EXPLANATORY MEMORANDUM TO

THE HIGHER EDUCATION (TRANSPARENCY CONDITION AND FINANCIAL SUPPORT) (ENGLAND) REGULATIONS 2018

2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Education and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument makes provision under the Higher Education and Research Act 2017 ("HERA") in relation to the transparency condition required to be imposed under section 9 of that Act and financial support that may be provided under section 39. In particular, it establishes that the Office for Students ("OfS") must ensure that the ongoing registration conditions of each registered higher education provider in the 'Approved' or 'Approved (fee cap)' part of the OfS register includes a transparency condition. This instrument also prescribes that registered higher education providers in the 'Approved (fee cap)' part of the OfS register are eligible to receive grants, loans or other payments from the OfS. Further detail regarding the OfS register is set out in paragraph 3 below.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

3.1 The OfS register referred to in paragraph 2.1 above is the register required to be established and maintained by the OfS under section 3 of HERA. The obligation to create the register, and the related powers of the OfS to enter higher education providers in the register and to divide the register into different parts, came into force on 1 April 2018.[1] From that date, the OfS was empowered to receive and assess applications for registration from higher education providers.

3.2 The OfS is required by section 3(9) of HERA to make the information contained in the OfS register publicly available. It is expected that the OfS will fulfil this obligation by publishing the register on its website as soon as the register is populated with the names of providers in different registration categories. As soon as applications are approved, the names of those providers will be entered into the appropriate parts of the register, namely the 'Approved' and the 'Approved (fee cap)' categories. The OfS register will

[1] The OfS was established on 1 January 2018 by the Higher Education and Research Act 2017 (Commencement No. 1) Regulations 2017 – S.I. 2017/788. The intention to split the register into categories including 'Approved' and 'Approved (fee cap)' was set out in the consultation which the government conducted on behalf of the OfS: "Securing student success: risk-based regulation for teaching excellence, social mobility and informed choice in higher education" issued on 19 October 2017, and the registration categories were confirmed as 'Approved' and 'Approved (fee cap)' when the OfS published the Regulatory Framework on 28 February 2018. See footnotes 8 and 12 for links to these documents.

be available to the public, enabling crucially, prospective students to use the register (and the protection that registration in a particular category provides) as a source of information when considering where to study.

3.3 The Department notes that this instrument contains reference to a document that does not exist yet but is of the view that it is necessary to refer to it for the following reasons. The first reason is that higher education providers seeking registration need to know before they make an application the consequences of applying for registration in each category of the register. As a result of the transparency condition provision made by this instrument, providers entered by the OfS in the 'Approved' and 'Approved (fee cap)' part of the register will be subject to a condition of registration that requires them to provide to the OfS, and publish, such information as the OfS may request under sections 9(2) and (3) of HERA. Breach of that condition may lead to the imposition of sanctions, including monetary penalties, by the OfS. As a result of the financial support provision made by this instrument, only providers entered by the OfS in the 'Approved (fee cap)' part of the register will be eligible to receive grants, loans or other payments from the OfS. This is vital information for higher education providers seeking registration in the OfS register for the first time and it is therefore crucial that they are aware of the specific implications of seeking registration in particular parts of that register.

3.4 The second reason is that, in order to fulfil its duties to create and maintain the register and then effectively regulate higher education providers who are successfully registered, the OfS itself needs to know which categories of provider have been prescribed by this instrument. That is because, when registering providers, the OfS needs to be clear about the providers on which it must impose a transparency condition as a condition of registration as well as the providers to whom it may make grants, loans or other payments.

3.5 In its Eleventh Report of Session 2017-19,[2] the Joint Committee on Statutory Instruments (JCSI) considered an earlier instrument[3] that prescribed higher education providers by reference to those registered in a particular part of the OfS register in circumstances where there was no indication in that instrument as to whether the register was available. Notably, having considered the Department's memorandum dealing with this issue (available at Appendix 2 of the Eleventh Report and repeated in detail in paragraphs 3.1 to 3.4 above), the JCSI concluded that it was satisfied that the sequence set out in the Department's memorandum was within the reasonably contemplated legislative intent.

3.6 As advisors to the JCSI are aware, the Department takes the view that it is permissible for this instrument to prescribe categories of provider by reference to parts of the OfS register in which an English higher education provider is registered. In its view this is authorised by section 119(5)(d) of HERA. That enables the Secretary of State to make regulations which are framed by reference to matters determined or published by the OfS (whether before or after the regulations are made)[4]. Further, and to that end, section

[2] See Instrument 2 on page 5 of the Eleventh Report of Session 2017-19, which can be found at: https://publications.parliament.uk/pa/jt201719/jtselect/jtstatin/72/72.pdf.

[3] The Higher Education (Fee Limit Condition) (England) Regulations 2017 (2017/1189).

[4] The example given to Parliament of a reference that may be made under section 119(5)(d) was to the part of the register to which an English higher education provider is registered (see Amendment 19 on page 21 of the 'Consideration of Bill Amendments as at 21 November 2016' at: https://publications.parliament.uk/pa/bills/cbill/2016-2017/0078/amend/higher_daily_rep_1118.pdf and column

3(2) of HERA makes clear that whether or not the register is divided into parts (and, by implication, what any such categories are called) is a matter that the OfS determines.

Other matters of interest to the House of Commons

3.7 This entire instrument applies only in relation to England. This is because its provisions relate to an aspect of the regulation by the OfS of institutions that are, or are applying to become, registered higher education providers within the meaning of section 3(10) of HERA. Section 3(3)(b) provides that an institution can only be registered on the OfS register (and thereby become a registered higher education provider) if it is, or intends to become, an English higher education provider. An English higher education provider is defined in section 83(1) of HERA as a higher education provider whose activities are carried on, or principally carried on, in England.

3.8 In the view of the Department, this instrument either has no effect outside of England, or may have such effects which are minor or consequential. This is because, as explained above, English higher education providers as defined in HERA may include providers of higher education that carry on some activities outside England, provided that their activities are principally carried on in England.

3.9 In the view of the Department, for the purposes of House of Commons Standing Order 83P, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament, and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

3.10 The Department has reached this view because this instrument makes provision relating to education – specifically, the regulation of providers of higher education. Education is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). By virtue of it not being included in the list of reserved matters in Schedule 5 to the Scotland Act 1998, education is within the devolved legislative competence in Scotland. Education is not a reserved matter listed within Schedule 7A to the Government of Wales Act 2006 and is not within one of the exceptions listed therein, nor is it otherwise outside the legislative competence of the National Assembly for Wales (see section 108A of that Act).

4. Legislative Context

4.1 This instrument is one of a number of instruments required to implement HERA. Section 1 of HERA establishes the OfS as the new regulator for English higher education providers. Section 3 of HERA requires the OfS to establish and maintain a register of English higher education providers and the OfS can apply registration conditions to them in accordance with sections 4 to 14. Further background information regarding the OfS register is set out in paragraphs 3.1 to 3.6 above.

4.2 By virtue of section 9(1) of HERA the OfS is required to ensure that the ongoing registration conditions of each registered higher education provider of a prescribed

707 of Hansard volume 617 at: https://hansard.parliament.uk/commons/2016-11-21/debates/3C2C0C73-35CF-4108-B68D-44820B49059B/HigherEducationAndResearchBill).

description includes a transparency condition. Sections 9(2) and (3) define the condition as one that requires prescribed providers to provide and publish information relating to student applications, completion and attainment, which may be broken down by gender, ethnicity and socio-economic background. Section 9(4) of HERA defines "prescribed" as meaning prescribed by regulations made by the Secretary of State. Regulation 4 of this instrument prescribes providers registered in the 'Approved' and 'Approved (fee cap)' part of the OfS's register for this purpose.

4.3 By virtue of section 39(1) of HERA the OfS may make grants, loans or other payments to the governing body of eligible higher education providers. Eligible higher education provider is defined in section 39(3) of HERA as a registered higher education provider of a description prescribed in regulations made by the Secretary of State. Regulation 5 of this instrument prescribes providers registered in the 'Approved (fee cap)' part of the OfS's register for this purpose.

4.4 This instrument is the first made under the powers in sections 9 and 39 of HERA. The instrument gives full effect to those sections of HERA by establishing which description of registered higher education provider (a) must be required by the OfS to comply with a transparency condition and (b) may be eligible for grant, loan or other payments from the OfS.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Minister of State for Universities, Science, Research and Innovation has made the following statement regarding Human Rights:

"In my view the provisions of The Higher Education (Transparency Condition and Financial Support) (England) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 In respect of the transparency condition provision made by this instrument, a key policy intention of HERA is to require certain higher education providers to provide information relating to their student access, participation and success in order to make their record on these features more transparent. This is because, although as of 2017 there are record numbers of 18 year olds entering higher education and the entry rate for the most disadvantaged English 18 year olds (measured by POLAR)[5] has increased to 20.4%, it is considered that there is still more work to be done to reduce unequal access and success in higher education. For example, analysis shows that 18-year-old applicants from the most advantaged areas (measured by POLAR) were 5.5 times more likely than those from the most disadvantaged areas to enter higher tariff providers.

[5] Polar, participation of local areas, is a classification that looks at how likely young people are to participate in HE across the UK and shows how this varies by area.

7.2 In this context, the Department is of the view that greater transparency is one of the best tools available to drive social mobility. The transparency condition will facilitate this by giving prospective students access to detailed individual provider level information about student applications, completion rates and attainment broken down by gender, ethnicity and socio-economic background. This will empower such students to make the right decisions for them. Furthermore, the transparency condition will shine a spotlight on those higher education providers who need to go further in terms of widening and diversifying access, participation and ultimately success for their students.

7.3 This instrument will therefore require the OfS to ensure that an ongoing registration condition of those registered higher education providers in the 'Approved' or 'Approved (fee cap)' part of the OfS register must include a transparency condition. Higher education providers in these parts of the OfS register will be able to access public funding for their courses and/or students. This condition will impose a requirement on such providers to provide to the OfS, and publish, information relating to the number of applications received for admission on to higher education courses, the number of offers made and accepted, and the number of students who complete their courses and attain a particular degree or other award. Further, the OfS may request this information by reference to the gender, ethnicity and socio-economic background of the individuals concerned. The Department understands that the OfS will be issuing additional advice on the presentation and contextualisation of the transparency information in autumn 2018.[6] This guidance will ensure that the information required by the transparency condition will be presented consistently across all providers and in a way that is meaningful to those accessing it. It will be important to avoid the disclosure of this data from inadvertently reinforcing perceptions that higher education is not open to all and discouraging prospective students from applying to specific institutions.

7.4 Alternatives to legislation for achieving the policy aims set out in this section were considered. These included the consideration of a series of voluntary agreements with higher education providers. However, the Department identified a risk that a lack of sufficient participation would mean that students, the OfS and the Government would not be able to systematically and routinely collect the information required to deliver the policy objectives thereby undermining policy intent.[7]

7.5 In respect of the financial support provision made by this instrument, a key part of the OfS's functions under HERA is to be able to issue grants to eligible higher education providers for teaching. The strategic uses of public grant funding for teaching and related activities are set out in the OfS Regulatory Framework, published on 28 February.[8] The majority of this is used to support provision where the cost is greater than the amount received as tuition fee income, where tuition fees are capped, and also to support access, success and progression for students from disadvantaged backgrounds and underrepresented groups.

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[6] See page 10 of the OfS Guidance to providers about transparency information, which can be found at: https://www.officeforstudents.org.uk/media/1107/ofs2018_08.pdf.

[7] Further detail can be found on pages 57 to 81 of the December 2017 Impact Assessment for the Higher Education and Research Act available on the government website at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/668061/Enactment_IA_-_Final_-_BRANDED.pdf.

[8] See paragraphs 53-54 of the OfS Regulatory Framework, which can be found at: https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf.

7.6 The OfS is currently receiving applications from higher education providers who are seeking to be on the register under section 3 of HERA. The financial support element of these regulations is required to confirm that grant and other funding may be available for those providers in the 'Approved (fee cap)' part of the OfS register. This will provide those providers with certainty regarding the benefit of being in this part of the register given this part of the register attracts the additional burden imposed by the tuition fee cap, as set out in condition G1 of the OfS's published Regulatory Framework. The financial support provision in this instrument therefore broadly replicates the earlier system established under the previous legislative framework,[9] which requires that those providers who benefit from grant funding must have their tuition fees capped.

8. Consultation outcome

8.1 The former Department for Business, Innovation and Skills published a consultation as part of the Green Paper on higher education entitled "Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice" in November 2015.[10] The consultation informed the subsequent Government White Paper on higher education entitled "Success as a Knowledge Economy: Teaching Excellence, Social Mobility & Student Choice" which was published in May 2016.[11] Sufficient input from the sector was received during the above consultations to inform policy development. Further, during the parliamentary passage of the Higher Education and Research Bill there was support for the principles of the transparency condition.

8.2 The Government subsequently published a further consultation document entitled "Securing Student Success: Risk Based Regulation for Teaching Excellence, Social Mobility and Informed Choice in Higher Education" on 19 October 2017 on behalf of the OfS, the response to which were published in February 2018.[12] This consultation set out the proposed regulatory framework and guidance on compliance with registration conditions. This included the requirements of the transparency condition as set out in HERA alongside a number of other conditions upon which the sector was asked to comment. Many respondents said it was an appropriate expectation for providers in the 'Approved' and 'Approved fee cap' categories to comply with the transparency condition. The intention to prescribe those higher education providers in the 'Approved (fee cap)' part of the register as eligible for grant and other funding was set out in the November 2015 Green Paper, the May 2016 White Paper for the Higher Education and Research Bill, and in the October 2017 Regulatory Framework Consultation referred to above.

8.3 The Department for Business, Energy and Industrial Strategy (BEIS), as the sponsor Department for the newly created UK Research and Innovation, was consulted on the

[9] See Part 2 of the Further and Higher Education Act 1992 (c. 13) and Part 2 of the Higher Education Act 2004 (c. 8).

[10] The Green Paper can be viewed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/474227/BIS-15-623-fulfilling-our-potential-teaching-excellence-social-mobility-and-student-choice.pdf.

[11] The White Paper can be viewed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

[12] The consultation can be viewed https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/; and the responses can be viewed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683616/Regulatory_Framework_DfE_government_response.pdf.

prescription of 'Approved (fee cap)' providers as those eligible for funding under section 39 of HERA. This is because section 97(5) of HERA defines "eligible higher education provider" in the context of Research England funding as having the same meaning as "eligible higher education provider" in section 39. BEIS were content with this approach.

9. Guidance

9.1 Section 2(3) of HERA requires the OfS to have regard to any guidance given to it by the Secretary of State when performing its functions. This includes functions under sections 9 and 39 of HERA relating to the transparency condition and financial support respectively. Guidance specifically relating to the transparency condition was included in the Secretary of State's Guidance which was published on 28 February 2018.[13] This Guidance was provided to the OfS following a commitment made by the Government during the parliamentary passage of HERA that it would request the OfS undertake a consultation with higher education providers on what other information should be collected and published as part of providers' Access and Participation Plans. The publication of this Guidance in February 2018 will also give providers sufficient time to put systems in place for the collection of data ahead of the publication of the first datasets due in August 2019. There is no need for guidance to cover the prescription of providers under sections 9 and 39, as this is not an OfS function.

9.2 Separately, the OfS has published guidance for higher education providers on the general ongoing registration conditions as part of its Regulatory Framework. Additional guidance sets out what providers in the 'Approved' and 'Approved (fee cap)' part of the register must do to comply with the transparency condition.[14] This technical guidance is procedural in nature and does not change the substance of the condition.

10. Impact

10.1 No significant impact on business, charities or voluntary bodies is foreseen beyond the impacts assessed as part of the HERA Impact Assessment (see paragraph 10.3 below).

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument. However, the impact of the transparency condition element of this instrument was assessed as part of the Impact Assessment published in December 2017 for the Higher Education and Research Act (see pages 57-81).[15] This remains an accurate assessment of the impacts that apply to the transparency condition element of this instrument, as it assessed the impact of the transparency condition applying to higher education providers registered in the 'Approved' and 'Approved (fee cap)' part of the OfS register.

10.4 The prescription of providers registered in the 'Approved (fee cap)' part of the OfS register as eligible for grant and other funding was considered on page 22 of the Impact

[13] Transparency is mentioned in both the Secretary of State's Strategic Guidance, which can be viewed at: https://www.officeforstudents.org.uk/media/1111/strategicguidancetotheofs.pdf, and the Secretary of State's Guidance on Access and Participation, which can be viewed at https://www.officeforstudents.org.uk/media/1112/access-and-participation-guidance.pdf.

[14] The OfS guidance to providers can be viewed at: https://www.officeforstudents.org.uk/publications/regulatory-advice-8-guidance-for-providers-about-condition-of-registration-f1-transparency-information/.

[15] See footnote 7.

Assessment published in May 2016 for the Higher Education and Research Bill.[16] This impact assessment stated that it was expected that all existing Higher Education Institutions and those Further Education Colleges currently receiving grant funding from the Higher Education Funding Council for England (HEFCE) would seek registration in the 'Approved (fee cap)' part of the register. The impact of this prescription was therefore minimal.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 No specific action is proposed to minimise regulatory burdens on small businesses.

11.3 Higher education providers which are small businesses have been consulted on the new regulatory framework (as outlined in section 8 above) alongside all other providers. Paragraphs 87 to 90 of the HERA Impact Assessment (referred to in paragraph 10.3 above) considered the impact on Small and Micro Businesses of having to comply with the transparency condition. It concluded that, although the burden on small institutions will be greater than for larger institutions, the incremental burden compared to current practice will be small. There is no impact from the prescription of those higher education providers who will be eligible for grant and other funding by virtue of these regulations. Those higher education providers not in the 'Approved (fee cap)' part of the register are able to increase their fees to make up any shortfall in teaching costs and so are able to mitigate any impacts.

11.4 In addition, higher education providers which are small businesses will be able to choose whether they subject themselves to a transparency condition when deciding whether to apply for registration in the 'Approved' or 'Approved (fee cap)' parts of the OfS register. It will therefore be for these providers to decide whether to accept this impact.

12. Monitoring & review

12.1 We have considered the requirement under Section 28 of the Small Business, Enterprise and Employment Act 2015 regarding the inclusion of a review provision in secondary legislation that regulates business. The requirements for the transparency condition and the prescription of providers eligible for funding under HERA have been estimated to have minimal additional impact on business. As such, the Department has concluded that it would be disproportionate on cost grounds to include a review provision within this instrument.

12.2 The Department for Education will, however, ask the OfS to monitor the effectiveness of the condition in delivering the policy aims to widen participation in higher education and identify whether changes should be considered.

13. Contact

Tom Worthington at the Department for Education, telephone: 07388 372223 or email: Thomas.Worthington@education.gov.uk, can answer any queries regarding the instrument.

[16] The Higher Education and Research Bill Impact Assessment (May 2016) can be viewed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524517/bis-16-264-he-research-bill-impact-assessment.pdf.