



Department  
for Education

# **Office for Students: monetary and financial penalties**

**Government consultation**

**Launch date 14 December 2017**

**Respond by 09 February 2018**

# Contents

Introduction	3
Context	4
Our proposals	6
Summary of questions	7
About this consultation	8
Chapter 1 - legislative context	12
Chapter 2 - monetary penalties	15
Chapter 3 - maximum monetary penalty amount	17
Chapter 4 - mandatory factors the OfS must (or must not) consider when imposing a monetary penalty	20
Chapter 5 - financial penalties for late payment of OfS fees	24

## Introduction

The Higher Education and Research Act 2017 (HERA) includes a power for the new Office for Students (OfS) to impose a monetary penalty on a higher education provider ('provider') if it appears to the OfS that there is or has been a breach by the provider of one of its ongoing registration conditions including the conditions relating to access and participation. HERA allows for the Secretary of State to make regulations on monetary penalties, including setting the maximum amount that can be imposed and the matters to which the OfS must, or must not, have regard to when imposing a monetary penalty.

HERA also enables the Secretary of State to make regulations giving the OfS the power to impose a financial penalty on a registered provider for late payment of its registration fees or separate 'other fees' that the regulator may charge from academic year 2019/20.

The purpose of this consultation is to seek views on our proposals relating to:

- the maximum amount of monetary penalty that the OfS should be permitted to impose for breach of an ongoing registration condition (see chapter 3).
- the matters which the Secretary of State should require the OfS to consider (or not consider) when imposing a monetary penalty. These are referred to as 'mandatory factors' in the rest of this document (see chapter 4).
- the approach to financial penalties for late payment of OfS registration fees and 'other fees', including the penalty amount and interest charged (see chapter 5).

## Context

There are no statutory obligations to consult on the proposals in this consultation. However, a commitment was made during the passage of HERA through Parliament to consult on the mandatory factors. As these are new regulatory powers, we would also like to seek views on our proposals on the maximum monetary penalty amount. We also made clear that we would seek views on late payment penalties.

This consultation is part of a wider package of reforms relating to the regulation of higher education and a number of other consultations are currently taking place. Please see below for a summary and links to the consultations:

Publication	Timings
<a href="#">Securing student success: risk-based regulation for teaching excellence, social mobility and informed choice in higher education</a>	19 Oct – 22 Dec
<a href="#">OfS registration fees (stage 2)</a>	19 Oct – 22 Dec
<a href="#">Designation of data body</a>	19 Oct – 22 Dec
<a href="#">Designation of quality body</a>	19 Oct – 22 Dec
<a href="#">Simplifying access to the market: Degree Awarding Powers &amp; University Title</a>	19 Oct – 22 Dec

The proposals on monetary penalties in this consultation are closely linked to those in the consultation on the OfS's regulatory framework entitled: *Securing student success: risk-based regulation for teaching excellence, social mobility and informed choice in higher education* ('the OfS's regulatory framework consultation'), particularly chapter 5 which covers the ongoing general registration conditions for providers and the OfS's approach to monitoring and interventions (including sanctions).

The proposals on financial penalties relate to the proposals in the *Office for Students: registration fees (stage 2)* consultation and the OfS's regulatory framework consultation, chapter 4, part F.

## Timing

The OfS will be established in January 2018 and will publish its regulatory framework in advance of the OfS portal opening for applications to the new register in April 2018. The government will also publish its response to the registration fees consultation and this consultation by April. However, the OfS's powers to impose monetary penalties and financial penalties (and the necessary regulations) will not come into effect until the

OfS's regulatory framework comes into full effect from 1 August 2019 (subject to the relevant Parliamentary approval processes).<sup>1</sup>

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<sup>1</sup> It is intended that the OfS's powers to impose sanctions for breach of ongoing registration conditions of suspension of registration and deregistration will be available from April 2018, subject to the relevant Parliamentary approval processes (for more on transition arrangements in 2018/19, see the OfS's regulatory framework consultation, chapter 9).

## Our proposals

This consultation document makes the following proposals:

- the Secretary of State should set a maximum limit on the monetary penalty that the OfS can impose on a registered provider in respect of a breach of an ongoing registration condition. This maximum should be a percentage of the provider's "qualifying income" (being OfS grant funding, plus the income the provider receives through tuition fees) or £500,000 (whichever is the higher amount). Further details can be found in chapter 3.
- the OfS should be required to consider 'mandatory factors' when deciding whether to impose a monetary penalty and when deciding how much the monetary penalty should be (within the maximum limit). Further details can be found in chapter 4.
- financial penalties for late payment of OfS registration fees and 'other fees' where due will comprise a £250 flat rate penalty amount plus interest on the total unpaid fee amount due of 5% above the Official Bank of England Rate, accruing on a daily basis. Further details can be found in chapter 5.

## Summary of questions

1. What are your views on the potential equality impacts of the proposals that are set out in this consultation? Please provide any relevant evidence if you can as this will support future policy development.
2. Do you agree or disagree that 2% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?
3. Do you agree or disagree that 5% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?
4. Do you agree or disagree with the proposed mandatory factors the OfS must take into account when considering whether to impose a monetary penalty, and how much that penalty should be?
5. Do you agree or disagree with the proposals on the late payment penalty?
6. Please provide any further views you have on the government's proposals on the maximum penalty amount, the factors and the late payment penalty.

# About this consultation

## Who this is for

This consultation is of primary relevance to higher education providers and others with an interest in higher education, including students, representative bodies, professional, statutory and regulatory bodies.

Higher education in the UK is a devolved matter. As such, this consultation is relevant to higher education providers whose activities are principally carried out in England.

## Issue date

The consultation was issued on 14 December 2017.

## Enquiries

If your enquiry is related to the policy content of the consultation you can contact the team on: [HERA.consultations@education.gov.uk](mailto:HERA.consultations@education.gov.uk)

If your enquiry is related to the DfE e-consultation website or the consultation process in general, you can contact the DfE Ministerial and Public Communications Division by email: [Consultations.Coordinator@education.gov.uk](mailto:Consultations.Coordinator@education.gov.uk) or by telephone: 0370 000 2288 or via the [DfE Contact us page](#).

## Additional copies

Additional copies are available electronically and can be downloaded from [GOV.UK DfE consultations](#).

## The response

The results of the consultation and the Department's response will be [published on GOV.UK](#) by 1 April 2018.

## Respond online

To help us analyse the responses please use the online system wherever possible. Visit [www.education.gov.uk/consultations](http://www.education.gov.uk/consultations) to submit your response.

## Other ways to respond

If for exceptional reasons, you are unable to use the online system, for example because you use specialist accessibility software that is not compatible with the system, you may download a word document version of the form and email it or post it.

### By email

[HERA.consultations@education.gov.uk](mailto:HERA.consultations@education.gov.uk)

### By post

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Higher Education  
Department for Education  
Ground floor  
Sanctuary Buildings  
20 Great Smith Street  
London SW1P 3BT

## Deadline

The consultation closes on 9 February 2018.

## Confidentiality and data protection

Responses to this consultation, including names (and supporting evidence), will be made public, unless respondents specifically request confidentiality.

Respondents who wish for their responses to remain confidential should clearly indicate this when responding online, and explain the reasons for confidentiality. Any confidentiality disclaimer that may be generated by your organisation's IT system will be taken to apply only to information in your response for which confidentiality has specifically been requested.

Respondents should be aware that confidentiality cannot always be guaranteed. For example, responses, including personal information, may be subject to publication or release in accordance with the access to information regimes (in particular, the Freedom of Information Act 2000, the Data Protection Act 1998).

## Impact Assessment

An impact assessment is not required for this consultation as it falls under a statutory exclusion prescribed in the Small Business, Enterprise and Employment Act 2015. The

proposals set out within this consultation do not change the regulatory activities of the OfS, for which the proposals are covered within the OfS's regulatory framework consultation.

## Equality Impact Assessment

Under the Equality Act 2010, the Department for Education (DfE), as a public authority, is legally obliged to give due regard to equality issues when making policy decisions – the public sector equality duty, also called the general equality duty. DfE as a public authority, must in the exercise of its functions, have due regard to the need to:

- a. eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act
- b. advance equality of opportunity between people who share a protected characteristic and those who do not
- c. foster good relations between people who share a protected characteristic and those who do not.

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard to the need to:

- a. remove or minimise disadvantages suffered by persons with protected characteristics
- b. take steps to meet the needs of persons who share a relevant protected characteristic
- c. encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

The general equality duty covers the following protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. From an equality impact perspective, overall our assessment is in line with that made for HERA that the benefits of the reforms will be more pronounced for those from under-represented groups and those whose outcomes currently lag behind those of their equally academically able peers.

**Question 1: What are your views on the potential equality impacts of the proposals that are set out in this consultation? Please provide any relevant evidence if you can as this will support future policy development.**

## **Family Test**

We have considered the Family Test and concluded that our proposals do not have any effect on family relations and functions.

## Chapter 1 - legislative context

1. HERA makes provision for the establishment of a new regulator – the OfS, and a new regulatory framework for higher education. The OfS will regulate the provision of higher education principally through the application of registration conditions to providers that apply to be registered. A provider must satisfy its ‘initial registration conditions’ in order to be registered and continue to comply with its ‘ongoing registration conditions’ while on the register.<sup>2</sup>
2. Ongoing registration conditions include those conditions that are generally applicable to providers and ‘specific ongoing registration conditions’ which the OfS can apply to a particular provider to address the specific risks or circumstances of that provider.
3. HERA gives the OfS enforcement powers to deal with instances where it appears that there is, or has been, a breach of a provider’s ongoing registration conditions. There are a number of circumstances where the OfS may judge that a provider has breached an ongoing condition. Some examples include:<sup>3</sup>
  - a provider breaching a quality condition due to student outcomes dipping below the acceptable baseline;
  - a provider breaching a financial sustainability condition by failing to notify the OfS of changes that impact its financial position;
  - a provider breaching a management and governance condition by failing to have adequate and effective management and governance arrangements for example as indicated by findings of non-compliance with other statutory obligations, such as those in relation to charity law or student unions;
  - a provider breaching an information condition by failing to provide the OfS with information in the time or manner specified by the OfS;
  - a provider breaching a student protection plan condition by failing to take reasonable steps to comply with the plan.
4. The OfS can impose a monetary penalty in accordance with regulations made by the Secretary of State. The OfS’s other enforcement powers include powers to:
  - suspend a provider’s registration (entirely or for specified purposes)
  - de-register a provider
  - refuse to renew an access and participation plan.

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<sup>2</sup> And sometimes afterwards where the necessary saving and transitional provision is made by the OfS.

<sup>3</sup> These examples are subject to the outcome of the OfS’s regulatory framework consultation.

5. HERA lays down the procedural requirements, such as breach of an ongoing registration condition, that must be satisfied before the OfS can impose a monetary penalty, suspend a provider's registration or de-register a provider.<sup>4</sup> In the case of monetary penalties and de-registration, HERA also provides for an appeal to the First Tier Tribunal. For refusal to renew an access and participation plan, procedural requirements and appeals are to be dealt with by regulations made by the Secretary of State.
6. In addition to the OfS's enforcement powers, where the OfS gives financial support (in the form of grants, loans or other payments) to providers or certain other institutions, it can make provision to allow it to claw back (with interest) some of the funds, up to a maximum of the whole amount paid by the OfS, if there has been a breach of any of the terms and conditions of the financial support.
7. HERA allows the OfS to charge registration fees and 'other fees' in accordance with regulations made by the Secretary of State. These regulations may, among other things, make provision about the imposition of financial penalties for the late payment of fees. These financial penalties are distinct from a monetary penalty for breach of an on-going registration condition (see chapter 5 for further discussion of the relationship between monetary and financial penalties).

#### **Treatment of income from penalties and interest**

8. Consistent with section 72 of HERA and Schedule 3, paragraph 5, the OfS cannot retain any income from financial penalties or interest or monetary penalties. In practice, sums from penalties and interest would be remitted to the Consolidated Fund, from which general government expenditure is provided (including for the Office for Students). This approach guards against the regulator imposing penalties or charging interest for its own financial gain.

#### **Current sanctions**

9. The single regulatory system created by HERA will replace the regulatory systems currently in place for providers that can be publicly funded through the Higher Education Funding Council for England (HEFCE) and for alternative providers. Sanctions under the current regimes are, in particular:
  - For HEFCE funded providers: if there has been a breach of any of the terms and conditions of financial support given to a provider, HEFCE may be able to claw back (with interest) some of the funds up to a maximum of

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<sup>4</sup> Sections 15, 16, 17 and 18 of HERA.

the whole amount paid by HEFCE.<sup>5</sup> There are also financial sanctions for the enforcement of fee caps and access agreements.<sup>6</sup>

- For alternative providers: sanctions are set out in the Department's Specific course designation guidance: policy and guidance for alternative providers of higher education, Annex F.<sup>7</sup>

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<sup>5</sup> Section 65 of the Further and Higher Education Act 1992.

<sup>6</sup> Under the Higher Education Act 2004 and the Student Fees (Approved Plans) (England) Regulations 2004. There is provision for the claw-back from a provider's grant money of 110% of fees charged above the maximum fees permitted by a plan, 110% of the shortfall in expenditure under a plan and/or a specified amount reflecting the severity of non-compliance, up to a maximum of £500,000. These powers have never been used.

<sup>7</sup> Department for Education specific course designation guidance:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631441/Specific\\_course\\_designation\\_guidance-2017.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631441/Specific_course_designation_guidance-2017.pdf)

## Chapter 2 - monetary penalties

### Regulatory context

10. The OfS's regulatory framework consultation sets out proposals on how the OfS intends to exercise its enforcement powers and less formal intervention powers (see chapter 5, part E on interventions).
11. It explains that registered providers will be expected to be self-aware and to manage and communicate their own risks before they crystallise into issues and they breach a registration condition. However, the OfS will not hesitate to use its powers to act where it deems it appropriate to do so. In addition to its formal sanctions, which can only be used where an ongoing registration condition has been breached, the OfS will also have other regulatory interventions available to it such as enhanced monitoring and the ability to impose specific ongoing registration conditions. These less formal interventions may be used instead of, or in addition to, sanctions to address a specific risk presented by a provider, and can also be used where a registered provider is at risk of breaching, but has not yet breached, an ongoing registration condition.
12. As the OfS's regulatory framework consultation states, when deciding whether and how to intervene, the OfS must have regard to the matters set out in section 2 of HERA. In particular, the OfS is required to take into account the need to use its resources in an efficient, effective and economic way and, where relevant, the principles of best regulatory practice (in regard to transparency, accountability, proportionality, consistency and targeted action). The OfS is also committed to complying with and adopting the Regulators' Code.<sup>8</sup> The OfS's regulatory framework consultation proposes a number of factors to be taken into account by the OfS when deciding whether and how to intervene. In addition, it includes proposals on the OfS's engagement with other regulators and bodies, including the need to work closely with UK Research and Innovation (UKRI) to ensure a co-ordinated and strategic approach to funding and regulation.<sup>9</sup>
13. When the OfS makes decisions about whether and how to intervene, it will be required to act consistently with the principles of general administrative law (for

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<sup>8</sup> The Regulators' code:

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300126/14-705-regulators-code.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf)

<sup>9</sup> UKRI is a new public body which will be in place of the 7 Research Councils, Innovate UK, and the research and knowledge exchange functions of the Higher Education Funding Council for England (HEFCE).

example, on reasonableness and taking into account relevant considerations but disregarding irrelevant ones).

14. The range of different interventions (including sanctions) available to the OfS means that it can take the most appropriate and proportionate actions that ensure risks to students are mitigated and that breaches are remedied as quickly as possible. The variety of interventions and sanctions available to the OfS equip it to deal effectively with a diverse range of circumstances, the varying risk levels of providers and the different ongoing registration conditions that need to be complied with.

## **Regulations on monetary penalties**

15. Section 15 of HERA allows the Secretary of State to make provision in regulations:
  - a. on the amount of monetary penalty that the OfS may impose. This includes the ability to specify a maximum amount (proposals set out in chapter 3)
  - b. the matters ('or mandatory factors') to which the OfS must, or must not, have regard to when exercising its power to impose a monetary penalty (proposals set out in chapter 4).

## Chapter 3 - maximum monetary penalty amount

### Approach

16. We intend, in regulations, to set a maximum limit on the amount of a monetary penalty that the OfS can impose on a registered provider for breach of an ongoing registration condition.<sup>10</sup> Setting such a statutory maximum will ensure that the OfS cannot impose a monetary penalty above the maximum amount. Within this statutory maximum, the OfS will have the discretion to impose a monetary penalty that is reasonable and proportionate to the circumstances of the breach, having regard to the factors discussed in chapter 4. We would not expect the OfS to impose monetary penalties at the maximum permitted level other than in the most exceptional circumstances.
17. In formulating our proposal on what the maximum monetary penalty amount should be, we have taken into account that the primary reason for the monetary penalty sanction is to support the OfS in ensuring providers comply with their ongoing registration conditions. As such, the maximum amount should reflect the need for monetary penalties to be set at a level that ensures there are visible and meaningful consequences for a provider that is in breach of an ongoing registration condition, while not being unnecessarily punitive. Also, providers should not be able to gain financially from breaching an ongoing registration condition.
18. Given the higher education sector is diverse, with a wide range of provider types, sizes of student population, sources of income, and levels of turnover, we believe it is desirable to ensure that the maximum amount is proportionate to the scale of a non-compliant provider. At the same time, we consider that the maximum amount should be sufficiently straightforward to calculate in a particular case to ensure transparency within the regime, and efficient regulation. Our proposals on the maximum amount also take into account the availability of other sanctions to the OfS, including suspension of registration, deregistration, refusal to renew an access and participation plan and grant claw-back.
19. In addition to the imposition of the penalties, the OfS's regulatory framework consultation proposes that monetary penalties and the reason for their imposition should be published on the OfS register. This should further encourage providers to comply, as the more serious breaches and associated penalty could have the potential for reputational damage.

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<sup>10</sup> Subject to the relevant Parliamentary approval process.

## **A percentage of qualifying income or £500,000 (whichever is the higher amount)**

20. Our proposal is that the maximum monetary penalty that the OfS can impose on a registered provider in breach of an ongoing general condition should be the higher of 2% of the registered provider's annual "qualifying income", or £500,000.
21. By "qualifying income" we mean income that a registered provider receives through direct OfS grant funding<sup>11</sup>, made under sections 39 or 40 of HERA, together with the income the provider receives through tuition fees (including fees paid directly through the Student Loans Company, and tuition fees paid directly to the provider by students themselves or via a sponsor).<sup>12</sup> An advantage of using qualifying income over other measures, such as percentage of turnover, is that the penalty is more proportionate and targeted as the OfS is only charging a penalty on the higher education activities it regulates. It is also a fairer way to calculate the penalty. Many providers have other non higher education income, and for some, higher education is only a small part of their income, therefore it would be less proportionate and fair to charge them a higher penalty which covers their non higher education activities.
22. We also considered having a maximum amount with a fixed overall cap of £500,000 or higher. Although this is a simpler approach, it is difficult to determine an overall maximum amount which is high enough to encourage larger and wealthier providers to comply (and to cover any potential gains resulting from a breach), but not too high to appear unreasonable for smaller providers. In contrast, the percentage of qualifying income approach ensures that the penalty amount is proportionate to the size of the provider.
23. We propose that the maximum amount is calculated on the basis of the provider's qualifying income for the financial year in which the breach occurred.

## **2% of the registered provider's "qualifying income" or £500,000 (whichever is the higher amount)**

24. To ensure we have a large enough maximum penalty but one which is not excessive, we propose that the maximum amount should be 2% of qualifying income or £500,000 (whichever is the higher). The below worked examples set out some 'real life' illustrations of what a maximum amount could look like for a provider with a large qualifying income and a provider with a small qualifying income. A qualifying income of 2% should result in a penalty that is large enough to deter larger and

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<sup>11</sup> Grants, loans or other payments.

<sup>12</sup> Students includes undergraduate, postgraduate, home, EU and international students.

wealthier providers from choosing to pay a penalty over complying with their ongoing conditions.

25. By having a maximum amount of £500,000 as a “ceiling” where the qualifying income is lower, we can also ensure that smaller providers do not have a disproportionately lower penalty than a larger provider where there has been a similar breach. It also ensures that the OfS can impose a monetary penalty on registered providers which do not have a qualifying income or have a period without qualifying income, but are still delivering higher education.

**Box A: worked example for 2% of qualifying income**

Provider A has tuition fees from 20,000 students and grants from the OfS. Its qualifying income is £400 million, which means 2% would be £8 million.

Provider B has tuition fees from 1,600 students, but no OfS grants. Its qualifying income is £10,000,000, which means 2% would be £200,000. However, they could be subject to a higher penalty amount of £500,000 if deemed appropriate and necessary by the OfS.

**5% of the registered provider’s “qualifying income” or £500,000 (whichever is the higher amount)**

26. We have also considered higher percentages, such as 10% of the qualifying income, which is used by other regulators. However, in our view this could be excessive and could result in punitive penalties, which would be difficult to justify. While 2% is the option that we currently favour, there may be concerns that this is too low and 5% might be considered to provide a more reasonable amount than 10%, and will provide a stronger incentive for providers to comply than 2%. We would therefore welcome views on whether 5% of qualifying income would be a more preferable option than 2% for encouraging compliance, considering that the maximum amount would only be used by the OfS in exceptional circumstances.

**Question 2: Do you agree or disagree that 2% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?**

**Agree/Disagree/Not sure. Please explain your answer if you responded ‘Disagree’ or ‘Not sure’**

**Question 3: Do you agree or disagree that 5% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?**

**Agree/Disagree/Not sure. Please explain your answer if you responded ‘Disagree’ or ‘Not sure’**

## Chapter 4 - mandatory factors the OfS must (or must not) consider when imposing a monetary penalty

### Approach

27. When deciding whether to impose a monetary penalty, and the amount it should be if it is imposed, the OfS will need to take into account all the circumstances of the particular situation. However, as noted in chapter 2, the OfS's discretion will be subject to a number of matters, in particular:

- the OfS is required to have regard to the matters in section 2(1) of HERA
- the OfS's regulatory framework consultation proposes that the OfS should include in its regulatory framework, and therefore consider, a number of intervention factors (such as the seriousness of the breach, the impact and how co-operative a provider is)
- the OfS is required to act consistently with the principles of general administrative law.

In addition, where relevant, the OfS will work closely with other bodies, such as UKRI.

28. We intend, in regulations, to specify the mandatory factors that the OfS **must** have regard to when deciding whether to impose a monetary penalty and if so how much that penalty should be.<sup>13</sup> These are the factors which we think are essential for the OfS to consider when imposing monetary penalties. We do not propose to specify any mandatory factors that the OfS must not have regard to.

29. The OfS has discretion to include in its regulatory framework factors in addition to the mandatory factors (see those intervention factors proposed in the OfS's regulatory framework consultation for all of its sanctions and intervention measures). The OfS's regulatory framework will be subject to the mandatory factors specified by the Secretary of State in regulations.

30. Our proposed mandatory factors are targeted at ensuring a monetary penalty should only be imposed where there is good reason to do so. In formulating our proposals on what the mandatory factors should be, as for the maximum monetary penalty amount, we have taken into account that the primary reason for the monetary penalty sanction is to support the OfS in ensuring registered providers comply with

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<sup>13</sup> Subject to the relevant Parliamentary approval processes.

their ongoing registration conditions and the need to ensure there are visible and meaningful consequences for registered providers that are in breach of an ongoing registration condition. Further, registered providers should not be able to gain financially from breaching an ongoing registration condition.

31. We consider that our approach to the mandatory factors will support the OfS's proposed student-focused approach. We expect that when the OfS is considering the imposition of a monetary penalty, it should take into account the availability, suitability and effectiveness of the other sanctions and interventions available to it. Further, we believe that the mandatory factors should provide sufficient flexibility to allow the OfS to take into account the specific circumstances of a particular case.
32. We do not think it is necessary to specify as mandatory factors the matters that the OfS is already required to have regard to, for example under section 2 of HERA or general administrative law. Nor do we propose to include a mandatory factor relating to the culpability or fault of the provider, for example, whether a provider has acted deliberately or recklessly as this is not an aspect on which HERA makes provision. We think this is an area where the OfS should have discretion and the OfS's regulatory framework consultation reflects this.
33. In practice, there may be a number of circumstances where a monetary penalty could be more appropriate than other sanctions or interventions, such as where a registered provider has made a direct financial gain as a result of breaching an ongoing registration condition (for example, by breaching the fee cap registration condition) or where it has repeatedly committed information-related breaches (for example, by failing to provide information to the OfS or produce returns or reports on time). It could also be appropriate to use a monetary penalty where a deregistered provider fails to honour their commitments in their student protection plan (for example, with regard to helping students to find a new course).
34. However, a monetary penalty may be less appropriate where there would be a disproportionate adverse impact on students from the provider spending its money on a penalty rather than on teaching resources. In these situations, the OfS may wish to use a different intervention or sanction. For example, where a provider has breached one of its ongoing conditions on quality by overstressing its finances and resources, the OfS could impose a specific ongoing registration condition that a provider must have a student number control.<sup>14</sup>

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<sup>14</sup> These examples are subject to the outcome of the OfS's regulatory framework consultation.

35. If a provider's financial position has significantly weakened since the time of the breach, the OfS could decide to use a payment plan to ensure that the provider does not subsequently close as a result of the penalty (as per the proposed mandatory factor on the impact of the monetary penalty on students below).

## The proposed mandatory factors

36. Below are the mandatory factors, which we think are essential for the OfS to consider when imposing monetary penalties:

### **1) The seriousness, impact and nature of the breach**

- We would expect the OfS to ensure that the level of penalty is proportionate to the seriousness, impact and nature of the breach. Impact would include harm to the student interest (for example, where student study is disrupted or a high number of students are adversely impacted), or harm to the taxpayer's interests (for example, costs have increased impacting on value for money), or reputational damage to the sector as a whole (and considering fairness to providers that did comply).
- We would expect the OfS to consider whether a monetary penalty would be an appropriate way of dealing with the particular breach or whether other sanctions or interventions may be more effective in addressing the breach and the issues underlying the breach.

### **2) Any gain (financial or otherwise) made by the provider as a result of the breach and, if so, the amount of the gain (if it can be quantified)**

- We would expect a penalty is more likely to be used, and likely to be higher where a provider has gained from non-compliance.
- We would expect the OfS to ensure the level of the penalty is proportionate to the level of the gain.

### **3) The OfS's assessment of the risk of a provider failing in the future to comply with OfS regulation**

- We would expect a penalty is more likely to be used, and likely to be higher, where the risk of a provider further breaching its ongoing registration conditions is high.
- In taking this factor into account, the OfS could look back at the compliance record of the provider, as well as taking a view on likely future behaviour.

#### **4) The impact of the monetary penalty on students**

- The OfS should consider whether a penalty will materially negatively impact on students and their experience, and in setting any penalty, it should balance any negative impacts against the interests of ensuring compliance (as well as the other matters above). This would include considering whether a penalty would materially negatively impact on the financial sustainability and viability of a provider insofar as this would impact on students.
- We would expect that the OfS would consider whether using a different intervention or sanction would be more appropriate if using a penalty would materially negatively impact on students and their experience. The OfS should also consider setting up payment plans with providers with financial sustainability or viability issues when a monetary penalty is used, to ensure there is not a detrimental impact on students.

***Question 4: Do you agree or disagree with the proposed mandatory factors the OfS should take into account when considering whether to impose a monetary penalty, and how much that penalty should be?***

***Agree/Disagree/Not sure. Please explain your answer if you responded 'Disagree' or 'Not sure'***

# Chapter 5 - financial penalties for late payment of OfS fees

## Background

37. Financial penalties under sections 70 and 71 of HERA are intended to deter providers from late payment, thus ensuring the timely receipt of income to cover the OfS's operating costs. Late payment of registration fees and 'other fees' could create significant cash-flow problems for the OfS, impacting its ability to regulate providers in the interest of students and taxpayers. It is therefore important that the OfS has the means – within parameters set by the Secretary of State – to deter late payment and incentivise timely repayment of any outstanding amounts due.
38. Payment of registration fees and 'other fees', where due, is also a proposed ongoing condition of registration for all registered providers under the new regulatory framework.<sup>15</sup>
39. In addition to imposing a financial penalty for late payment, regulations may give the OfS the power to charge interest on unpaid fee amounts. This will help to encourage providers to promptly pay the fees that are due. It will also help to deter providers from 'borrowing' money by delaying payment, which without the addition of interest could be less expensive than money borrowed from the bank.
40. The separate consultation on the OfS's regulatory framework has proposed that, where a provider has not complied with a registration condition or conditions and a sanction has been imposed, this will be noted on the register.<sup>16</sup> It is therefore possible, pending the result of that consultation, that where a provider has paid their registration fees or 'other fees' late and received a sanction as a result, this information will be made public. This will further encourage the payment of fee amounts by the date that they are due.

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<sup>15</sup> Source: OfS's regulatory framework consultation: [https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/supporting\\_documents/HE%20reg%20framework%20condoc%20FINAL%2018%20October%20FINAL%20FINAL.pdf](https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/supporting_documents/HE%20reg%20framework%20condoc%20FINAL%2018%20October%20FINAL%20FINAL.pdf)

<sup>16</sup> Source: OfS's regulatory framework consultation, page 142: [https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/supporting\\_documents/HE%20reg%20framework%20condoc%20FINAL%2018%20October%20FINAL%20FINAL.pdf](https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/supporting_documents/HE%20reg%20framework%20condoc%20FINAL%2018%20October%20FINAL%20FINAL.pdf)

## **Interaction with formal sanctions - monetary penalties, suspension and deregistration**

41. Consistent with its proposed risk-based regulatory approach, the OfS will be expected to use its judgment to determine whether a late payment penalty is the most appropriate intervention or sanction in the circumstances. For example, an isolated instance of late payment may be due to genuine provider error and be rectified immediately upon prompt notification of that provider. Similarly, a provider may be facing wider financial sustainability issues that have impeded its ability to pay and may pose far-reaching risks to students, requiring an alternative, more holistic intervention by the OfS.
42. On the other hand, if a provider has persistently paid late, or been found to be in breach of other registration conditions, a more serious sanction may be required that is appropriate to the nature and increased severity of the contravention. For example, if the late payment penalty did not result in the recovery of the fees due, the penalty amount and interest due, the OfS would have recourse to its other sanctions to address that same instance of late payment.
43. Under sections 18 and 22 of HERA, the OfS may also make provision to treat a deregistered provider as registered for specified purposes and so impose a sanction on that provider. This would allow the OfS to impose a financial or monetary penalty on a deregistered provider for the late payment of their registration fees or 'other fees' where due.

## **Proposals on late payment**

44. In practice, we envisage that providers will have 30 days from the date of notification of the amount payable in which to pay their registration fee or 'other fee', which will be clearly specified. A fee payment is then late if it is made after this agreed period.
45. We propose that the OfS will charge all registered providers a flat rate penalty amount of £250 if they pay their registration fees or 'other fees' late. This is designed so as to be proportionate to the nature and severity of late payment and is the same initial amount for all providers regardless of their registration category because it recognises that all registered providers are subject to the ongoing condition to pay their OfS fees.
46. We are also proposing that the OfS will charge interest on any unpaid part of the fee at the rate of 5% a year above the Official Bank of England Rate, accruing on a daily

basis from the date on which the amount concerned became due.<sup>17</sup> This is designed to encourage providers to promptly pay the outstanding fees that are due.

**Box B: worked example**

A provider in the Approved registration category with 700 FTE HE students fails to pay their £29,100 annual registration fee by the date specified, instead paying 30 days late.

The OfS imposes a late payment penalty of £250 on the provider and charges them 5.5% interest (5% above the Official Bank of England Rate of 0.5%) on the unpaid fee amount of £29,100, which accrues daily from when it became due.

The provider pays a total of £381.55. This breaks down into the £250 fixed penalty amount plus £131.55 interest accrued over 30 days.

Fixed penalty = £250

Annual interest = 5.5% \* £29,100 = £1,600.50

Daily interest = £1,600.50 / 365 = £4.38

Interest after 30 days = £4.38 \* 30 = £131.55

Total penalty and interest payable = £250 + £131.55 = £381.55

**Question 5: Do you agree or disagree with the proposals on the late payment penalty?**

**Agree/Disagree/Not sure. Please explain your answer if you responded 'Disagree' or 'Not sure'**

**Question 6: Please provide any further views you have on the government's proposals on the maximum penalty amount, the factors and the late payment penalty.**

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<sup>17</sup> The Official Bank Rate is the rate of interest that the Bank of England pays on reserve balances held by commercial banks and building societies (source: [http://www.bankofengland.co.uk/statistics/pages/iadb/notesiadb/wholesale\\_baserate.aspx](http://www.bankofengland.co.uk/statistics/pages/iadb/notesiadb/wholesale_baserate.aspx))



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