EXPLANATORY MEMORANDUM

THE STUDENT FEES (APPROVED PLANS) (ENGLAND) REGULATIONS 2004

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

2. Description

This instrument details the required content of access plans; the process for their approval and variation; their duration; how the Director of Fair Access can enforce them, if necessary; and the process for a review of the Director's decision by a person or panel of persons.

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

3.1 Regulation 3(d)

This is considered to be a provision relating to the promoting of equality of opportunity. The concern behind the creation of the office of the Director of Fair Access to Higher Education was that the introduction of higher variable fees for certain higher education courses might deter potential students from poorer backgrounds from applying to such courses. The measures contained in regulation 3(a) to (d) aim to ensure that there is no such deterrent effect. In the absence of regulation 3(d), the situation might arise that a prospective student would not know, before committing himself to a course, what the aggregate amount of the fees would be for, say, a three year course. This is because in accordance with section 33(1) of the Higher Education Act 2004, a plan has to specify only the fee limit (which will be per year) which the fee for a course must not exceed, not the actual amount. Uncertainty as to what the actual fee would be for the whole course is considered to be a potential deterrent especially for poorer students. By requiring institutions in regulation 3(d) to provide certainty to a prospective student about the total fee commitment which the student enters into, this element of uncertainty, and therefore the deterrent element, is removed.

3.2 Information requirements under regulations 5(a), (c) or (d) and 9(a), (b), (c), (d), (f) and (g)

The method of informing the governing body will be for the Director to decide. It was not considered necessary to be prescriptive about the method in the regulations. The Director will be subject to public law principles, and as well as being subject to the review process provided for in section 39 of the Higher Education Act 2004 and regulations 15 to

20, he can be challenged by way of judicial review. The combined effect of these avenues for challenge means that the Director will have to choose a suitable method of informing the governing body. It is expected that the Director would choose to inform the governing body in writing, electronically or by post. Furthermore, by virtue of section 32(3) of the Higher Education Act 2004, the Director must, in the performance of his functions, have regard to any guidance given to him by the Secretary of State. Therefore, should experience show that there is a need for guidance on the method by which the Director should inform the governing body, this could be included in guidance.

3.3 Regulations 5(b) and 9(a)

What is a “reasonable time” for the purposes of this regulation is ultimately an objective test, so that this will be decided by reference to the circumstances in accordance with established legal principles. It is therefore not strictly necessary for anybody to make an initial decision as to what the reasonable time is and in the interest of taking a deregulatory approach to the drafting of these Regulations, it was not considered necessary to be more prescriptive. However, it might clearly he helpful for the governing body to have an indication from the Director as to what the Director would regard as a reasonable time, to ascertain quickly whether there is a difference of opinion. It is expected that the Director would give such an indication when he informs the governing body under regulation 3(b) that he is minded not to approve the plan, or the Director could issue a general statement as to the time he would consider reasonable. If the Director did neither of these and the governing body wanted to establish whether there was a meeting of minds on this issue, they could ask the Director.

3.4 Regulation 10(b)

It will be noted that regulation 3(a), (b) and (c), which is referred to in regulation 10(b) does not require a plan to set out expenditure levels. By using the words “any expenditure levels set out in the plan” in regulation 10(b) it is made clear that regulation 10(b) can only apply to the extent that expenditure levels are in fact set out in the plan. It is expected that in practice the plans would set out expenditure levels in at least some of the provisions included in the plan under regulation 3(a), (b) and (c), if only in order that the Director has a full understanding of the measures proposed by the governing body. Where the plan does not set out expenditure levels under any particular head, the sanction available would be that set out in regulation 10(c).

3.5 Regulation 16

It was not thought necessary to be prescriptive about the precise method of the application. When the person or panel has been appointed, this and their contact details will be publicised. The method of application will be a method which the governing body considers suitable. In practice, it

is expected that a governing body would choose to apply in writing.

3.6 Regulation 17

In view of the relatively short time period specified there, the formulation "calendar days" is used in order to avoid any suggestion that it might be interpreted as a reference to working days. In the absence of a definition of "day" in the Interpretation Act 1978, it was considered clearer to refer to "calendar days".

3.7 Regulation 21

The reference to the Code of Practice for Ministerial Appointments to Public Bodies issued by the Commissioner for Public Appointments does not bring the appointment within the remit of the Commissioner. The regulation does, however, provide that the Secretary of State must make the appointment in accordance with the principles set out in the Code of Practice issued by the Commissioner. These principles are: Ministerial responsibility; merit; independent scrutiny; equal opportunities; probity; openness and transparency; and proportionality. This is in fulfilment of an undertaking given at third reading of the Higher Education Bill in the House of Lords on 22 June. Hansard column 1172 refers.

4. Legislative Background

Section 31 of the Higher Education Act 2004 provides for the appointment of a Director of Fair Access to Higher Education (commonly known as the Office for Fair Access or OFFA). The Director will have a duty to promote and safeguard fair access to higher education.

Any institution that wishes to charge higher variable fees in excess of the basic fee for any of their courses from Autumn 2006 will be required to have an access plan (commonly known as an access agreement), approved by the Director. "Course" has the definition employed in section 41(1) of the Higher Education 2004, which "does not include any part-time or postgraduate course other than a course of initial teacher training". The basic and higher amounts on the tuition fees that may be charged to full-time undergraduates will be set by the Student Fees (Amounts) (England) Regulations 2004, a draft of which has been laid before Parliament for approval.

Section 33 of the Higher Education Act 2004 details the contents of access plans that may be required by regulations. The access plan will set out the fee limits and the courses to which they apply. The access plan will also cover an institution's provisions for financial and other support for students (including bursaries); outreach activity; and its own milestones for assessing progress in widening participation.

These Regulations will come into force on the day after the day on

which they are made. Where institutions wish to be able to charge higher variable fees from Autumn 2006, we expect that they will be submitting their access plans to the Director in Autumn 2004. Although draft regulations have been in the public domain since February 2004, institutions will need to have certainty about the required contents of access plans; and the Director will need to have certainty about the approval process. The regulations provide this certainty.

5. Extent

This instrument applies to England.

6. European Convention on Human Rights

The Minister of State for Lifelong Learning , Further and Higher Education, Alan Johnson MP, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Student Fees (Approved Plans) (England) Regulations 2004 are compatible with the Convention rights.

7. Policy background

The policy of an access regulator was first set out and justified in the Higher Education White Paper (Cm 5375) and was then expanded in the policy document *Widening Participation in Higher Education*, published in April 2003. Copies of both documents are in the House Library. Both documents highlight the historic problem of under-representation in higher education by certain groups, most notably young people from poorer backgrounds. Young people from higher social groups are around three times more likely to attend higher education than those from lower social groups.

As higher education institutions gain the freedom to introduce higher variable tuition fees from Autumn 2006, the Government is determined to ensure that access to higher education is broadened not narrowed.

The key features of the policy are:

A Director of Fair Access will be appointed who will have a duty to promote and safeguard fair access to higher education.

Institutions can charge higher variable fees of up to £3,000 only if they first have an access plan approved by the Director. The access plan will set out what the institution intends to do in order to attract applications from prospective students who are members of groups under-represented in higher education.

The Director will have the power to impose a sanction on an institution, if he believes that that institution has breached the

terms of its access plan.

More detailed information on the way in which the Secretary of State expects the Director to operate is contained in the draft letter of statutory guidance which can be found at http://www.dfes.gov.uk/hegateway/hereform/index.cfm?cid=6

There has been interest in the policy of the Director of Fair Access from Parliament, the higher education sector and the media. There were 120 responses, from a wide range of respondents, to *Widening participation in higher education.*

8. Impact

A Regulatory Impact Assessment has been completed for the Higher Education Act, and can be downloaded from http://www.dfes.gov.uk/hegateway/hereform/index.cfm?cid=4

9. Contact

Martin Williams, Divisional Manager, Access & Modernisation Division, Room 1.23, Department for Education and Skills, Sanctuary Buildings, 20 Great Smith Street, London SW1P 3BT. Tel: 020 7925 7455.