EXPLANATORY MEMORANDUM TO

THE HIGHER EDUCATION (FEE LIMITS AND FEE LIMIT CONDITION) (ENGLAND) REGULATIONS 2018

2018 No. 903

1. Introduction

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

2. Purpose of the instrument

2.1 The Higher Education (Fee Limits and Fee Limit Condition) (England) Regulations 2018 ("these Regulations") set variable limits on the maximum fees that prescribed registered higher education providers can charge students undertaking higher education courses in respect of an academic year starting on or after 1 August 2019. Registered higher education providers are higher education providers as defined in section 83(1) of the Higher Education and Research Act 2017 ("the Act"), which are included in a register established and maintained by the Office for Students (OfS) (see paragraph 3.1 below).

2.2 The Student Fees (Amounts) (England) Regulations 2004, the Higher Education (Basic Amount) (England) Regulations 2016 and the Higher Education (Higher Amount) (England) Regulations 2016 currently set a limit on the tuition fees which higher education institutions funded by the Higher Education Funding Council for England (HEFCE)[1] may charge but those regulations and their enabling powers are to be revoked as part of the implementation of the new regulatory regime which is set out in the Act. The purpose of these Regulations is to set fee limits at the same levels as those existing currently.

2.3 These Regulations also make amendments to the Higher Education (Fee Limit Condition) (England) Regulations 2017 ("the Fee Limit Condition Regulations") which prescribe the type of higher education provider, the qualifying courses of higher education and the qualifying students which will be subject to the fee limits set out in these regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These Regulations sit in tandem with the Fee Limit Condition Regulations which came into force on 1 April 2018 and which prescribe the higher education providers, the persons (students) and the courses which will be subject to tuition fee limits. These Regulations prescribe the levels of those limits. The Joint Committee on Statutory Instruments has, in connection with the Fee Limit Condition Regulations, previously sought and received an explanation as to why those Regulations prescribe

[1] The Office for Students (OfS) has taken on the statutory functions of HEFCE between 1st April 2018 and 31st July 2019. This is required as HEFCE ceased to exist on 1st April 2018 and it is necessary to keep to their functions alive for the transition period as OfS functions under the Higher Education and Research Act 2017 will not be fully in force until 1st August 2019.

higher education providers according to their category of registration (with registration meaning inclusion in the register established and maintained by the Office for Students under section 3 of the Act), when that register had not yet been established and was not yet available to the public. This instrument does not make reference to the register, or any category of registration, but the Committee's attention is drawn to the Department's explanation given in connection with the Fee Limit Condition Regulations for completeness. That explanation is available at appendix 2 to the Committee's report at the following link:

https://publications.parliament.uk/pa/jt201719/jtselect/jtstatin/72/7203.htm#_idTextAnchor003

3.2 Separately, these Regulations correct several errors in the Fee Limit Condition Regulations, amongst other amendments to those Regulations which result from policy changes. The Department has consulted the SI Registrar in this regard, in accordance with SIP 5th edition, paragraph 4.7.6. The Department believes that the free issue procedure should not be applied in this instance, because the Fee Limit Condition Regulations have not been amended primarily to correct earlier errors; the corrections feature minimally amongst other substantive amending provisions which would have been made in any event.

Other matters of interest to the House of Commons

3.3 These Regulations and the Fee Limit Condition Regulations apply to English higher education providers, which are defined in section 83(1) of the Act as higher education providers whose activities are carried on, or principally carried on, in England. These Regulations therefore apply to students resident in England, Wales, Scotland and Northern Ireland, if they are studying a higher education course at an English higher education provider.

3.4 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; the devolved legislative competence of the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament; and the devolved legislative competence of the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

3.5 The Department has reached this view because it considers that the primary purpose of these Regulations relate to education, which is within the devolved legislative competence of each of the three devolved legislatures: the primary purpose of the subject matter of the instrument is not within Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the subject matter of the instrument 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 the Act); the primary purpose of the subject matter of the instrument 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 The Act enables the establishment of the Office for Students (OfS) as the regulator for English higher education providers. It also provides for the abolition of the existing body which provides public funding to those providers – the Higher Education Funding Council for England ("HEFCE") which was established by section 62 of the Further and Higher Education Act 1992 (1992 c.13). Section 24 of the Higher Education Act 2004 (2004 c.8) currently requires HEFCE to impose a limit on tuition fees charged to prescribed students undertaking prescribed courses, as a condition of public funding. Following the repeal of the relevant parts of the Further and Higher Education Act 1992 (in England) and of the Higher Education Act 2004 by the Act, these Regulations will prescribe the maximum tuition fees that will apply to higher education providers which are registered in a certain part of the register maintained by the OfS under section 3 of the Act.

4.2 Section 10 of the Act provides that the OfS must ensure that the ongoing registration conditions applicable to registered providers of a prescribed description include a fee limit condition, which applies to qualifying courses attended by qualifying persons. The Fee Limit Condition Regulations set out those providers, courses and persons which will be subject to a fee limit condition.

4.3 Paragraphs 2 and 3 of Schedule 2 to the Act allow the Secretary of State to prescribe the fee limits themselves by regulations. Section 119(2)(i) of the Act requires such regulations to be laid before, and approved by a resolution of, both Houses of Parliament.

4.4 These Regulations set the maximum level of tuition fees which may be charged in academic years commencing on or after 1st September 2019. In these regulations, "academic year" means:

(a) in the case of an academic year of a course which begins between 1st January and 31st March, the period of twelve months beginning on 1st January of that year;

(b) in the case of an academic year of a course which begins between 1st April and 30th June, the period of twelve months beginning on 1st April of that year;

(c) in the case of an academic year of a course which begins between 1st July and 31st July, the period of twelve months beginning on 1st July of that year; and

(d) in the case of an academic year of a course which begins between 1st August and 31st December, the period of twelve months beginning on 1st September of that year;

4.5 Different tuition fee limits apply to different types of course, according to whether they are "full-time", "part-time", or do not involve more than a certain level of "attendance" or "full-time study". These concepts are undefined in these Regulations, and have been used, undefined, in regulations relating to student finance for a number of years. However, they are explained in guidance issued by Student Finance England ("SFE"), which is available on its practitioners' website, and are well-understood in the higher education sector.

4.6 These Regulations set a limit on the maximum fees that prescribed registered providers which **have** access and participation plans approved by the OfS in place, and which have a high level quality rating under arrangements made under section 25

of the Act may charge for full-time or part-time higher education courses which started on or after 1 September 2012 in respect of an academic year starting on or after 1 August 2019. This limit is known as the "higher amount".

4.7 These Regulations similarly set a limit on the maximum fees that prescribed registered providers which **do not have** access and participation plans approved by the OfS in place, but which do have a high level quality rating may charge for full-time or part-time higher education courses which started on or after 1 September 2012 in respect of an academic year starting on or after 1 August 2019. This limit is known as the "basic amount".

4.8 The nature and content of access and participation plans are dealt with in sections 29 to 35 of the Act, and in the Higher Education (Access and Participation Plans) (England) Regulations 2018 (S.I. 2018/470).

4.9 The "floor amounts" in respect of the higher and basic amounts are also prescribed by these Regulations. The Secretary of State has the power under Schedule 2 paragraphs 2(6) and 3 (5) to determine fee limits where prescribed providers do not have a high level quality rating under arrangements made under section 25 of the Act. These limits are known as "sub-level amounts", and by virtue of paragraphs 2(9) and 3(8) of Schedule 2, such sub-level amounts must be equal to or greater than the relevant prescribed floor amount.

4.10 These Regulations[2] also set a limit on the maximum fees that prescribed registered providers may charge in respect of three particular groups of students: those who began a current course before 1st September 2012, those who transferred on to a current full-time course from a full-time course which began before 1st September 2012, or those who are defined as "end-on students". These students must fall into one of the eligibility categories listed in the Schedule to the Fee Limit Condition Regulations, in order for the higher, basic and floor amounts to apply.

4.11 These Regulations amend the Fee Limit Condition Regulations to introduce a new category of qualifying person who will have the benefit of capped fees, namely those who are stateless persons or who are family members of stateless persons. These Regulations introduce an exemption for students who already hold an equivalent or higher qualification and are undertaking (i) full-time pre-registration courses in an allied health profession subject (excluding courses in a dental profession subject), midwifery, nursing, nursing and social work or operating department practice or (ii) full-time and part-time pre-registration courses in a dental profession subject so that those students are qualifying persons and are therefore able to benefit from fee limits. These Regulations also make clear that the requirement for a provider to be registered in the Approved (fee cap) category of the register at the time of an offer a place only applies to courses, the first academic year of which commences on or after 1 August 2019.

4.12 These Regulations also make some minor technical corrections to the Fee Limit Condition Regulations, which will apply on the date that these Regulations come into force (see section 3 under "Matters of Interest to the Joint Committee on Statutory Instruments").

[2] The Student Fees (Amounts) (England) Regulations 2004 and their enabling powers under the Higher Education Act 2004 which set maximum fees for courses starting before 1 September 2012 (and for transferring and end on students) will cease to apply from 1 August 2019. These Regulations will prescribe the maximum tuition fees for these categories of student from 1 August 2019.

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, Sam Gyimah, has made the following statement regarding Human Rights:

In my view the provisions of the Higher Education (Fee Limits and Fee Limit Condition) (England) Regulations 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 A key policy intention lying behind the Act is that registered higher education providers are able to charge varying fees depending on meeting a number of conditions by virtue of registration in a particular part of the register.

7.2 Section 3 of the Act requires the OfS to establish and maintain a register of English higher education providers, and allows the OfS to divide the register into such parts or categories as it may determine. The OfS has divided the register into two parts: Approved, and Approved (fee cap).

7.3 Providers registered in the Approved category will be able to charge unlimited tuition fees, although the maximum amount of student support (fee loans) which will apply to courses provided by Approved providers will remain at a level currently set out in the Education (Student Support) Regulations 2011. Students who are qualifying persons and are undertaking qualifying courses at providers registered in the Approved (fee cap) part of the Register ("prescribed registered providers") will be subject to the fee limits set out in these Regulations.

7.4 These Regulations set the maximum fees which prescribed registered providers may charge from academic year 2019/20, varied according to whether they have an access and participation plan approved by the OfS in force or not. Those providers which have such a plan in force may charge up to the prescribed higher amount, and those which do not have such a plan in force may charge up to the prescribed basic amount. In each case these amounts apply where the provider has received a high level quality rating under arrangements made under section 25 of the Act. This currently means an award under the Teaching Excellence and Student Outcomes Framework as operated by the OfS.

7.5 Providers without a high level quality rating may charge course fees up to the level of the sub-level amount in respect of the higher amount (where they have an access and participation plan) and up to the sub-level amount in respect of the basic amount (where they do not have an access and participation plan). The sub-level amounts are determined by the Secretary of State, but they must be equal to or greater than the floor amounts which are prescribed in these Regulations.

Maximum fees for full-time courses starting on or after 1 September 2012

7.6 The higher amount for prescribed registered providers with a high level quality rating will be £9,250 for full-time courses in 2019/20. The floor amount in respect of the higher amount for prescribed registered providers without a high level quality rating will be £9,000 for full-time courses in 2019/20.

7.7 The basic amount for prescribed registered providers with a high level quality rating will be £6,165 for full-time courses in 2019/20. The floor amount in respect of the basic amount for prescribed registered providers without a high level quality rating will be £6,000 for full-time courses in 2019/20.

Maximum fees for specified cases for full-time courses starting on or after 1 September 2012

7.8 Lower basic and higher amount tuition fees apply to the final year of a full-time course which is normally required to be completed after less than 15 weeks' attendance, for a sandwich work placement year where the periods of full-time study are less than 10 weeks, for a full-time course provided in conjunction with an overseas provider where the periods of study at the UK provider are less than 10 weeks, and for an Erasmus study or work placement year. An Erasmus year is an academic year of a course where a student is participating in the European Union programme, Erasmus + , for education, training, youth and sport.

7.9 For the final year of a full-time course which is normally required to be completed after less than 15 weeks' attendance, prescribed registered providers can charge up to 50% of the maximum full-rate fees.

7.10 The higher amount for the final year of a course for prescribed registered providers with a high level quality rating will be £4,625 in 2019/20. The floor amount in respect of the higher amount for the final year of course for prescribed registered providers without a high level quality rating will be £4,500 in 2019/20.

7.11 The basic amount for the final year of a course for prescribed registered providers with a high level quality rating will be £3,080 in 2019/20. The floor amount in respect of the basic amount for the final year of course for prescribed registered providers without a high level quality rating will be £3,000 in 2019/20.

7.12 For a sandwich work placement year where the periods of full-time study in the academic year are less than 10 weeks, prescribed registered providers can charge up to 20% of the maximum full-rate fees.

7.13 The higher amount for a sandwich work placement year for prescribed registered providers with a high quality rating will be £1,850 in 2019/20. The floor amount in respect of the higher amount for a sandwich work placement year for prescribed registered providers without a high quality rating will be £1,800 in 2019/20.

7.14 The basic amount for a sandwich work placement year for prescribed registered providers with a high quality rating will be £1,230 in 2019/20. The floor amount in respect of the basic amount for a sandwich work placement year for prescribed registered providers without a high quality rating will be £1,200 in 2019/20.

7.15 For an overseas study year where the periods of full-time study at the UK provider are less than 10 weeks or an Erasmus study or work placement year, prescribed registered providers can charge up to 15% of the maximum full-rate fees.

7.16 The higher amount for an overseas study year or an Erasmus study or work placement year for prescribed registered providers with a high quality rating will be £1,385 in 2019/20. The floor amount in respect of the higher amount for an overseas study year or an Erasmus study or work placement year for prescribed registered providers without a high quality rating will be £1,350 in 2019/20.

7.17 The basic amount for an overseas study year or an Erasmus study or work placement year for prescribed registered providers with a high quality rating will be £920 in 2019/20. The floor amount in respect of the basic amount for an overseas study year or an Erasmus study or work placement year for prescribed registered providers without a high quality rating will be £900 in 2019/20.

Maximum fees for part-time courses starting on or after 1 September 2012

7.18 Maximum fees for part-time courses are set at around 75% of the maximum fees for full-time courses.

7.19 The higher amount for prescribed registered providers with a high level quality rating will be £6,935 for part-time courses in 2019/20. The floor amount in respect of the higher amount for prescribed registered providers without a high level quality rating will be £6,750 for part-time courses in 2019/20.

7.20 The basic amount for prescribed registered providers with a high level quality rating will be £4,625 for part-time courses in 2019/20. The floor amount in respect of the basic amount for prescribed registered providers without a high level quality rating will be £4,500 for part-time courses in 2019/20.

Maximum fees for full-time courses starting before 1 September 2012

7.21 The higher amount and the floor amount in respect of the higher amount for prescribed registered providers will be £3,465 for full-time courses in 2019/20.

7.22 The basic amount and the floor amount in respect of the basic amount for prescribed registered providers will be £1,380 for full-time courses in 2019/20.

7.23 These amounts will apply in 2019/20 to full-time courses starting before 1 September 2012, for students who have transferred to a full-time course starting on or after 1 September 2012 from a full-time course starting before 1 September 2012 and for students undertaking a full-time Honours Degree course immediately after achieving a full-time lower level qualification which started before 1 September 2012.

Maximum fees for specified cases for full-time courses starting before 1 September 2012

7.24 The higher amount and the floor amount in respect of the higher amount in specified cases will be £1,725 for full-time courses in 2019/20.

7.25 The basic amount and the floor amount in respect of the basic amount in specified cases will be £680 for full-time courses in 2019/20.

7.26 The specified cases are for (i) a final year of a full-time course which is normally required to be completed after less than 15 weeks' attendance (ii) a sandwich work placement year where the periods of full-time study in the academic year are less than 10 weeks and (iii) an overseas study year where the periods of full-time study at the UK provider are less than 10 weeks.

7.27 These amounts will apply in 2019/20 to full-time courses starting before 1 September 2012, for students who have transferred to a full-time course starting on or after 1

September 2012 from a full-time course starting before 1 September 2012 and for students undertaking a full-time honours degree course immediately after achieving a full-time lower level qualification which started before 1 September 2012.

Introducing a new eligibility category in the Fee Limit Condition Regulations for stateless persons and their families

7.28 These Regulations amend the Fee Limit Condition Regulations so that persons who have a current grant of stateless leave, and their families who are undertaking qualifying courses in the 2019/20 academic year are defined as qualifying persons (subject to them meeting all of the criteria specified in new category 5A). This means that they will be subject to the same maximum fees that currently apply to other qualifying persons, such as persons who are settled in the United Kingdom.

Ensuring students already holding a higher education qualification who are undertaking a pre-registration healthcare course qualify for home fee status.

7.29 Most students undertaking a higher education course who already hold a qualification that is equivalent or higher than their second course are not qualifying persons i.e. their fees are not subject to prescribed limits. However the Fee Limit Condition Regulations have a number of exceptions to this rule.

7.30 These Regulations amend the Fee Limit Condition Regulations so that students already holding an equivalent or higher level qualification who are undertaking a full-time pre-registration course in nursing, midwifery, nursing, nursing and social work, operating department practice or the allied health professions (excluding a dental profession subject) or a full-time or part-time pre-registration course in a dental profession subject will be defined as qualifying persons and will have the benefit of fee limits.

Qualifying courses and fee limits

7.31 The Fee Limit Condition Regulations require that a provider must be registered in the Approved (fee cap) part of the OfS register at the time a qualifying person received an offer of a place on a qualifying course in order to qualify for a fee limit.

7.32 These Regulations amend the Fee Limit Condition Regulations to make it clear that the requirement referred to in paragraph 7.31 only applies where the first academic year of a course begins on or after 1 September 2019.

Consolidation

7.33 Consolidation is not appropriate as this is the first instrument made under new enabling powers.

8. Consultation outcome

8.1 There is no statutory requirement to consult on these Regulations and a separate consultation has not been carried out for them.

8.2 The former Department for Business, Innovation and Skills published a consultation as part of the Green Paper on higher education "Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice" in November 2015. The consultation informed the Government White Paper on higher education; "Success as a Knowledge

Economy: Teaching Excellence, Social Mobility & Student Choice"[3] which was published in May 2016.

8.3 The Government published a detailed consultation document: Securing Student Success: Risk Based Regulation for Teaching Excellence, Social Mobility and Informed Choice in Higher Education[4] on 19 October 2017, setting out its proposed regulatory framework under the Act and providing guidance on compliance with registration conditions. This included fee limits.

8.4 As part of a quality review process in Spring 2018, the draft regulations were sent to the Office for Students (OfS) to check that they met policy intent.

9. Guidance

9.1 Minister Sam Gyimah announced proposed changes to maximum fees in detail in a Written Ministerial Statement (WMS) to Parliament on 2 July 2018.

9.2 Information setting out these changes is being made available for universities, colleges and other higher education stakeholders on Student Finance England's practitioners' website. Further information on changes to maximum fees for 2019/20 will be published for students on GOV.UK and SFE websites.

9.3 Guidance materials are being produced by SFE for students intending to apply for financial support for full-time and part-time courses in 2019/20 and these will be available in both hard copy and electronic formats.

10. Impact

10.1 There is not expected to be any additional impact on business, charities or voluntary bodies. Tuition fee limits at the same levels are already imposed on higher education providers which are eligible for public funding, and the fee limits imposed by these Regulations will also only apply to those providers which are so eligible.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument.

10.4 An Equality Analysis (EA)[5] covering maximum fees for 2019/20 and their impact on protected and disadvantaged groups of students is being published on the GOV.UK website after these Regulations have been laid.[6]

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 the regulatory burdens on small businesses.

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[3] https://www.gov.uk/government/consultations/higher-education-teaching-excellence-social-mobility-and-student-choice

[4] https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/

[5] A hard copy of this EA is available from Linda Brennan at the Department for Education: Tel 07931 018296, email: Linda.Brennan@education.gov.uk.

[6] https://www.gov.uk/

11.3 This is because smaller higher education providers are free to decide whether to apply for the part of the OfS register which will bring them within the fee limit regime – it is not obligatory – and in the case of those providers which are already subject to fee limits – the levels are not being increased. Higher education providers which are small businesses have been consulted on the new regulatory framework, and the imposition a fee limit as outlined in section 8 above, alongside all other providers. The impact of a tuition fee limit has positive elements in that it widens the pool of potential students who are able to undertake their courses. Higher education providers which are small businesses will be able to choose whether they subject themselves to a tuition fee limit in return for the benefits to which registration in the Approved (fee cap) part of the register entitles them. It will be for such providers to decide whether to accept that impact.

12. Monitoring & review

12.1 These Regulations will be kept under review and in particular we will be monitoring the views of stakeholders. We will also be monitoring the numbers of students who receive tuition fee loans. This information is published in the SLC's statistical first releases.

13. Contact

13.1 Mark Williams at the Department for Education Telephone: 07391 018340 or email: mark.williams@education.gov.uk can answer any queries regarding the instrument.