

EXPLANATORY MEMORANDUM TO
THE HIGHER EDUCATION (FEE LIMIT CONDITION) (ENGLAND)
REGULATIONS 2017

2017 No. 1189

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

2. Purpose of the instrument

- 2.1 These Regulations provide that tuition fees payable in respect of certain qualifying courses of higher education undertaken by certain qualifying persons and provided by certain registered higher education providers do not exceed a limit which will be set out in separate regulations.
- 2.2 The Student Fees (Qualifying Courses and Persons) (England) Regulations 2007 (SI 2007/778) currently prescribe the courses and persons which are subject to such a fee limit, but those regulations and their enabling powers are to be revoked as part of the implementation of a new regulatory regime for higher education which is set out in the Higher Education and Research Act 2017 (2017 c.29) (“the Act”).

3. Matters of special interest to Parliament

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

- 3.1 Certain terms and concepts within the regulations have been taken from existing legislation, for example: the descriptions of agriculture and related courses and nursing related courses in regulation 5 are found in regulations 144 and 13(2A) of the Education (Student Support) Regulations 2011 (SI 2011/1986) respectively; the events listed in regulation 6(2) are found in regulation 17 of those regulations; the definition of “academic year” is found in regulation 2 of those regulations; and the descriptions of qualifying persons and courses are largely a replication of those found in the Student Fees (Qualifying Courses and Persons) (England) Regulations 2007.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

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 by HEFCE. Following the repeal of the relevant parts of the Further and Higher Education Act 1992 (in England) and of the Higher Education Act 2004, these Regulations will similarly prescribe the persons and courses which will have the benefit of a tuition fee limit, and will also provide that such a limit applies 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(1) 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. Section 119(5) of the Act further allows 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). Regulation 3 of these Regulations prescribes providers registered in the ‘Approved – (fee cap)’ category of the OfS’s register for this purpose.
- 4.3 Section 10(2) of the Act provides that the fee limit condition only applies to “regulated course fees” which are defined in section 10(3) of the Act as fees payable by a qualifying person in connection with a qualifying course, payable in respect of an academic year which begins at a time when the provider is registered in the OfS’ register. Section 10(4) of the Act provides that a qualifying person is not an international student and is within a prescribed description of persons. Regulation 4 of these Regulations provides that qualifying persons must fall within one of the categories listed in Part 2 of the Schedule at a point in time which accords with the beginning of their course, which categories are framed by reference to the nationality or immigration status of those persons. The regulations are to have practical effect in relation to academic years (as defined in regulation 2) which commence on or after 1 September 2019, but regulation 4(2) ensures that persons are also qualifying if they are undertaking an existing course at that date, if they meet the Schedule 2 criteria at that time.
- 4.4 Regulations 5 and 6 of these Regulations exclude certain persons from being a qualifying person for the purposes of the fee limit condition, for example where they already hold a higher education qualification, and they are intending to undertake another course at an equivalent or lower level, subject to some exceptions.
- 4.5 Section 10(6) of the Act provides that a qualifying course is a higher education course of a prescribed description. Regulation 7 of these Regulations defines such qualifying courses by reference to their designation for student support under section 22 of the Teaching and Higher Education Act 1998 (1998 c.30) and their provision by a higher education provider whose activities are principally carried on in England. In order that persons considering an offer of a place on a course know the registration status of a provider, and consequently the maximum level of the course fees at that time, regulation 7(2) requires that that provider must be registered in the Approved (fee cap) part of the register at the time the person received an offer of a place, in order for the course to qualify for a fee limit.

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 England.

5.3 The provisions of the Act relating to the fee limit condition apply in relation to registered higher education providers, as defined in section 3(10) of the Act. Section 3(3)(b) of the Act requires that, in order to be registered, a provider must be or intend to become an English higher education provider, as defined in section 83(1) of the Act.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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 and according to the benefits they can access 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 policy intention is that the register will be divided into three parts: (i) Registered Basic, (ii) Approved, and (iii) Approved (fee cap).
- 7.3 Providers registered in the first two categories will be able to charge unlimited tuition fees, although the amount of student support (loans) which will apply to courses provided by Approved providers will remain capped at a level currently set out in the Education (Student Support) Regulations 2011. By contrast these Regulations provide that students who fall within the eligibility criteria set out in regulations 4, 5 and 6 and who study courses that fall within regulation 7 will be subject to a tuition fee limit if their provider is registered in the Approved (fee cap) part of the register.
- 7.4 The reasons for this are that registration in that part of the register will, as a result of separate regulations intended to be made in advance of 1 August 2019; make a provider eligible for grant funding out of public funds from the OfS; enable a provider to charge higher tuition fees; and enable students to access commensurately higher loans to pay for those fees. In return for such eligibility and benefits, the Government's policy is that providers must not impede access to their courses by charging tuition fees above a prescribed limit.
- 7.5 Tuition fee limits have been imposed on HEFCE-funded providers for many years as a condition of grant funding, with the limits themselves set out in regulations made under section 24 of the Higher Education Act 2004. The (2017) Act introduces a wholly new regulatory environment which involves the abolition of HEFCE, the repeal of much of the currently applicable legislation and the establishment of a registration regime.
- 7.6 Notwithstanding the new regime, the policy intention is to maintain the link between eligibility for public funding (which comes with registration in the Approved (Fee Cap) part of the register) and tuition fee limits. The policy intention is also to retain the descriptions of qualifying persons and qualifying courses (currently found in the Student Fees (Qualifying Courses and Persons) (England) Regulations 2007) in these Regulations.

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 “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” which was published in May 2016.
- 8.2 The Government further published a detailed consultation document: Securing Student Success: Risk Based Regulation for Teaching Excellence, Social Mobility and Informed Choice in Higher Education on 19 October 2017, setting out its proposed regulatory framework and providing guidance on compliance with registration conditions. This included the proposed fee limit condition.
- 8.3 There is no statutory requirement to consult on these Regulations. They largely replicate the existing position and sufficient input from the sector was received during the above consultations to inform policy development.

9. Guidance

- 9.1 The Secretary of State may give the OfS guidance on the performance of its functions under section 2 of the Act, however, the prescription of qualifying providers, courses and persons is not an OfS function, and consequently no guidance is necessary in relation to these Regulations.

10. Impact

- 10.1 There is not expected to be any additional impact on business, charities or voluntary bodies from these Regulations. Tuition fee limits are already imposed on higher education providers which are eligible for public funding and these Regulations will maintain this link. The impacts of the other ongoing conditions of registration have been measured in separate impact assessments.
- 10.2 The impact on the public sector is expected to be minimal, for the same reasons as in paragraph 10.1. Higher Education Providers are not universally public bodies, but some receive public funding and are subject to tuition fee caps as a result. These Regulations preserve those fee caps which already exist, or apply them to those providers which are willing to accept them, in return for eligibility for public funding
- 10.3 An Impact Assessment has not been prepared for this instrument

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 business have been consulted on the new regulatory framework, and the imposition a fee limit as outlined in paragraph 8, 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 We consider a review clause to be inappropriate and disproportionate. The persons and courses which are prescribed for the purposes of current fee limits are well established and are not intended to change in the near future. These Regulations largely replicate the existing position.

13. Contact

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