require a provider to take (or refrain from taking) specified actions in a certain timeframe. Our proposed condition and guidance include some non-exhaustive examples of the type of actions we would expect to consider in these circumstances.

**e. Requirements for providers to provide specified information relating to subcontractual provision**

- Following this consultation, should we decide to implement the proposed condition, we also propose amending associated regulatory advice documents.
- These amendments would require providers to publish specified information relating to their subcontractual arrangements in their audited accounts, and add new events or matters that they must report to the OfS.

**f. Monitoring compliance**

- Our aim is that the regulatory requirements contained in proposed condition E8 drive changes in providers' behaviour without us needing to introduce a comprehensive routine approach to monitoring.
- We expect to be able to detect shortcomings in relation to compliance with proposed condition E8 through our normal regulatory activity. However, where we identify concerns in relation to individual providers, we would expect to take regulatory action, including enforcement, where we consider that appropriate.

6. The proposed condition is designed to improve the resilience of the higher education sector, including by protecting quality and improving governance. Its implementation would lead to fewer incidences of poor practice in subcontractual arrangements, with students and taxpayers better protected.
7. We are consulting on these proposals until 1 October 2025 and welcome the views of all types and sizes of higher education provider, especially those currently involved in subcontractual arrangements or that are planning to be. We are also interested in the views of students, schools and further education colleges, employers, third sector organisations, policy bodies, and others with an interest in protecting public funding and promoting quality in higher education.

8. We plan to publish our final decisions after considering consultation responses in late 2025, and are proposing that any new condition would take effect from early 2026.



# Introduction

## Background

9. The English higher education sector is diverse. Students can choose to study at a wide range of providers, offering many different pathways for them to achieve their chosen qualification. While many of these pathways, such as the traditional three-year, first-degree course, are tried and tested over many years, the sector is also developing new, alternative routes for students.
10. Since the OfS was established as the regulator for English higher education, we have seen significant and rapid change in some parts of the sector. It is therefore important that our regulation evolves to ensure that we can continue to deliver our regulatory objectives for all students, including those choosing to study through emerging delivery models.
11. This consultation introduces our proposals for a new, general ongoing condition of registration ('condition E8') relating to the oversight of subcontractual arrangements by a lead provider and sets out our reasoning for these proposals.
12. Subcontractual delivery means that students are registered with a 'lead' provider. Usually, though not always, the lead provider is a larger university. However, the lead provider enters a contractual relationship with a 'delivery' partner that is responsible for delivering some services to students. This often includes admissions, teaching and assessment. The lead provider generally keeps part of students' tuition fees, and the rest goes to the delivery provider. These arrangements are commonly known as franchised provision.
13. This type of delivery in the English higher education sector has increased substantially. The number of students registered on subcontracted courses has expanded significantly in recent years. The OfS's 'size and shape of provision' dashboard<sup>3</sup> shows that 80 per cent of students in subcontractual arrangements are registered on full-time, undergraduate courses. In the 2019-20 academic year, five per cent of entrants on full-time, undergraduate courses were studying through a subcontractual arrangement. By 2022-23, this had risen to 10.5 per cent of entrants. Our data indicates that, across all years of study, more than 116,000 students were registered on courses delivered through subcontractual arrangements by 2022-23.
14. In some cases, subcontractual delivery can increase the choices available to students. Some subcontractual provision is for highly specialised courses that are difficult for universities to provide directly. Subcontractual provision can arguably benefit some students for whom study in a more traditional university setting may not be feasible.
15. When delivered well, the OfS agrees that this is a valued aspect of the diversity of the English sector.
16. However, the OfS and others (such as the Department for Education (DfE) and the National Audit Office)<sup>4</sup> have identified concerns that this activity is driving substantial risks in the sector. Our experience suggests that these risks are heightened when a delivery provider

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<sup>3</sup> OfS, '[Size and shape of provision data dashboard: Data dashboard](#)'.

<sup>4</sup> GOV.UK, '[Franchising in higher education](#)', (See Section 1.1).

operates on a 'for-profit' basis and they use tuition fees to return profits to owners or shareholders rather than reinvesting for the benefit of the student experience. This is also the case when delivery partners are not registered with (and therefore not regulated by) the OfS. This creates a potential gap between the OfS's oversight of a lead provider's activities and the teaching of students in these arrangements.

17. Our regulatory framework is clear that the lead provider is responsible for all students registered to study with them, regardless of where they are taught. As well as the contractual relationship with students, our general ongoing conditions of registration apply in the same way to students taught by subcontracted delivery partners as they do to students taught directly by the registering provider. However, the more distant nature of the relationship between a lead provider and these students, in our view, increases the need for robust oversight of delivery.
18. Where oversight by a lead provider is not robust, in the way it first enters a partnership or over its lifetime, the risks for students and taxpayers are higher. Our investigations and intelligence are leading to a substantial body of evidence suggesting poor practice at a number of delivery providers. Examples include:
  - a. vulnerable students being recruited to courses, and applying for student loans, without any realistic prospect of them being able to meaningfully engage or benefit from higher education
  - b. entire cohorts of students being supported to commit academic misconduct to ensure onwards progression through a course
  - c. entire cohorts of students being recruited onto courses and taking out student loans where the quality of the delivery is so poor that not a single student can achieve the qualification that they have studied
  - d. course design being sub-standard and not offering sufficient academic challenge for the designated level of study, risking the award of qualifications that do not meet sector standards.
19. The OfS has published a summary of some of the key risks associated with this method of delivery in our September 2024 Insight brief on these issues.<sup>5</sup> and published several case reports setting out concerns at particular providers.
20. Our student outcomes data demonstrates that outcomes for students tend to be less positive for courses delivered through subcontracting. Moreover, we have observed a marked deterioration in continuation for full-time, first-degree students on subcontracted courses since 2019. Continuation (the proportion of students continuing to the second year of their course) for entrants in 2019-20 was 82.1 per cent, but fell to 77.7 per cent for 2020-21 entrants and further to 75.2 per cent for 2021-22 entrants. This has been consistently below the continuation rate for students taught by the provider with which they are registered, which was 88.6 per cent for 2021-22 entrants.<sup>6</sup> Our most recent data shows that, at a sector level,

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<sup>5</sup> OfS, '[Subcontractual arrangements in higher education](#)', (Insight 22).

<sup>6</sup> See [Student characteristics data: Outcomes data dashboard](#).

median continuation rates for subcontracted, full-time, first degrees have been below the 80 per cent threshold used in our regulation of student outcomes in the last two years' of data.

21. These examples, in our view, clearly illustrate the risks to students' interests and to public funding arising from a lack of robust oversight of subcontracted provision by the lead provider. We are concerned that students are not receiving value for money from their courses because of the risk of poor quality outcomes. Some of this information is in the public domain, for example in providers' financial statements, and the student outcomes published by the OfS. We do not consider, however, that how lead and delivery partners split students' tuition fees is sufficiently transparent, which means students do not have this information as they make decisions about what and where to study. Similarly, we are concerned that taxpayers are not receiving value for money. Our concerns here are exacerbated by the examples we have set out above where there are indications of inappropriate use of public funds.
22. The OfS has committed significant resources to the investigation and regulation of inappropriate activity generated from subcontracted provision as part of our ongoing efforts to address poor performance. We are aware of significant actions initiated by others, such as the DfE, to protect public money and preserve public funds. Our view is that, for us and others, continuing to rely on individual interventions of this nature is not the most effective or sustainable approach to managing these risks in the long term. Rather, a more effective and sustainable approach is increased accountability for the lead provider.
23. Finally, we consider that the continued emergence of well-publicised examples of poor practice in this part of the sector represents a reputational risk to the sector as a whole. As well as investigation and case reports published by the OfS, recent journalistic investigations leading to articles in the New York Times and the Sunday Times, and public enquiries such as the one undertaken by the National Audit Office,<sup>7</sup> have had a wide-ranging audience and have presented a negative view of quality within the English higher education sector. At the OfS, we believe one of the most effective ways to achieve our regulatory objectives is to ensure that the outstanding reputation of the sector overall is maintained, and that students can continue to have confidence in the qualifications they achieve.
24. We believe, therefore, that now is the time to consider imposing stronger requirements for the oversight of subcontracted provision, and improved transparency about the nature of these partnerships. Without such measures, the harms to students and taxpayers are likely to continue.
25. We recognise that DfE has recently consulted on the registration of certain delivery providers, and is still considering its response. However, we believe it is appropriate for us to consult on the proposals in this consultation because they focus on providers that are already registered with the OfS, and the general ongoing conditions of registration that apply to them. If implemented, our proposals would form part of a wider set of measures intended to reduce risk in this area of the sector that would complement the proposals from DfE. Given the severity of the risks associated with this type of provision, we do not consider it would be prudent to delay our consultation. We are mindful of the possibility that DfE could decide to take a different approach towards subcontractual arrangements. If that becomes the case

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<sup>7</sup> National Audit Office, '[Investigation into student finance for study at franchised higher education providers](#)'.

before we take our final decisions in response to this consultation, we will take account of any plans published by DfE.

## What we are consulting on

26. We are consulting on proposals to introduce a new general ongoing condition of registration setting out oversight and control requirements that would be in effect for a provider engaged in subcontractual arrangements. We propose that the condition should apply to all registered providers, but that the obligations in the condition will only take effect for a provider engaged in subcontractual arrangements meeting our proposed threshold for inclusion.
27. In this consultation, we have set out proposals for the operation of the condition, including:
  - a. the application of the condition
  - b. requirements for a provider to establish a governance and control environment for subcontractual provision to ensure appropriate oversight
  - g. operational requirements for a provider
  - c. proposals to include a power of direction within the condition where the OfS may require a provider to take a specific action
  - d. additional disclosures in a provider's audited financial statements
  - e. monitoring compliance.
28. The consultation questions are listed in full in Annex A.

## Documents referred to in this consultation

In this consultation we refer to the following documents:

### **'Securing student success: Regulatory framework for higher education in England'**

This publication sets out the OfS's approach to regulation of English higher education providers, including the requirements of general ongoing conditions of registration applicable to registered providers.

### **'Regulatory advice 9: Accounts direction' for accounting periods beginning on or after 1 August 2019**

This accounts direction sets out the information that providers are required to include in their audited financial statements.

### **'Regulatory advice 15: Guidance and monitoring'**

This document provides further information for registered providers on monitoring and intervention, and should be read in conjunction with the regulatory framework.

### **'Regulatory advice 16: Reportable events'**

This document provides guidance for registered providers about the events or matters they are required to report to the OfS.

**‘Regulatory advice 21: Publication of information’**

This regulatory advice sets out guidance for registered providers on the approach we will take to the publication of information about providers.

## Proposal 1: Introduce a new general ongoing condition of registration (condition E8)

### Overview

The OfS is proposing a new, general ongoing condition of registration relating to subcontractual arrangements. The proposed condition and guidance are available at: [www.officeforstudents.org.uk/publications/consultation-on-new-requirements-for-the-oversight-of-subcontractual-arrangements-in-english-higher-education/](http://www.officeforstudents.org.uk/publications/consultation-on-new-requirements-for-the-oversight-of-subcontractual-arrangements-in-english-higher-education/)

In summary:

- The proposed condition would apply to all registered providers, but a provider would only have obligations under the condition if it meets certain criteria.
- A provider that is the lead provider in one or more subcontractual arrangements with 100 or more students would have obligations under the proposed condition.
- Some subcontractual arrangements are exempt, for example arrangements with public bodies such as NHS trusts or police commissioners.
- The obligations under the proposed condition would require a lead provider to establish effective oversight and control mechanisms for its subcontractual arrangements so that risks to students and taxpayers are mitigated.

### Overarching purpose

29. In this consultation, the OfS sets out a proposal to introduce a new, general ongoing condition of registration that will apply to all registered providers (condition E8). Under this proposed condition, any registered lead provider that meets the criteria relating to subcontracting would be required to meet certain requirements. These requirements are intended to ensure that a lead provider maintains robust oversight of subcontractual provision, thereby reducing the risk of poor practice. They are also intended to increase transparency about subcontracted delivery.
30. The overarching requirement of the proposed condition would require each lead provider to ensure that any risks to the interests of students and/or taxpayers posed by its existing and future subcontractual arrangements are effectively identified and addressed. The condition also sets out a non-exhaustive set of specific requirements with which a provider must comply. The OfS may choose to assess whether a provider has met the overarching obligation of the condition, and undertake any consequent regulatory or enforcement activity, even when a provider has, for example, complied with the requirement to have a single comprehensive source of information.
31. The overarching purpose of this proposed condition is to protect both students and taxpayers from risks that can arise in subcontractual arrangements. We recognise that, where well managed and of high quality, subcontracted partnerships can offer benefits to students. This

is particularly true where such arrangements enable access to niche or specialist courses that may not be feasible within a traditional university setting.

32. However, as explained in the introduction to this consultation, the OfS has serious concerns about subcontractual provision where a lead provider does not provide sufficient oversight. In many cases, these concerns stem from inadequate controls over student recruitment, particularly where subcontractual arrangements disproportionately recruit students who may have limited access to independent advice and guidance about their higher education choices. We have also identified serious concerns indicating that student loan funding may be being claimed inappropriately. Our experience suggests that these issues occur more frequently in subcontractual provision than in other parts of the sector.
33. These concerns have increased both in frequency and in severity in recent years. Taken together, our concerns have led us to reach a view that some types of subcontractual provision present a higher risk to students and taxpayers. We therefore consider that it is appropriate to propose the introduction of more detailed requirements for oversight from the lead provider for this method of delivery into our regulatory framework.

## Scope

34. We are proposing that condition E8 will apply to all registered providers. However, we propose that a provider would generally only need to meet the obligations in the condition if certain circumstances apply:
- The provider acts as a lead provider in a partnership with at least one other provider that meets our definition of subcontractual provision;
  - The subcontracted partnerships do not fall into our exempt categories (see paragraph 54 below); and
  - The total number of the lead provider's students taught under these arrangements is, or is planned to be, at least 100 (FTE) students in any given academic year. The 100-student threshold is met within a single partnership or cumulatively across multiple partnerships.
35. Under the proposed condition, each provider would need to determine whether it meets the criteria set out in the condition (and therefore if the requirements apply to its circumstances). A provider will need to continue to review whether the requirements of the condition apply following new or planned intakes of students where an intake (or planned intake) will result in the provider passing the 100-student threshold. However, from time to time, the OfS may review student data to ensure that all relevant providers have identified, and are complying with, their obligations.
36. We also propose that the OfS would have the ability to bring an individual provider within the scope of the condition. Where a lead provider would not normally meet our criteria for having obligations under the condition but regulatory intelligence and the reasonable view of the OfS suggests a material risk to students' or taxpayers' interest, we would consider applying the obligations of the condition.

37. Further, the OfS may seek (through further consultation) to amend the categories considered exempt from the condition, either to widen or reduce the coverage of the condition in response to our evolving view of risk to students or taxpayers.
38. In our definitions of subcontractual arrangements, we refer to students ‘registered’ at a lead provider. For clarity, we intend to use the same definition of ‘registered’ that is included in Higher Education Students Early Statistics survey (HESES) guidance.<sup>8</sup> We have chosen to take this approach so that it is consistent with the use of these terms elsewhere in the OfS’s regulation.

### **Student numbers for existing arrangements**

39. A provider with existing subcontractual arrangements, where these arrangements are already in operation and students registered for courses, should use the existing OfS methodology for counting student numbers to determine whether it meets the threshold of 100 or more students (FTE).<sup>9</sup> Our data definitions are now established in the sector and offer a consistent approach to reporting student numbers that is used across the OfS’s regulation. While developing these proposals, we have not identified any reason that would indicate we should change our methodology for calculating student numbers in this instance. However, we will consider any feedback received in response to this consultation on whether FTE or headcount measures are most appropriate.
40. This student number threshold would apply when proposed condition E8 comes into effect, and on a rolling basis each academic year while the relevant subcontractual arrangement(s) remain in place. Where a provider usually has at least 100 students in its subcontractual arrangements, but experiences slightly lower recruitment in a given year, we do not expect the provider to consider itself to be out of scope of the obligations of proposed condition E8 for that academic year.
41. We have proposed the 100-student threshold following review of OfS data of student numbers registered with a lead provider but taught elsewhere. We consider that setting the threshold at this level enables us to bring into scope delivery arrangements that are sufficiently large to present a risk to students or taxpayers in the event of poor practice, but remains proportionate so that excessive burden is not placed on the smallest arrangements. We consider that these delivery arrangements are a high-risk area of provision at the current time, and so have set a lower student number threshold than we might do for lower risk areas. We have considered matters of regulatory burden, and have balanced this with our view of risk and believe that the proposed approach is proportionate. In general, we do not think that a higher threshold would sufficiently address the risks associated with subcontractual provision because of concerns we have identified about data accuracy and compliance.

### **Planned intakes**

42. The proposed condition indicates that a provider would have obligations if there is a material likelihood that the number of students registered on its existing or future arrangements will reach 100 or more students. To consider its obligations under this aspect of the proposed

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<sup>8</sup> OfS, ‘[Higher Education Students Early Statistics survey 2023-24](#)’

<sup>9</sup> See [Student numbers for regulatory purposes](#).



condition, a provider would need to take account of its planned intakes as well as its registered students. When referring to a planned intake, we mean where:

- a provider has established its recruitment plans for an upcoming intake so that it has determined the number of places it intends to offer to students (normally this would refer to recruitment for the following academic year, either through a single intake or cumulatively across multiple intakes)
- filling those places would result in 100 or more students being included in the HESA Student Return or ILR.

43. As set out above, where a provider has established partnerships already in operation, and those partnerships are recruiting students on a regular academic cycle, then the provider should use the established OfS methodology for counting student numbers. However, where a provider is entering into new arrangements, or adjusting the number of students being recruited under existing arrangements, it should consider whether there is a material likelihood of student numbers reaching 100 or more, and therefore how this affects its obligations under the proposed condition.
44. A provider should rely on its own plans for identifying whether the number of students it plans to enrol will, or will be likely to, reach the threshold of 100 students once students are registered. We recognise that there will often be some small variations in actual numbers recruited from any recruitment round. However, we expect a provider's planning to be sufficiently robust to enable accurate identification of planned intakes that will result in at least 100 students in subcontractual arrangements. Where this is the case, we would expect oversight and control mechanisms relevant to student recruitment and admissions to be applied to this intake.
45. We have proposed to include planned intakes as part of the student number threshold because we have identified a number of risks linked to the recruitment and admissions cycle in subcontractual provision. For example, inadequate checks on students' English language ability or capacity for study at the level required for higher education will occur at this early stage. Our proposals require a provider to include control mechanisms that will cover this stage of the student lifecycle because this is the point at which we think many poor practices initially occur. This means that control mechanisms applied by a lead provider will, in some cases, need to be put in place during the academic year before students have taken up their places – for example, if an increase in planned recruitment will (or is materially likely to) bring a provider into the scope of the condition, or if a new subcontractual arrangement is established that intends to recruit at least 100 students.
46. For clarity, we do not intend to apply the proposed condition retrospectively. The requirements of the condition would apply only to activities undertaken after the condition takes effect. However, the provisions of the proposed condition are intended to ensure that a provider implements appropriate oversight and control measures at an appropriate point to manage risks associated with the recruitment and admissions cycle.
47. From time to time, the OfS would conduct a review of student data and a provider's forecasts in its financial statements to ensure relevant providers have identified their obligations. We have included more information about our expected approach should a provider recruit more

students than originally planned. See paragraphs 10-12 of our proposed guidance, available at [www.officeforstudents.org.uk/publications/consultation-on-new-requirements-for-the-oversight-of-subcontractual-arrangements-in-english-higher-education/](http://www.officeforstudents.org.uk/publications/consultation-on-new-requirements-for-the-oversight-of-subcontractual-arrangements-in-english-higher-education/)

## **Bringing an individual provider into scope**

48. In some circumstances the obligations contained in the condition may be appropriate for a provider that does not meet the criteria set out above. We have therefore included provision in the proposed condition that these obligations would also apply to a provider should the OfS determine that it has reasonable grounds to suspect that the provider's existing or future subcontractual arrangements pose material risk to the interests of students and / or taxpayers.
49. When assessing whether a provider's relevant subcontractual arrangements pose material risks to the interests of students and taxpayers, the OfS will consider regulatory information and intelligence it holds about the provider. This may include, but is not limited to:
  - a. third party notifications
  - b. reportable events
  - c. the outcomes of any OfS investigation or improvement work with the provider
  - d. any OfS quality assessment
  - e. any OfS data audit
  - f. information received from other regulatory or relevant public bodies.
50. We do not propose to set out a pre-determined set of circumstances in which this would apply, or to establish a threshold of materiality that would apply. Instead, the OfS would consider each example on a case-by-case basis, with reference to the relevant risks to students and taxpayers that we have set out in guidance. We are proposing this approach because our primary reason for including this provision in the condition is to allow the OfS to respond to unexpected or unusual circumstances as the sector continues to evolve. This includes (but is not limited to) circumstances where the OfS identifies, or has reasonable grounds to suspect, that a provider has engaged in manipulation of its contractual arrangements in a way that is designed to avoid scrutiny under the proposed condition. We consider that an approach of this nature would be a strong indicator of potential poor practice and resulting risks to students and taxpayers that would be likely to justify applying these obligations.
51. Where the OfS does decide to apply this provision of the condition, we would write to the provider explaining the reasons for our decision and why we consider it to be an appropriate intervention.
52. Where we have brought an individual provider into the scope of the condition's obligations, we would review the appropriateness of that approach on a regular basis. Again, we do not intend proposing an exact set of circumstances when such an intervention would be removed. Instead, we would make individual judgements taking into account risks to students and taxpayers.

## Exclusions

53. We propose to focus on domestic franchising arrangements, as this is where we have identified the highest risks, and so this proposal excludes transnational education (TNE) from the scope of this condition. Subcontractual activity involving a delivery partner based outside, or delivering teaching outside of, England, Scotland, Wales or Northern Ireland is not covered. We may choose to undertake further analysis and adapt our approach in future.
54. Our proposed categories of exempt types of subcontractual partnerships are aligned with those included in DfE's recent consultation.<sup>10</sup> We have reviewed these exemptions directly and consider that they appropriately represent lower risk partnerships that are already subject to additional oversight protecting the use of public money, and that it would therefore not be proportionate to impose further obligations on these partnerships. However, we are keen to remain consistent with any exemptions adopted by DfE in future regulations where appropriate, as we think alignment and consistency would be beneficial for the sector. We will, therefore, have regard to the outcomes of DfE's consultation when that is published.

## Alternatives we considered

55. Given that the requirements of the proposed condition E8 would not take effect for all providers registered with the OfS, we considered whether it would be appropriate to instead impose specific conditions of registration on an individual provider where we have regulatory concerns. However, we are of the view that this would not be the most efficient or effective approach for addressing our concerns, because:
- a. Our policy objective is intended to have a preventative effect, enabling a lead provider to identify and mitigate risk of poor practice at an early stage, and using specific ongoing conditions would mean that regulatory controls would likely be lagged.
  - b. We consider that implementing a general ongoing condition of registration sends a clearer signal to the sector about our expectations for managing subcontractual partnerships now and in the future. Including our requirements in the regulatory framework in this way provides greater transparency for all providers and for other stakeholders.
  - c. In taking this approach, we consider that we are also creating an opportunity for providers to learn from each other about effective practice that has been developed. If we were to choose to impose specific conditions on a provider where we had concerns, we think that we would be less likely to surface positive developments in this type of course delivery.
  - d. Imposing specific conditions on an individual basis is a more resource-intensive approach for the OfS, and we consider that introducing a general ongoing condition is a more efficient use of our limited resources. This is particularly the case given the frequency of changes in partnership arrangements between lead and delivery providers, where new arrangements are entered into and existing relationships terminated

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<sup>10</sup> GOV.UK, '[Franchising in higher education](#)'.

regularly. This would present challenges to the OfS in ensuring all relevant providers were subject to an appropriate specific condition of registration.

56. We are proposing that the requirements in the new condition relate to the lead provider rather than to the delivery provider in a subcontractual arrangement. There are two primary reasons for this approach:
- a. First, there is currently no requirement for a delivery provider to be registered with the OfS. Although DfE has recently consulted<sup>11</sup> on requiring any delivery provider with 300 or more students to register with the OfS, outcomes of that consultation have not been published at the time of writing and there remains a proportion of delivery providers that are not subject to OfS regulation. However, even if this registration requirement were to be introduced in line with DfE's proposals, a lead provider would continue to hold regulatory responsibility for students registered with them.
  - b. Second, as students on these courses are registered with the lead provider, it is with this provider that they have their contractual relationship. Student fees, including student loan funding, are paid to the lead provider, which is ultimately responsible for delivering the course requirements, including in the event the delivery partner closes. We therefore consider that it is appropriate for the lead provider to take a sufficiently active role in governance and assurance for all courses for which it holds responsibility, and receives income through student fees. We also consider that risks to the reputation of the sector are better mitigated by placing responsibility for governance with lead providers, which tend to be larger, more well-known institutions with an ongoing incentive to ensure compliance.
57. In addition, in the OfS's regulatory framework, the general ongoing conditions of registration relating to quality of courses (our 'B' conditions) explain that they apply to 'the quality of higher education provided in any manner or form by, **or on behalf of**, a provider'. In our view, there is a clear obligation already in place for a lead provider, as well as for a registered delivery provider, in relation to the quality of courses. We consider that it is likely to be challenging for a provider to demonstrate their compliance with this obligation without having appropriate controls in place for oversight of its delivery partners.
58. We considered whether we should apply any different criteria to determine whether a provider would have obligations under the condition. In particular, we considered whether we should include only subcontractual arrangements where the delivery provider operates on a for-profit basis because our regulatory intelligence is particularly concentrated on these providers. On balance, however, we decided against proposing this as a criterion for the application of the condition. While there may be tensions inherent in for-profit provision between the use of students' tuition fee funding to generate profits for shareholders and owners, versus reinvestment for the benefit of students, our concerns about the risks in subcontractual activity are not limited to this part of the sector.
59. We considered whether it would be proportionate to include a mechanism to exclude a provider with 100 or more students where we think the risks to students and taxpayers are lower, but on balance we decided not to include this in the proposed condition. We consider

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<sup>11</sup> GOV.UK '[Franchising in higher education](#)'.

that the requirements we are proposing reflect good practice for dealing with inherent risks of a subcontractual business model, rather than being measures that are necessary only where those risks are particularly acute. We also consider that this would reduce the preventative effect we are seeking to achieve with the condition.

**Question 1**

Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.

**Question 2**

In your view, is the proposed definition of subcontractual arrangements clear and does it correctly capture the nature of these arrangements?

**Question 3**

Do you have any comments on the scope of providers that will have obligations under the proposed condition?

**Question 4**

Do you have any comments on the impact of these proposals for particular groups of students?

**Question 5**

Do you have any alternative suggestions to the approach we have proposed?

## Proposal 2: A governance and control environment for subcontractual provision

### Overview

The proposed condition includes an overarching requirement for each relevant provider to have in place oversight and control mechanisms to effectively manage risks associated with subcontractual arrangements. A provider would be required to achieve this by:

- a. Maintaining a comprehensive source of information covering the policies, procedures and other provisions relating to the oversight of its subcontractual arrangements; and
- b. Operating in accordance with its comprehensive source of information, so that the combination of policies and practices results in effective oversight in practice (see Proposal 3).

### The overarching requirement

60. The proposed condition is intended to ensure that a lead provider takes an active and direct role in overseeing its subcontracted delivery. Current regulatory intelligence suggests that this is not consistently happening. In some cases, a lead provider adopts a 'hands-off' approach in these arrangements, which has enabled some delivery providers to engage in poor, and in some cases potentially fraudulent, practices without fear of jeopardising their contract.
61. It is important to emphasise that lead providers hold significant accountability in these arrangements. They have the same responsibilities to students studying through subcontractual provision as they do to students studying directly with them. This includes responsibilities for the quality of education, student support and outcomes. All existing regulatory requirements, such as those relating to quality, student protection and financial sustainability, apply equally to subcontractual provision.
62. However, despite these existing responsibilities, we have observed instances of weak oversight and insufficient control in lead providers. This has led to poor practices that undermine students' and/or taxpayers' interests. As a result, we consider more prescriptive regulatory requirements are now necessary to ensure that lead providers fulfil their obligations effectively and consistently.
63. One contributing factor to weak oversight can be the financial incentives associated with subcontractual arrangements. For some providers, these partnerships provide a significant revenue stream. Our analysis of provider annual financial returns shows that some are financially reliant on these arrangements to such an extent that the sudden loss of this income could threaten their ability to continue to operate. In these cases, the financial importance of maintaining subcontractual partnerships may discourage a lead provider from implementing robust oversight measures because this could introduce additional costs or operational complexity.

64. Financial reliance is not the only reason for weak oversight. Other contributing factors may include:
- lack of internal capacity or expertise to manage complex subcontractual relationships
  - insufficient governance structures or unclear lines of accountability within a lead provider
  - overreliance on trust-based relationships with delivery partners, rather than formalised assurance processes
  - inadequate risk assessment frameworks that fail to identify or respond to emerging issues in subcontracted delivery.
65. Weak oversight arrangements create opportunities for poor practices to emerge and flourish. The proposed condition is therefore focused on closing these oversight gaps, with the aim of improving quality, accountability and outcomes across subcontractual provision.
66. We have considered the burden that our proposals may place on a provider. However, in practice we would expect many of the measures for oversight and control to be an existing part of effective governance and due diligence at most providers. In many cases, therefore, we consider that the amount of additional work a provider may need to complete if our proposal is implemented is not likely to be extensive. Further, we would expect that the complexity of controls required would be relative to the size and complexity of a particular subcontractual arrangement, again limiting the extent of activity required by a lead provider managing a smaller partnership.
67. We have balanced considerations about burden with our concerns about risks relating to subcontractual provision, which we have set out in this document. We have noted the prevalence of published reports on these risks (and have provided links to some examples elsewhere in this document). We would expect that many providers seeking to support good practice will have taken the opportunity to review their own approach and identify their level of risk. For a provider that has not already undertaken similar work, we think that the level of risk to students and taxpayers is now sufficiently high for us to require them to do so.

## **Comprehensive source of information**

68. The proposed condition includes a requirement for a provider to establish and maintain a comprehensive source of information. This source should either set out the information required to comply with the proposed condition, or provide a clear summary of that information with links to additional, more detailed documents.
69. We consider this requirement would promote greater clarity about the oversight and control mechanisms a provider uses to manage its subcontractual arrangements. In our view, consolidating the relevant policies, procedures and supporting information offers a more rounded view of the combined measures in place at a provider, and encourages each provider to consider its approach holistically. Without this consolidated information, we think there is a risk that a provider will rely on a fragmented set of measures that do not clearly link together to provide the level of oversight required.

70. When developing a comprehensive source of information, our view is that a provider should consider the risks to student and/or taxpayers that may arise from subcontractual arrangements. Our draft guidance sets out some non-exhaustive examples of key risks. A provider should assess risks associated with its own operating context as well as that of its delivery partners.
71. Under the proposed condition, a provider would not be required to submit this information to the OfS on a routine basis. However, it must ensure that documented evidence of compliance is available on request.
72. The OfS may request this information where needed, for example:<sup>12</sup>
- as part of an investigation involving a lead or a delivery provider, where subcontractual delivery is relevant
  - in response to relevant regulatory intelligence or information where the OfS considers it would be appropriate to do so. For example, if we observe significant growth in the number of students registered in a particular subcontractual arrangement, we may request information about a provider's policies and procedures. This helps us assess whether the oversight measures are appropriate for managing the increased risk.

## Minimum content requirements

73. Proposed condition E8 allows a provider flexibility in how it manages its subcontractual arrangements, subject to restrictions to ensure this delivers the objective of effective risk management. To support consistency across the sector we are proposing a set of minimum content requirements that a provider must include in their comprehensive source of information.
74. Although we expect that the content of the comprehensive source of information would reflect the specific context of a provider's subcontractual arrangements, we are proposing these minimum requirements as a baseline. Our view is that these requirements would be a necessary part of any set of effective arrangements. To avoid any potential confusion, we are also proposing that the condition would require a provider to make sure that any additional areas of content over and above the minimum content requirements do not conflict with, or undermine, these requirements.

## The five core areas

75. Our proposals group the minimum content requirements into five areas:
- a. Rationale
  - b. New arrangements
  - c. Governing body oversight

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<sup>12</sup> We would base these requests for information on the OfS's general ongoing condition of registration that concerns providing information to the OfS (condition F3). For further information, see: [Condition F3: Provision of information to the OfS](#).



- d. Policies and procedures
- e. Adaptability.

## **Rationale**

- 76. As explained in the draft guidance to the proposed condition, we propose that a provider must include a clear explanation of the rationale underpinning its approach to subcontracting in its comprehensive source of information. This rationale should be consistent with the information published in the provider's audited financial statements (see Proposal 5), and must explain the provider's overall strategic and academic rationale for entering into subcontractual arrangements, including those arrangements already in place. Further, it must include an explanation of how the provider ensures that students' interests are prioritised within subcontractual arrangements.
- 77. We have included this requirement because we think it is important that a provider is able to clearly articulate their objectives for engaging in subcontractual arrangements and the benefits they expect to achieve. A well-defined rationale supports alignment with a provider's broader organisational strategy and improves accountability for decision making.
- 78. Many providers will already have a strategic approach that would meet this proposed requirement. The benefits of subcontracting will vary for different providers, but we expect that each provider's rationale would demonstrate a clear consideration of the benefits to current and future students. Where a provider has not yet established a clear strategy for subcontracting, we consider that this increases the risk that due diligence and oversight processes may be less effective in the absence of a coherent overarching approach.

## **New arrangements**

- 79. We propose that a provider must set out how it will assess the feasibility of potential new subcontracting arrangements, to include:
  - a. How the new arrangement would support the provider's rationale and strategic objectives for subcontracting; and
  - b. Any potential risks to the provider's ability to comply with wider regulatory requirements, including quality and standards arising from the new arrangement.
- 80. This is intended to ensure that a provider has developed a clear and effective approach to due diligence when considering new subcontractual arrangements. Where a provider has reached a decision that it will not enter into any new arrangements in the foreseeable future, it should include a statement to that effect in the comprehensive source of information.
- 81. We consider this requirement is important because of the significant breadth and depth of regulatory responsibility placed on the lead provider in a subcontractual arrangement. In particular, we are mindful of the lead provider's responsibility for the quality of education provided by the delivery partner, and its responsibilities to students if the delivery provider fails. Our view is that appropriate assurance and due diligence work before entering into a contract is an essential element of preventing significant risk and issues emerging during delivery. Regulatory engagement to date has indicated that this work has not always been

carried out effectively, or been given sufficient prominence in decision making by a lead provider to have this preventative effect for managing regulatory risk.

82. Many providers will already have procedures in place for their wider delivery, and we agree that it is appropriate that a provider draws on these, or any other relevant organisational procedures, to meet this minimum content requirement. However, we expect each provider to be able to demonstrate that it has adapted established procedures as necessary so that they can be effectively applied to the specific risks associated with subcontractual delivery.

### **Governing body oversight**

83. We propose that a lead provider should be required to demonstrate how its governing body maintains control and oversight of the activity of delivery partners so that it is able to identify and address risks to students and taxpayers. This includes the risks we have set out in Box A of our draft guidance. A provider can determine its own arrangements for the proper oversight of these issues by its governing body and/or any sub-committee of the governing body, as well as the delegation for day-to-day management of this activity by the provider's senior managers. However, the purpose of this requirement is to ensure that a governing body has clear oversight of subcontractual activity, and a provider's arrangements must therefore reflect that purpose.
84. One of the tools we expect that governing bodies will draw on to provide oversight is the use of internal and external audit. Where that is the case, our proposed minimum content requirements include provision for a governing body to demonstrate how it ensures the quality and effectiveness of these audit arrangements in practice. Details of a provider's internal and external audit arrangements for subcontractual partnerships must also form part of the comprehensive source of information.
85. Our proposed minimum content requirements relating to a governing body's oversight reflect the importance we place on active and effective oversight at the most senior levels of a provider. We expect a governing body to have oversight of all its registered students. It is therefore right that the interests of these students, and any risks associated with the delivery of these contracts, are adequately considered by the provider's governing body.
86. The governing body also has a role to test the lead provider's internal controls and risk management, used to control their partners delivery. Normally, this would be delivered via an internal audit function and overseen by a risk and audit committee of a provider's governing body. We accept that some providers (especially smaller providers) may not have a risk and audit committee and may have established a different arrangement to undertake these duties as part of the governing body.
87. Although we recognise that a lead provider has wide-ranging regulatory responsibilities in relation to their subcontractual arrangements, we have particularly highlighted the need for governing bodies to take an active role in ensuring that regulatory obligations relating to quality and standards of courses are met. We think this is important because our experience suggests that this is sometimes an area that receives less attention at board level compared with the financial aspects of subcontractual activity. Where this is the case, we require a provider and its governing body to rectify this by developing and implementing the minimum content requirements. Where a provider and its governing body already has relevant

oversight and control mechanisms in place, we would expect it to review these periodically to identify any ongoing improvements in their effectiveness.

## **Policies and procedures**

88. Annex 1 of the proposed condition sets out a suite of policies and procedures that a provider is required to include in their comprehensive source of information. As with other aspects of our minimum content requirements, these are intended as the core, mandatory content. We strongly encourage providers to consider whether there are other policies and procedures that it would be beneficial to implement to reflect their operating context.
89. As part of our proposals, a lead provider should establish how they will monitor performance at a delivery partner to ensure courses delivered under subcontractual arrangements comply with the OfS's conditions for quality and standards (the 'B' conditions). While key performance indicators and other performance measures related to the terms of the contract are of course helpful, we expect a provider to consider other indicators of performance relative to the risks to students and taxpayers that we have set out in this consultation. For example, data relating to student outcomes or to instances of academic misconduct are likely to be relevant. We would expect to see policies in place that explain when a provider would escalate performance issues, and the actions it would expect to take. In line with our overarching objective for this proposed condition, we would be more likely to be satisfied with interventions that demonstrate an active approach by the lead provider such as deployment of staff to a delivery provider or increased scrutiny of delivery provider data.
90. We also propose requiring a lead provider to be clear about the measures they will take to protect students and taxpayers if a delivery provider fails. Many providers will have included content of this nature in their student protection plan, and should continue to do so. However, a student protection plan is a public-facing document and therefore not always an appropriate channel for documenting detailed internal procedures. A student protection plan may form part of the provider's comprehensive source of information. We would, however, expect providers to consider whether they should develop additional information about the steps they will take to manage a delivery partner's failure.
91. In due course we will publish the outcomes of our consultation about the conditions of registration that require providers to treat students fairly (the 'C' conditions). We are likely to consider whether there should be any additional minimum content requirements relating to these conditions.<sup>13</sup>
92. The documents that we have proposed including are those which we consider most directly address the risks to students and taxpayers arising from subcontractual provision. In line with other requirements in the proposed condition, they are intended to ensure that a lead provider has appropriate measures in place to support them in taking an active role in the oversight and control of the delivery of their subcontractual arrangements. When taken as a combined set of measures, our view is that these policies and procedures will support providers in establishing a core framework for this oversight.
93. However, we recognise that the OfS cannot reasonably foresee all appropriate oversight and control measures that could apply across the diverse range of providers in the sector. We

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<sup>13</sup> OfS, 'Part 1: Proposals for new initial condition C5 - Treating students fairly'.

also think that to attempt to do so would be overly prescriptive in many cases, adding burden and curtailing institutional autonomy for some providers where this is not necessary. We have therefore limited the mandatory policies and procedures specified in our proposals to those that we expect to be relevant to **all** providers engaged in subcontractual arrangements. As with other proposed requirements of this condition, there remains an onus on each provider to properly consider its own needs and implement additional policies and procedures that it thinks necessary. In many cases, we anticipate that providers will already have a number of these measures in place.

94. We are particularly interested in the steps that a provider will take if a delivery partner performs poorly or fails. Our interactions with providers have indicated that contractual terms of subcontractual arrangements do not always provide adequately for managing delivery issues such as financial concerns, widespread academic misconduct or low course quality. We consider that contracts should contain an element of contingency planning to manage risk, especially as the lead provider continues to hold regulatory responsibility for those students. We therefore propose to introduce a minimum content requirement that a lead provider establishes (if they have not done so already) the steps it will take to intervene in such circumstances.

## **Adaptability**

95. The proposed minimum content requirements include documentation setting out how a provider's oversight and control mechanisms will remain effective in the face of changes in a provider's subcontractual arrangements or wider operating context.
96. The most common circumstance where we expect this to materialise is if the number of students a delivery partner teaches increases significantly, particularly where this increase occurs over a short period of time. Quality investigations conducted by the OfS have highlighted that this can increase risks to students, especially where the leader provider has not planned effectively for the growth.<sup>14</sup> For example, a provider may not have recruited additional student support staff alongside the increased numbers of students, or not have increased library resources, such that students' access to reading materials is reduced.
97. In terms of oversight and control mechanisms, we consider that the most likely effect of a rapid and significant growth in the student population is that staff no longer have the capacity to carry out checks and other control activities contained within the provider's policies, weakening oversight. We have observed this effect in investigations that we have conducted. Our proposal to include a specific requirement here is intended to prompt a provider to fully consider the impact of change, and any subsequent adjustments to oversight and control that might be needed, in a timely way that prevents risks from escalating.
98. Consideration of adaptability is not, however, limited to student number growth. Other examples may include a partnership entering a teach-out phase, introduction of a new subject area or other examples not listed here. A provider is expected to determine how it will ensure adequate review and adapt the comprehensive source of information so that measures remain fit for purpose.

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<sup>14</sup> See our published reports for [assessments of student outcomes](#) and [other ongoing quality conditions of registration](#).

## Timing and implementation

99. We have carefully considered when to implement the requirements of this proposed condition, and the practicalities of introducing some of the changes we are proposing. In particular, we have balanced consideration of the burden of additional regulatory requirements for providers with the level of risk to students' and taxpayers' interests that we have observed. We consider some providers need to make significant improvements at pace, for the reasons that we have set out in the background to this consultation. However, we also expect that many lead providers will already have comprehensive oversight and control mechanisms in place, reducing the additional burden of these proposals.
100. We therefore propose that a provider should establish its oversight and control mechanisms, and develop its comprehensive source of information in line with the minimum content requirements, with immediate effect and no later than four weeks after the proposed condition comes into effect.
101. We recognise that some providers may find this timescale challenging, but our initial view is that the risks related to subcontractual provision are such that this is a reasonable timeframe. The level of activity that will be required from a provider will be determined by their existing due diligence and oversight processes and the provider's understanding of the effectiveness of those processes. We think that, where these processes are largely absent or ineffective, the risk to students and taxpayers is greatly increased and that this short timeframe targets action where it is most needed.
102. From time to time, we anticipate that a provider would review and update their own policies and procedures, to improve their effectiveness or in response to changes in the provider's context. We consider this to be a natural and positive step as control mechanisms evolve over time. However, should the OfS seek to investigate a potential adverse event in a subcontractual arrangement, it is important for us to be able to have sight of the control mechanisms that were in place at the time of that event. We therefore propose to require a provider to retain historical versions of the information contained in the comprehensive source of information since the implementation of this proposed condition. Any investigation or regulatory intervention by the OfS would take account of relevant contextual information, and would normally look positively on evidenced examples of ongoing improvements in a provider's control environment.
103. We have proposed a five-year retention period for historical versions of the comprehensive source of information and documents relating to the minimum content. This is consistent with the retention period we have set out for assessed student work in conditions B4 and B5.<sup>15</sup> We think this is an appropriate retention period because, in practice, if our risk-based approach to monitoring prompts us to undertake investigatory activity in relation to oversight and control mechanisms for an individual provider, our assessment team would be likely to want to have access to relevant documentation covering a period of up to five years. This would give us sight of changes and improvements that a provider had made to its oversight and control mechanisms over time and allow the OfS to give weight to that in its assessment. Although we considered a three-year retention period when developing our proposals, we took the view

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<sup>15</sup> OfS, '[Supplementary guidance: Retention of assessed work](#)'.

that this shorter timeframe would be less likely to support this important aspect of our assessment activity.

## Alternatives we have considered

104. In developing this proposal, we considered whether we could identify alternative approaches that would result in improved practice and outcomes in subcontractual provision. We particularly considered whether we should adopt a different approach to the level of detail and specificity we have included in our proposals.
105. We considered whether we should propose more detailed content requirements over and above the current proposed minimum content requirements. However, we reached a view that, in general, this would be likely to be too prescriptive and not allow a lead provider to establish control mechanisms appropriate for their context. We recognise the diversity of providers in the sector and the need for a provider to retain an appropriate level of flexibility in shaping their own oversight arrangements.
106. We also considered whether we should extend the minimum content requirements to include **all** appropriate oversight and control measures that could apply across the sector. We think that to attempt to do so would be overly prescriptive in many cases, adding burden and curtailing institutional autonomy for some providers where this is not necessary. We have therefore limited the mandatory policies and procedures to those that we expect to be relevant to **all** lead providers engaged in subcontractual arrangements. As with other requirements of this proposed condition, there remains an onus on the provider to properly consider their needs and implement additional policies and procedures that they think necessary. In many cases, we expect that providers will already have such measures in place.
107. Conversely, we also considered whether we could have proposed an approach with less detail contained in the condition, for example by not specifying any minimum content requirements. However, we took the view that this type of approach would be unlikely to be sufficiently robust to address some of the more serious instances of poor practice that we have observed. We therefore reached a view that the proposed condition strikes an appropriate balance between these factors.
108. We are proposing an absolute obligation requiring a provider to deliver the outcomes specified in the condition, rather than that a provider is required to use their best endeavours to develop appropriate control mechanisms. We carefully considered whether a requirement to use best endeavours or to take all reasonable steps in developing control mechanisms would be appropriate. However, we reached a view that this would not be an effective way to meet our overarching policy objective of reducing risks to students and taxpayers. This is because:
  - a. Our primary concern and test of compliance is that control mechanisms are effective in managing risks that, in some cases, are substantial. We do not consider that a 'best endeavours' approach places the same weight on a provider needing to ensure that risks are controlled and that poor practice is prevented, particularly in light of rapid change in this part of the sector.

- b. Based on our experience to date, we anticipate that a small number of providers may be inclined to rely on such an approach to limit the robustness of their controls. Most providers share our goals for providing high quality courses for all their students regardless of the way these courses are delivered. However, we aim to ensure that our requirements, in the form of general ongoing conditions of registration, are themselves sufficiently robust to manage the nature of the issues that are of concern to us. In this instance, we consider a 'best endeavours' approach would be less effective.
109. We have taken into account regulatory burden in developing our proposals, and have therefore considered whether we could adopt an approach that would result in less burden for those providers where we have not currently identified evidence of poor practice. However, in practice we would expect many of the measures for oversight and control to be an important component of effective governance and due diligence at most providers. In many cases, therefore, any additional work is not likely to be extensive. Further, we would expect that the complexity of controls required would be relative to the size and complexity of a subcontractual arrangement, again limiting the extent of activity required by lead providers managing smaller partnerships.

#### **Question 6**

Do you have any comments on the nature of the risks that we have included in our draft guidance that we are proposing providers mitigate?

#### **Question 7**

Do you agree or disagree with the minimum content requirements we have proposed for the single document we propose a provider should maintain? Please give reasons for your answer.

#### **Question 8**

Do you have any views on any challenges that you anticipate with the implementation of this proposal?



## Proposal 3: A provider to operate in accordance with the comprehensive source of information

### Overview

The proposed condition E8 would require a provider to operate in accordance with the measures set out in its comprehensive source of information. Our initial view is that a provider having internal policies would not be sufficient unless those policies are implemented effectively in practice.

Our proposed overarching requirement is that providers have effective measures in place. To meet this, a provider would need to have appropriate policies in place, operate in accordance with those policies and this must deliver effective oversight of the subcontractual arrangements in practice.

### Effective implementation and oversight

110. We have included a proposed requirement for a provider to operate in accordance with the comprehensive source of information to emphasise the importance we place on it. In the event of any regulatory engagement with the OfS, a provider would need to be able to evidence how it complies with this aspect of the proposed condition.

### Onsite testing

111. We are proposing that a provider's oversight mechanisms should always enable testing of its delivery partners' practices, for example through unannounced inspections, student interviews, assessment sampling or similar methods. Our initial view is that relying only on reporting by a delivery partner, without independent validation through testing, would not be sufficient to meet our expectations.

### Contractual implications

112. The proposed condition includes a requirement for a provider to implement its subcontractual arrangements in line with the comprehensive source of information. Within this requirement, we propose that this may include making changes to contract terms where necessary. We have included this point because our experience has often suggested that some providers do not routinely build sufficient provision for due diligence into their contractual arrangements, or that the arrangements are superficial. Some existing contracts support the 'hands-off' approach referred to in paragraph 61 or seek to deter detailed scrutiny of delivery activities.
113. This proposed obligation is intended to ensure that a lead provider addresses contractual deficiencies that restrict adequate and effective oversight of subcontractual arrangements. For example, a contract that does not grant the lead provider access to raw student data limits its ability to verify accuracy of information about student enrolment, attendance and related metrics.
114. As explained in paragraph 112, we propose that oversight mechanisms must allow practical testing. If the proposed condition is introduced, therefore, a provider would need to ensure that its contractual arrangements with delivery providers reflect the control mechanisms that it



has established and allow provision for them to be applied and tested in practice. In the event of an investigation, we would normally be less likely to consider control mechanisms to be effective if we identify contractual barriers to their application that providers have not sought to resolve. We have considered the potential burden on providers of proposing this approach, but have currently concluded that providers should be (and, in many cases, already are) adopting this type of oversight as part of their own risk management. We welcome views on this as part of the response to this consultation.

115. Within the proposed condition, we have set out that consideration of changes to contractual provisions applies to both:

- a. Existing contracts in place at the time any new condition we decide to introduce comes into effect for a lead provider; and
- b. Any new contracts that a lead provider enters into during the period in which the condition is in effect for the lead provider.

116. We are proposing to include this wording to make it clear to providers that existing contracts would not be exempt from these requirements, and a provider will have a clear obligation to engage with its existing partners to remove contractual barriers. We do not think it is appropriate to exclude existing contracts from this requirement because of the risk to the large number of students already studying under existing subcontractual arrangements, as well as the risk to prospective students who may choose to register on courses delivered under existing arrangements as they extend into future academic years.

117. We do not expect providers to routinely submit contractual information to the OfS, or for the OfS to have a role in approving any contractual arrangements. However, we would expect documented evidence of a provider's compliance with this requirement to be available if we request it. This may include requesting copies of contracts between providers should that be relevant for our regulatory purposes. We would consider whether we need to see contractual information as part of any investigation at a provider (either a lead provider or a delivery provider) where oversight of subcontractual delivery is relevant to the scope of our investigation. We may also ask for information as we consider regulatory intelligence using the established approach under condition F3.<sup>16</sup>

118. We have previously explained that we propose requiring providers to develop their comprehensive source of information at pace, and within four weeks of the proposed condition coming into force, should we decide to proceed. We recognise, however, that negotiating and finalising changes to existing contracts requires careful consideration. While we expect providers to take prompt action to identify where amendments may be needed, we do not expect those changes to be completed within four weeks. Instead, we think that any changes should be made as soon as practicable but no later than the next break point or renewal point for that contract. In the event of any regulatory engagement, we expect to consider the opportunity a lead provider has had to make contractual changes since the condition became effective and the progress that has been made in resolving these issues.

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<sup>16</sup> See Condition F3: Provision of information to the OfS.

119. Obligations relating to new contracts entered into while a provider has obligations under the condition would apply as soon as the condition takes effect (subject to the outcomes of consultation).

## Capacity and resources

120. The proposed condition sets out a requirement for providers to have the capacity and resources to operate according to the provisions set out in the comprehensive source of information. By this, we mean the financial and staffing resources that will be needed to effectively deliver a provider's policies, procedures and other provisions at an appropriate scale for the size of the provider's subcontractual arrangements. We have included this provision to consolidate our approach that the delivery of control mechanisms **in practice** is an essential element of reducing risk. We are unlikely to consider a provider to be operating in accordance with its policies and procedures if it has not allocated adequate staff time and expertise to that work. This is especially likely to be the case if a provider has significantly expanded the scale of its subcontractual arrangements but has not similarly adjusted the resources allocated to oversight of them.
121. While the condition would apply directly to lead providers, we recognise that the capacity and resources of delivery partners is also a key aspect of managing risk. We would expect lead providers to work with their delivery partners on this, and for lead providers to be able to evidence that they are satisfied that delivery partners have also allocated appropriate capacity and resources to meet their contractual and other responsibilities.

## Alternatives we considered

122. In developing this proposal, we considered alternative approaches, particularly in relation to changes to contractual terms. We considered carefully whether the OfS should propose requirements that have the potential to influence the contractual terms between providers. However, we have reached a provisional view that, if we didn't do so, there would be an opportunity for providers to rely on contractual terms to limit the robustness of the control mechanisms in place. We consider that this would present a risk to the effectiveness of the proposed condition, and for this reason have included this provision in our proposals. However, we have taken account of our general duty to have regard to institutional autonomy and have proposed an approach that gives providers flexibility to consider how to meet the obligations of the condition. We are mindful that many providers will already have appropriate measures in place, or where existing contractual arrangements provide appropriate flexibility to introduce any changes needed.
123. We considered whether to go further in our proposals for onsite testing, or other in-practice testing, of a lead provider's control mechanisms. For example, we assessed whether it would be appropriate to specify particular approaches to sampling of student records, such as attendance or assessment records, or to set out a pre-determined format for unannounced site visits to delivery providers. However, we recognise that lead providers are likely to require a level of flexibility to implement these measures in a way that best suits their own context. We also recognise that it would be extremely challenging for the OfS to develop an approach for this activity that would be fit for purpose for all relevant providers.
124. We also considered whether we should establish a transition period for providers to implement control measures, particularly those including onsite testing. Having developed

their comprehensive source of information, we recognise that providers may need to take further steps to establish the control measures in practice. For example, providers may need to implement changes to their governance structures or deploy members of staff to implement control measures. We recognise that some of these steps may take time to complete. However, we are also mindful of the ongoing and increasing risk to students and to public funding, and of our overarching view that we should not delay the work needed to reduce these risks. For this reason, our initial view is that we will not put in place a transition period for the delivery of control measures, and will expect providers to act promptly to complete this work. Instead, we would take account of the time that had elapsed since the introduction of the condition, and the progress that a provider has made in delivering controls, as relevant context in our consideration of any regulatory intervention.

### **Question 9**

In your view, are there any barriers to implementing the measures in this proposal, which require a provider to operate in accordance with its comprehensive source of information? If so, please specify which, and tell us why

## Proposal 4: Power of direction

### Overview

Proposed condition E8 includes a requirement for a provider to comply with any subcontractual arrangement direction (SCD) imposed by the OfS in circumstances where the OfS has reasonable grounds to suspect that the provider's subcontractual arrangements (either existing or future arrangements) pose significant risks to students' or taxpayers' interests. A SCD would likely require a provider to take (or refrain from taking) specified actions in a certain timeframe. Our proposed condition and guidance include some non-exhaustive examples of the type of actions we would expect to consider in these circumstances.

### Imposing a direction

125. We would expect that in general a provider would be able to develop and implement oversight and control mechanisms appropriate for its own context, and provide evidence of their effectiveness. However, we are proposing to include a power of direction within the proposed condition to ensure that mechanisms are in place to protect students and taxpayers where arrangements are not effective. The proposed power of direction would mean that the OfS could, in certain circumstances, require an individual lead provider to undertake specified actions consistent with the overall objective of this condition, namely, to protect the interests of students and taxpayers in relation to subcontractual provision.
126. The proposed condition and guidance explain that the OfS may impose a SCD where the OfS has reasonable grounds to suspect that a provider's existing, or future, subcontractual arrangement pose a significant risk to the interests of students and/or taxpayers.
127. By 'significant', we mean that we have identified a substantially increased level of risk of harm to students' or taxpayers' interests (such as the risks we have set out in Box A in our draft guidance), or that harm is already occurring, and that the impact of that harm is not immaterial. Our initial view is that using a SCD would enable the OfS to require a lead provider to take steps to reduce this risk or harm appropriately. We use a similar power of direction in our existing ongoing condition C4, and have found it to be an effective tool where we need to respond quickly to an emerging issue.
128. Proposed condition E8.1 sets out that the OfS may bring a provider into the scope of condition E8 (so that the standard obligations apply) when it has reasonable grounds to suspect that the relevant subcontractual arrangements pose 'material' risks to the interests of students and/or taxpayers. However, when considering whether to impose a direction, the OfS will consider if the risks are 'significant' in the way that we have set out here to determine whether the further requirement to carry out (or refrain from) specified actions through a direction is also necessary.
129. As set out above, decisions to use this power would be based on the OfS's judgement about the level of risk. We do not propose to specify criteria in advance that would indicate that a particular risk is 'significant'. This is because we do not think it is feasible for us to develop a pre-determined set of criteria that will remain appropriate over an extended period, especially

as the sector continues to evolve. Instead, we propose that the OfS uses its judgement on a case-by-case basis to establish whether there are reasonable grounds to suspect a significant risk.

130. Our initial view is that this proposed power of direction could be used whether or not the OfS has started or completed a formal investigation. Decisions to impose a direction may, for example, be informed by regulatory intelligence such as (but not limited to) intelligence from other public bodies, notifications and reportable events. This would enable the OfS to respond quickly where circumstances suggest this is necessary to protect the interests of students or taxpayers.
131. We propose that the ability to impose a SCD would come into effect at the same time as the other elements of the proposed condition, subject to decisions we take following this consultation. We do not intend the SCD to be used retrospectively in relation to risks that have been satisfactorily resolved when a new condition may take effect. However, where risks are ongoing and, in our view, are sufficiently significant to require further action that warrants the use of a direction, we would expect to be able to use that power at any point after the proposed condition takes effect. This would also apply to risks that subsequently arise after the implementation of the proposed condition.
132. The OfS would consider its general duties (in section 2 of the Higher Education and Research Act 2017 (HERA)) when considering whether imposing a SCD is an appropriate intervention. Our general duties include (among others) the requirement to have regard to best regulatory practice, in the need to take proportionate action, to target resources at those cases where action is needed, and to promote value for money, quality and opportunity for students. We think that all these duties are likely to be particularly relevant in considering whether a subcontractual direction is an appropriate intervention. Although we would consider each scenario on a case-by-case basis and take action appropriate to the individual circumstances of the case, we anticipate that we would place particular weight on our duties that promote the interests of students.

## **Action required by a direction**

133. We are not proposing to set out a definitive list of the actions that we may require a provider to take in response to a SCD, but we have set out an illustrative list of examples in the proposed condition and draft guidance. Our initial view is that we would need flexibility in the requirements of any direction to ensure we can take into account individual circumstances.
134. Were we to introduce a power of direction, we would carefully consider which if any measures were appropriate depending on the circumstances of a case. Depending on the level of risk to students and taxpayers, and the available options, it may be appropriate to require a provider to stop carrying out a particular activity, or even to withhold payments to a delivery partner, if risks to public funding are suspected. However, in other cases, a direction could be limited to requiring a provider to amend its comprehensive source of information to address a gap in its control measures. Our initial view is that it is important to retain flexibility over how we intervene because we have already observed examples of providers' behaviour (as explained in the background section of this document) that we may have considered sufficiently serious to merit more significant interventions.

135. Depending on the nature of the concern, we may decide to impose a direction which is time-bound and expires when we are satisfied the relevant action has been completed. However, we expect that there will be some circumstances in which the OfS may seek to revoke or vary the requirements of a direction. For example:
- a. We may wish to revoke a direction where we have reached a view that the level of risk is no longer significant because of appropriate controls or mitigation.
  - b. We may wish to vary a direction if it becomes evident that the specified actions are unlikely to be effective in controlling the risk.
136. Should this be the case, we would notify the provider, in writing, of the revocation or variation.

## **Alternatives we considered**

137. We considered whether it was necessary to include the use of SCDs in our proposals, or whether the other measures we have proposed would be sufficient to control the risks that we are concerned about. In general, we think that the measures contained in the development of a comprehensive source of information, as well as the requirement to operate in accordance with this, will be sufficiently robust for most providers. However, we are mindful of the examples we have seen in the sector where some providers have not put in place suitable arrangements themselves, and serious issues have arisen requiring more immediate and intrusive interventions. With that in mind, we consider it prudent to reserve the ability to take additional, more directive, regulatory action in the most serious cases.
138. We considered whether we should establish more specific criteria for the circumstances in which we would consider the use of a SCD. While we recognise that some providers would find this additional clarity helpful, on balance we concluded that this would be counter-productive in relation to the main objective of the use of a SCD – to allow for a rapid and tailored regulatory response to serious concerns. We are taking the view that establishing a pre-determined set of circumstances in which a direction could be imposed creates a risk that we would not be able to intervene appropriately in the event of an emerging scenario that we have not foreseen.
139. In a similar vein, we considered whether the actions we have highlighted in the proposed condition are appropriate. We recognise that some of the specified actions are particularly intrusive and would be likely to have a substantial impact on a provider if they are imposed. However, in line with the point we have made above about reserving the ability to take appropriate action in the most serious cases, on balance we think it is helpful to signal to providers the full range of steps that we may consider where we think it is necessary.
140. We also considered whether we should propose to set out a fixed transition period in relation to this aspect of our proposals. However, we have reached the view that this should not be included for two main reasons:
- a. Our initial view is that the main purpose of imposing a SCD is to respond to rapidly emerging or serious circumstances. We considered that a transition period would likely limit our ability to fulfil our regulatory objective of addressing risks without delay.

- b. The ability to impose a SCD does not, in itself, require a provider to take any action beyond acting to comply with other aspects of proposed condition E8, and therefore does not impose any additional regulatory burden until the OfS exercises that power.

#### **Question 10**

Do you have any comments on the proportionality and effectiveness of our proposed approach to using subcontractual arrangement directions?

## Proposal 5: Requirements for providers to provide specified information relating to subcontractual provision

### Overview

Following this consultation, should we decide to implement the proposed condition, we propose also amending associated regulatory advice documents. These amendments would require providers to publish specified information relating to their subcontractual arrangements.

### Disclosure proposals in ‘Regulatory advice 9: Accounts direction’

141. First, through an amendment to Regulatory advice 9, we are proposing two new disclosure requirements for lead providers:<sup>17</sup>

- a. **Subcontractual rationale:** A published statement explaining the provider’s strategic and academic rationale for engaging in subcontractual provision. This would be in addition to the existing required disclosures about management and governance: corporate governance and internal controls.
- b. **Subcontractual fee retention:** A financial information disclosure, (in the form of notes to the audited financial statements) explaining the proportion of student fees retained by the lead provider in each subcontractual arrangement. This includes fees paid by the Student Loans Company or directly by a student, or on behalf of a student. This would be in addition to the existing required disclosures about financial information, for example information about grant and fee income or access and participation expenditure.

142. We propose that these disclosure obligations would apply to all registered providers that are required to meet the obligations set out in the proposed condition (E8). We are inviting comments from respondents about these proposed disclosure requirements. The proposed additions to Regulatory advice 9 are set out in the box below.

### Additional disclosures: proposed format and content

Subcontractual rationale
<p>This section applies to all registered providers with relevant subcontractual arrangements subject to the requirements of general ongoing condition E8. More information about the scope and application of these requirements are set out in condition E8 and its associated guidance. This includes the definition of a relevant subcontractual arrangement.</p> <p>In a subcontractual arrangement, sometimes known as a franchise arrangement, students are registered with and receive their qualification from a lead provider and are taught for some or all their course at one or more other providers – a delivery provider. A delivery provider may or may not be registered with the OfS. A student’s contractual relationship is with the lead provider.</p>

<sup>17</sup> Regulatory advice 9 is available at [‘Regulatory advice 9: Accounts direction’](#).



A provider must include a 'statement of Subcontractual Rationale' in its audited financial statements for accounting periods ending on or after 1 January 2026. The statement of Subcontractual Rationale must set out the rationale that guides the provider's approach to subcontracting, including but not limited to:

- the provider's overall strategic rationale for its existing relevant subcontractual arrangements
- how it ensures that the needs of students are prioritised over financial considerations.

This should be consistent with the rationale set out in the provider's comprehensive source of information, as required by condition E8.

### **Subcontractual fee retention**

This section applies to all registered providers with relevant subcontractual arrangements subject to the requirements of general ongoing condition E8. More information about the scope and application of these requirements are set out in condition E8 and its associated guidance. This includes the definition of a relevant subcontractual arrangement.

In a subcontractual arrangement, sometimes known as a franchise arrangement, students are registered with and receive their qualification from a lead provider and are taught for some or all their course at one or more other providers – a delivery provider. A delivery provider may or may not be registered with the OfS. A student's contractual relationship is with the lead provider.

A provider must include a note to its audited financial statements for accounting periods ending on or after 1 January 2026 that provides information about retained course fees paid to the lead provider by the Student Loans Company, directly by a student, or on behalf of a student, as follows:

- each delivery partner with which the lead provider has a relevant subcontractual arrangement
- for the relevant financial year, for each delivery partner:
  - the number of students within the scope of condition E8
  - the total course fees paid to the lead provider by the Student Loans Company, a student, or on behalf of a student
  - the total payment from the lead provider to the delivery provider relating to these students
  - the average course fee retained per student by the lead provider with respect to these students, set out as a percentage of total course fee.

Example below:

Delivery Partner	Number of students (FTE)	Total course fees paid to the lead provider	Total payment from lead provider to delivery partner	Average fee retained per student (% of total course fee)	Average fee retained per student (£)
ABC Training Co	500	£1.5m	£1m	33%	1000
DEF Education Co	200	£600k	£450k	25%	750

In this calculation, the OfS expects a provider to use the definition of student numbers as it is used to determine whether the requirements of condition E8 are in force. For the purposes of this calculation this should include actual student numbers for the relevant financial year (rather than forecast numbers).

In this calculation, the OfS expects providers to calculate course fees to include the fees paid by students directly or the Student Loans Company, to cover the key elements of students course and academic life, as well as core services related to students' wellbeing and experience. For example, this would cover lectures, seminars, and tutorials, course administrative costs, access to course-related facilities and equipment (e.g. laboratories, studios), access to libraries and computer rooms, support services for students, students' union membership, field trips essential for completion of your course (travel and accommodation only). The OfS would not expect it to cover: printing or photocopying at libraries or IT facilities, non-compulsory field trips, textbooks and other course materials, e.g. art supplies, dancewear, personal technology, e.g. laptop, tablet, specialist software, camera, and accessories, membership to union clubs and societies, travel costs to work placements, professional body membership, living costs e.g. accommodation, travel, graduation attire, photography, and guest tickets.<sup>18</sup>

Payment structures and schedules in contracts between a lead provider and its delivery partners can be complex. For example, they may include a one-off payment at the start of the contract, a yearly fee and a per student payment that may vary depending on the number of students recruited. In some cases a lead provider may vary the fee it retains depending on whether it is providing specific services relevant to a particular course, or group of students. As such, for simplicity, the OfS is requiring disclosure of an average fee per student. The calculation set out above should include any and all payments from a lead provider to each delivery provider, averaged across students. A lead provider may wish to add its own commentary to explain this information, but this is not required.

<sup>18</sup> This reflects the published Student Loan Company definition of course fees.

143. Our intention in making these amendments to Regulatory advice 9 is to increase the transparency over the money that flows through subcontractual arrangements. Students and other stakeholders are generally not able to see and understand how fees are distributed between providers. We think this transparency is important because it supports students in making decisions about the value for money they receive. Although students, or prospective students, may not engage directly with the details in a provider's audited financial statements, the inclusion of this information for all relevant providers enables interested parties to conduct analysis.
144. In addition to requiring disclosures in a providers audited financial statements, the OfS has the power to compel a registered provider to provide specified information. We expect to require each provider to submit this information, for example in its OfS annual financial return. The OfS is then likely to undertake and publish relevant analysis of this information – for individual lead providers and their delivery partners, and in relation to sector trends – to meet our objective of transparency for students and taxpayers. We may also publish this information in conjunction with student outcomes data, or with other relevant data held by the OfS.
145. 'Regulatory advice 21: Publication of information' sets out our approach to publishing information about providers and the factors we would consider in decisions about publication.<sup>19</sup> We would expect that considerations about students' and taxpayers' interest would be particularly relevant in this context. We would therefore expect to give particular weight to those factors in any publication decision.
146. We also propose to require providers to publish their strategic and academic rationale for engaging in subcontractual activity should we proceed with the introduction of proposed condition E8. Our proposals include a requirement for each provider to set out a qualitative description of the academic and strategic rationale for its relevant subcontractual arrangements. We think this is important because it provides us, and a wider audience, with contextual information to understand a provider's strategic approach. We are also seeking to ensure providers articulate their subcontracting strategy in a way that is accountable and is not solely based on financial incentives. Providers offer subcontracted provision for different reasons. In many cases this will influence their choice of delivery partners and the nature of the controls needed to mitigate risk.
147. In developing this proposal, we considered whether we could achieve the outcomes we are seeking by requiring disclosures to be published, but without requiring this to be done in a provider's audited financial statements. Our initial view is that requiring inclusion of this information in audited financial statements is a better way of promoting transparency. The audited financial statement is an important publication for a provider and, in our experience, a considerable degree of scrutiny is focused on their preparation. They are also reviewed by an external auditor. Given the importance of properly managing subcontractual partnerships, we think this is therefore an appropriate place for a provider to set out key information about this aspect of its work.
148. As this requirement would be incorporated into our requirements for the audited financial statements for relevant providers, the information explaining the distribution of fees between

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<sup>19</sup> OfS, '[Regulatory advice 21: Publication of information](#)'.

subcontracting partners would be disclosed annually, and signed off by the providers external auditors. We are proposing to introduce this requirement so that relevant providers will need to include this information in their financial statements for financial years ending from 1 January 2026, and annually thereafter.

149. A provider's strategic and academic rationale should be reviewed and agreed by its governing body annually, to ensure that it appropriately reflects any changes in the provider's approach. We expect that this would normally happen, as a minimum, in the process of signing off the audited accounts for publication. This part of the sector is evolving rapidly and we anticipate that some providers' approach to subcontracting will also continue to evolve. To support our objective of transparency and accountability in relation to this requirement, we consider inclusion of this information in a provider's published audited financial statements each year is appropriate and proportionate to ensure that it remains up to date.

## **Consequential amendments to 'Regulatory advice 16: Reportable events'**

150. We have set out above our proposed requirements under condition E8. In addition to this, if we decide to introduce condition E8, we expect that we would make consequential changes to our reporting requirements. We expect that this would be achieved through an amendment to 'Regulatory advice 16: Reportable events' to add a requirement for a provider (regardless of whether or not they have obligations under proposed condition E8) to report certain changes in, or events relating to, its subcontractual arrangements to the OfS as a reportable event.<sup>20</sup> We intend to reach a final view on the detailed changes needed to Regulatory advice 16 when we make final decisions following this consultation. We are not seeking comments on any changes to Regulatory advice 16 as part of this consultation, but have set out our plans here in the interests of transparency for respondents.
151. We currently anticipate that changes to Regulatory advice 16 are likely to relate to matters such as:
- a. New, suspended or terminated subcontractual or validation arrangements where these are outside of the exceptions used in condition E8 (set out elsewhere in this paper).
  - b. Changes in the contractual basis of a subcontractual arrangement – for example where a contract changes from a subcontractual agreement to a validation agreement.
  - c. Significant changes to the size and shape of a provider's subcontractual arrangements, including where either partner has taken steps to reduce or limit the number of students that can be recruited to such activities.
  - d. Any audit undertaken by a provider's internal audit function, or otherwise, which has resulted in a 'low' or 'no assurance' opinion where the subject matter relates to subcontractual or validated activity in any way.
  - e. Allegations of, or investigations into, suspected fraud or misuse of public funding by any party in relation to a subcontractual arrangement.

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<sup>20</sup> OfS, 'Regulatory advice 16: Reportable events'.

- f. Allegations of, or investigations into, widespread academic misconduct or inappropriate recruitment and admissions practices within a subcontractual arrangement.

152. Subject to the outcomes of this consultation, we expect to introduce these changes at the same time as we publish final decisions relating to the introduction of the proposed condition. We will confirm the date and nature of any updates to Regulatory advice 16 and notify providers in due course.

#### **Question 11**

Are there aspects of the proposal to require additional disclosures in a relevant provider's audited financial statements that you found unclear? If so, please specify which, and tell us why?

#### **Question 12**

In your view, are there any barriers to implementation of this proposal?

#### **Question 13**

Do you have any comments on the proposals to publish this information, either in providers audited accounts or by the OfS?

## Proposal 6: Monitoring compliance

### Overview

In general, our aim is that the regulatory requirements contained in proposed condition E8 drive changes in providers' behaviour without us needing to introduce a comprehensive routine approach to monitoring. In our view, the most desirable outcome from the introduction of this condition would be that lead providers actively engage in appropriate oversight to reduce instances of poor practice in their delivery partners without the need for direct intervention from the OfS. Indeed, many providers already have sensible and appropriate measures in place and we are not seeking to add unnecessary burden where arrangements are already working effectively.

However, where we identify concerns in relation to individual providers, we would expect to take regulatory action, including enforcement, where we consider that appropriate.

As explained earlier in this consultation and in the draft guidance, we are not proposing a requirement for each provider to periodically submit information to us about its oversight and control mechanisms. Instead, we will use our established risk-based approach to monitoring as set out in the regulatory framework.

Our general monitoring activity allows us to identify the potential risks to students and taxpayers that we have set out in this consultation, and we expect to be able to detect shortcomings in relation to compliance with proposed condition E8 through our normal regulatory activity. We are not proposing to employ a different approach for this condition. As such, our guidance on monitoring and intervention sets out our general approach.<sup>21</sup>

Where our monitoring activity generates intelligence or evidence that suggests there may be compliance concerns for an individual provider, the OfS may adopt one or more of the following approaches in any order:

- a. Engage with a provider to ensure it is aware of the issues.
- b. Gather further information we consider relevant to the scope of the potential concerns, from a provider or from elsewhere on a voluntary basis, to facilitate an assessment of whether there is, or has been, a breach of one or more conditions.
- c. Use our investigatory powers where that is considered appropriate for any reason, either by conducting an investigation ourselves or by asking another appropriate body to obtain information on our behalf.
- d. Issue a subcontractual arrangement direction (SCD).

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<sup>21</sup> OfS, '[Regulatory advice 15: Monitoring and intervention](#)'.

## Considerations relevant to these proposals

153. When considering a provider's compliance with this proposed condition, we expect to consider, among other matters, the following contextual factors:
- a. The extent to which a provider would have, or should have, known that it was in scope of the requirements of this condition.
  - b. Any evidence that a provider has attempted to conceal the extent of its subcontractual arrangements, or restructured its arrangements, so that it appears out of scope of the requirements of this condition.
154. Where the OfS decides that there is, or has been, a breach of this condition, it would consider the use of the full range of its enforcement powers. The financial incentives for providers that are associated with this type of provision mean that we would expect to give particular consideration to imposing monetary penalties or suspending aspects of a provider's registration (including its access to student loan funding) where we identify a breach. The OfS will follow any statutory consultation and representation process as it takes enforcement action.
155. We would also expect to carefully consider a provider's eligibility for degree awarding powers (DAPs) where we identify a breach of this condition, or increased risk of a future breach. For a lead provider, this is likely to include consideration of restricting existing DAPs, for example to prevent a provider from entering into future partnerships or reconfiguring existing subcontractual arrangements into validation arrangements.
156. For a subcontractual delivery provider submitting an application for registration or DAPs, we would consider its track record as a delivery provider and any regulatory concerns identified in relation to its partnerships in our consideration of those applications. We consider that regulatory risk – whether that risk has been judged to represent a breach of condition E8 or not – arising from a subcontractual partnership involving an applicant for registration or DAPs is a relevant additional consideration. Providers in these circumstances should therefore be prepared for consideration of these issues to extend the time it takes to assess their applications.
157. Where the OfS considers there to be an increased risk of a breach or a relevant wider regulatory concern, we may impose one or more specific ongoing conditions of registration. We will also consider whether additional monitoring requirements are appropriate, for example, a requirement to report additional matters as reportable events or to submit regular reports about a lead provider's oversight activity.
158. Decisions about publication of information about investigations or other regulatory interventions arising from assessment of compliance with this condition will be made on the basis of our normal approach set out in our guidance on our approach to publishing information about providers (Regulatory advice 21).<sup>22</sup> In summary, we would normally expect to publish information about our regulatory decisions, and in doing so would consider the factors weighing in favour of, and against, publication that have been set out in Regulatory

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<sup>22</sup> OfS, '[Regulatory advice 21: Publication of information](#)'.

advice 21. We are not proposing any changes to that guidance, or any bespoke approaches to publication matters in relation to proposed condition E8.

159. For this reason, we are not proposing any transition arrangements as part of this consultation. However, we would take into account the time that has elapsed since the imposition of the condition and the progress that a provider has made in developing its oversight and control mechanisms where that is relevant to a particular case. This does not, however, override the timeframes that we have set out in these proposals for providers to comply with the proposed requirements. We take the view that swift and effective implementation of these requirements by all relevant providers is the most direct way to reduce existing risks to students and taxpayers, and that remains our overarching objective.

#### **Question 14**

Do you have any comments on the appropriateness and effectiveness of our proposed approach to monitoring compliance with the proposed condition?



## **Annex A: List of consultation questions**

### **Question 1**

Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.

### **Question 2**

In your view, is the proposed definition of subcontractual arrangements clear and does it correctly capture the nature of these arrangements?

### **Question 3**

Do you have any comments on the scope of providers that will have obligations under the proposed condition?

### **Question 4**

Do you have any comments on the impact of these proposals for particular groups of students?

### **Question 5**

Do you have any alternative suggestions to the approach we have proposed?

### **Question 6**

Do you have any comments on the nature of the risks that we have included in our draft guidance that we are proposing providers mitigate?

### **Question 7**

Do you agree or disagree with the minimum content requirements we have proposed for the single document we propose a provider should maintain? Please give reasons for your answer.

### **Question 8**

Do you have any views on any challenges that you anticipate with the implementation of this proposal?

### **Question 9**

In your view, are there any barriers to implementing the measures in this proposal, which require providers to operate in accordance with their comprehensive source of information? If so, please specify which, and tell us why.

### **Question 10**

Do you have any comments on the proportionality and effectiveness of our proposed approach to using subcontractual arrangement directions?

### **Question 11**

Are there aspects of the proposal to include additional disclosures in provider financial returns that you found unclear? If so, please specify which, and tell us why?

### **Question 12**

In your view, are there any barriers to implementation of this proposal?

### **Question 13**

Do you have any comments on the proposals to publish this information, either in providers audited accounts or by the OfS?

### **Question 14**

Do you have any comments on the appropriateness and effectiveness of our proposed approach to monitoring compliance with the proposed condition?

# **Annex B: Matters to which we have had regard in developing 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:
  - 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. In formulating these proposals, we have given careful consideration to (a). We consider that for some providers this condition, including through directions imposed by the OfS, could lead to significant interference with institutional autonomy. However, we consider that there is a strong rationale for the condition in general due to the issues we have observed to date, and that the more significant interference would only apply in response to risks to students and taxpayers on which we put considerable weight.
3. We have also given particular weight to (b), (d), (e), (f) and (g).

## **Quality, choice and opportunities**

4. These proposals seek to ensure that students choosing to study through a subcontractual arrangement can have confidence that the delivery provider they have chosen is able to deliver a high quality higher education. The proposals aim to achieve this by setting out proposed minimum requirements that lead providers must meet to ensure a robust level of oversight of their delivery partners. We consider that strong management and governance of these arrangements is essential for ensuring that students' interests relating to quality and

opportunities are protected, and that instances of poor practice that may damage student opportunities are reduced.

5. Where a provider engaged in subcontracting is not meeting these minimum requirements for its students, it is important that the OfS can intervene to ensure that current and future students are not exposed to unacceptable risks by taking appropriate regulatory action. Students making choices about what and where to study need to be confident that the regulatory system ensures that they can choose from a range of providers that can comply with minimum regulatory standards. Opportunities for study are not meaningful if a student is able to choose, or continue on, courses which will result in a poor overall experience of higher education, because the regulatory system has permitted such performance, or if a student's course or provider closes because of financial pressures in the sector. Our provisional view is that these proposals will have a positive effect on the quality of higher education options available for students to choose, because providers offering poor quality are likely to be required to improve under these proposals.

## **Value for money**

6. Value for money in the provision of higher education is important for both students and the taxpayer. Students normally pay significant sums for their higher education and incur debt for tuition fees and maintenance costs, and student loans are taxpayer-backed. The investment of students and taxpayers in higher education is less likely to represent value for money where providers do not have effective governance arrangements to prevent risks of poor practice. Our proposals also require providers to have effective arrangements for detecting and preventing the inappropriate use of public funds and enable them to test these arrangements in practice to effectively control these risks for their own subcontractual arrangements. The proposals for transparency around how funding is shared between lead and delivery partners will help students and others reach informed views on value for money.

## **Equality of opportunity**

7. The OfS's overall approach to regulation is designed to promote equality of opportunity in connection with access to, and participation in, higher education. This means that we are concerned with ensuring that students from disadvantaged or underrepresented backgrounds can access higher education, and succeed on and beyond their courses.
8. Our proposed general ongoing condition of registration seeks to ensure that students from all backgrounds can choose to study at a range of registered providers that deliver high quality higher education and are effectively governed. Effective governance enables providers to successfully navigate the challenges facing the sector and protects students from potential risks to their study.
9. The OfS's Equality of Opportunity Risk Register<sup>23</sup> identifies the risk that some students may not have equal opportunity to access a sufficiently wide variety of higher education course types. This may result in restricted choice for students with certain characteristics, and increase the likelihood that they will enrol to study at a provider with lower student outcomes or at a provider that is focused on its own financial interests rather than delivering high quality

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<sup>23</sup> See [Equality of Opportunity Risk Register](#).

courses for its students. It is therefore important that providers are subject to robust regulatory requirements to prevent risks of this nature from materialising. Our proposals seek to ensure this.

10. Students studying through subcontractual arrangements are more likely to be mature, from the most deprived areas of the UK, or living locally before entering higher education. They are somewhat more likely to be from a minority ethnic background or from an area of England where fewer young people go on to higher education.<sup>24</sup> Although subcontractual arrangements can offer alternative routes into higher education for students from disadvantaged or underrepresented backgrounds, such routes only aid equality of opportunity where these students receive a high quality education, and are supported to engage in it fully. The proposals in this consultation will help the OfS to intervene where there are concerns about a provider's ability to effectively manage, oversee and deliver higher education within subcontractual arrangements and to comply with regulatory requirements designed to protect students' interests within these arrangements.
11. We also think it is particularly important to champion the consumer rights of students from disadvantaged and underrepresented backgrounds. Students from these backgrounds may have fewer choices available to them, may not have access to the information, advice and guidance needed to make the right choice for them and may be targeted by unscrupulous providers seeking to recruit students for financial gain rather than because it is in the students' best interests. The cost to a student in financial and personal terms of being recruited to a course which is unsuitable for them is significant. It may particularly affect students from disadvantaged or underrepresented backgrounds who may stand to lose more and experience a greater opportunity cost by making the wrong choice of higher education course.

## **Efficient, effective and economic use of the OfS's resources**

12. We have considered the need to use the OfS's resources in an efficient and effective way. For this reason, our proposals place the onus on providers to ensure their own oversight arrangements are effective in managing the risks we consider to be of concern, rather than proposing an approach of regular monitoring by the OfS. However, it remains our view that the risks in the subcontractual part of the sector are substantial, and we are seeing increasing evidence that those risks are materialising in the form of poor, sometimes potentially fraudulent, practice. We are therefore making these proposals to ensure that the OfS has the regulatory tools available to respond efficiently and effectively if required.

## **The principle that regulatory activities should be proportionate**

13. We have considered the principles of best regulatory practice, in particular of proportionality. We have set out elsewhere in this proposal information relating to the increasing numbers of students enrolled in subcontractual arrangements and, subsequently, the increased amount of public funding at risk. Our proposals seek to ensure that the OfS can protect the interests of students and taxpayers while balancing this with the interests of providers. We have aimed to propose requirements that would be relatively straightforward for well-prepared providers to comply with but that enable us to intervene where we identify providers that present risks to

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<sup>24</sup> OfS, '[Subcontractual arrangements in higher education](#)' (Insight 22).

students and taxpayers, and where lead providers are not discharging their own responsibilities. We have considered carefully whether less intrusive options would achieve our regulatory aims. Where we propose universal requirements for all providers, our initial view is that this information would be necessary for effective governance and operational management. However, we recognise that there will be a cost to providers in terms of staff time to understand the OfS's regulatory requirements and deliver additional controls where necessary.

14. As part of our general consideration of proportionality, we have considered the impact of our proposals on small providers, or those with small numbers of higher education students. We recognise that smaller providers would have a smaller number of staff available to consider and address the OfS's regulatory requirements. This means that such providers may experience a disproportionate regulatory burden compared with larger providers. However, we expect that this will be countered in many instances because smaller providers are less likely to be acting as lead providers in complex subcontractual arrangements.

## **The principle that regulatory activities should be transparent**

15. We have considered the need for our requirements and approach to be transparent, another principle of best regulatory practice. The proposals in the current consultation seek to be transparent by including definitions of key terms in the proposed conditions and setting out detailed guidance about our requirements. We also think this will ensure consistency in the approaches taken by providers and decisions made by the OfS.

## **The public sector equality duty**

16. We have had due regard to the public sector equality duty set out in section 149 of the Equality Act 2010. This requires the OfS to have due regard to the need to eliminate unlawful discrimination, foster good relations between groups and advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
17. We consider that the proposals in this consultation may have a particular impact on current and prospective students of subcontractual arrangements at delivery partners. In general, we have sought to design our proposed regulatory requirements to have a positive impact on all students, including students with protected characteristics. Our proposals are intended to reduce risks to students of all backgrounds from enrolling on courses where they may receive poor value for money, or where courses and entry requirements do not appropriately reflect the prior learning that students need to succeed. We consider that these proposals will reduce the incentives for some providers in this part of the sector to prioritise institutional and financial benefits over students' interests.
18. This will have positive effects for some groups of students with protected characteristics because we know that at a national level many of these students may not have equal access to information about the English higher education system to support them in making an informed choice. For example, prospective students who did not complete their secondary education in England or who are returning to study as mature learners would not have the same access to the type of guidance given to school leavers.

19. Students studying through subcontractual arrangements are more likely than students in general to be mature and somewhat more likely to be from a minority ethnic background. We consider that our proposals would over time increase the likelihood that these students are enrolled at providers that can effectively manage, oversee and deliver higher education within subcontractual arrangements.
20. This consultation gives stakeholders an opportunity to inform the development of our proposals. Through this consultation we are seeking views on any unintended consequences of our proposals, for example for particular types of provider or student, or for 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.

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

21. We have had regard to guidance issued to the OfS by the Secretary of State<sup>25</sup> under section 2(3) of HERA, including the following guidance:
  - a. Guidance to the OfS on strategic priorities for FY22-23 (31 March 2022).
  - b. Guidance to the OfS on the future of access and participation (23 November 2021).
22. Given the relatively recent emergence of strong evidence about the risks associated with subcontractual provision, this area of the sector is not specifically included in the March 2022 guidance. However, this guidance sets out the Secretary of State's view that 'tackling unacceptable pockets of poor quality provision' is a high priority, and that every student should have confidence that they are on a high quality course that can lead to good outcomes. The proposals contained in this consultation are designed in a way that is consistent with these objectives in that they are intended to protect students from poor quality subcontractual arrangements. Further, these proposals are designed to increase transparency about the nature of these arrangements so that students can make an informed choice about their study options.
23. From the same guidance, we continue to have regard to the need to reduce regulatory burden, including the comments from the Secretary of State and the Minister of State to consider what more can be done to 'reduce the burden on providers of responding to the OfS's requirements'. However, we recognise that the proposals in this condition may, at face value, suggest an increase in regulatory burden for some providers. To minimise this as much as possible, we have sought to reduce burden for well-prepared providers through these proposals by ensuring that our mandatory content is focused on measures that we would expect many providers to already have in place as part of effective governance. We are also of the view that there is a preventative aspect to many of these proposals, which are intended to reduce the likelihood of significant failures that would require the commitment of substantial resources to resolve. Our guidance on the proposed condition and how we expect to consider provider compliance is intended to give providers as much clarity as possible about the requirements.
24. From the guidance on 'the future of access and participation' issued on 23 November 2021, we have given regard to the Secretary of State's view that 'there should be a shift away from

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<sup>25</sup> See [Guidance from government](#).

marketing activities which serve to benefit the institutions and not students'. While our focus on setting a higher bar for protecting students (as well as taxpayers) is not focused directly on marketing activities, the principle of requiring providers to place greater emphasis on the risks to students instead of benefits to the provider is aligned to the principle behind this guidance.

25. The same guidance states that 'Providers should not be incentivised, nor rewarded, for recruiting disadvantaged students onto courses where too many students drop out or that do not offer good graduate outcomes.' Our size and shape of provision data shows that 60.6 per cent of students studying in subcontractual arrangements live in areas in the bottom two quintiles of the Index of Multiple Deprivation (the most deprived), compared with 33.9 per cent of full-time taught or registered undergraduate students at the same providers. We know from our recent published data dashboard on subcontractual provision that the continuation rates for students studying in subcontractual arrangements are below the OfS's threshold. We therefore consider that the aim of strengthening regulatory requirements to address the risks in relation to subcontractual provision, and ensuring that lead providers in subcontractual arrangements meet our proposed higher bar for oversight, means that providers will be less likely to recruit students, including disadvantaged students, onto courses where too many students drop out.

## The Regulators' Code

26. We have had regard to the Regulators' Code.<sup>26</sup> Section 3 of the code is particularly relevant and 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. We have also noted paragraph 3.5, which provides for regulators to review the effectiveness of their activities and make necessary adjustments accordingly. We have reflected on the effectiveness of our current general ongoing conditions of registration to identify whether these are appropriate for managing risks associated with subcontractual arrangements in the light of emerging intelligence about practices at some providers. We have also considered how our experiences have shaped our view of risks for students and taxpayers, and are of the view that there is evidence of increased risks posed by the growth of subcontractual provision. We are therefore seeking to adjust our regulatory conditions to increase the level of scrutiny applied to subcontractual provision to address these increased risks.
27. Section 5 of the code is also relevant, in that it discusses the need for regulators to ensure that clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply. Our general approach in this consultation, along with the proposed condition wording and guidance, is to set out in detail what providers must do to meet the requirements of the new proposed conditions and to explain our rationale for making these proposals.

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<sup>26</sup> GOV.UK, [Regulators' Code](#).





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