Regulatory advice 19: The OfS's approach to determining the amount of a monetary penalty

Guidance for providers registered with the Office for Students

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Introduction

1. The Higher Education and Research Act 2017 ('HERA') gives the OfS enforcement powers to use if it appears to the OfS that there is or has been a breach of one or more conditions of registration. We have the power to:

   a. Impose one or more specific ongoing conditions of registration.[1]

   b. Impose a monetary penalty.

   c. Suspend aspects of a provider's registration, to include suspending access to student support funding or OfS public grant funding.

   d. Deregister a provider.

2. Our regulatory framework sets out our general approach to the use of our enforcement powers and sets out the processes that we must follow if we are minded to impose one or more of these sanctions on a provider. We will also have regard to the intervention factors, set out in paragraph 167 of the regulatory framework, and our general duties in section 2 of HERA, as we decide whether a particular sanction would be appropriate in a provider's circumstances.

3. In addition, when we are deciding whether to impose a monetary penalty and the amount of that penalty, we must have regard to the factors set out in the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 (the '**Monetary Penalties Regulations**'). Those regulations also set out the maximum penalty that we can impose for each breach.[2]

4. We also have the power to require a provider to pay the costs we incur in relation to the process that results in the imposition of sanctions[3] and can apply an interest charge for late payment of OfS registration fees under the Higher Education (Registration Fees) (England) Regulations 2019 (the '**Registration Fees Regulations**').[4]

5. This document provides guidance for registered providers on our approach to the calculation of a monetary penalty. It provides information about the factors that we will consider in calculating the amount of a monetary penalty and our approach to settlement discounts. It also explains our approach to costs recovery and interest charges for late payment of our registration fees.

6. Any decisions that we make on individual cases will normally be taken in accordance with our scheme of delegation.[5] This includes decisions about a monetary penalty, costs recovery, or

[1] Under Section 6 of HERA, the OfS may impose one or more specific ongoing registration conditions on a provider. Our power to do so is not limited to circumstances in which we determine that a provider has breached, or is at increased risk of breaching, an ongoing condition of registration.

[2] The Monetary Penalties Regulations are available at: www.legislation.gov.uk/uksi/2019/1026/contents/made.

[3] This power is set out in section 73 of HERA. Under section 73(2) of HERA the relevant sanctions to which it applies are imposing a monetary penalty, suspension of a provider's registration with the OfS or removing a provider from the OfS Register.

[4] The Registration Fees Regulations are available at: www.legislation.gov.uk/uksi/2019/543/contents/made.

[5] See www.officeforstudents.org.uk/media/61967279-3461-4576-adda-44febab76f86/scheme-of-delegation-22-september-2020.pdf [PDF].

charging interest for late payment of registration fees. We have published our scheme of delegation to provide transparency for stakeholders about who, within the OfS, is able to make decisions about particular matters.

7. This document should be read with the OfS's regulatory framework (OfS 2018.01)[6] and with our guidance for registered providers on our approach to monitoring and intervention.[7] If there are any inconsistencies between the regulatory framework and this document, then the regulatory framework will prevail. All registered providers should be familiar with the content of the regulatory framework which sets out in full the approach that the OfS will take to the regulation of providers.

8. For further information about this guidance, the Compliance and Student Protection team can be contacted on 0117 931 7305 or regulation@officeforstudents.org.uk.

[6] See www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

[7] See Regulatory advice 15: Monitoring and intervention, available at www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

Determining the amount of a monetary penalty

By reference to qualifying income

9. We will use our five-step process (see below) to calculate a monetary penalty. As a general principle, we will normally calculate a monetary penalty by reference to a percentage of a provider's 'qualifying income'. This means that the 'baseline' penalty, under Step 1, and the monetary penalty to be imposed (see Step 5 below) will normally be expressed as a percentage of a provider's 'qualifying income'.

10. 'Qualifying income' is defined in paragraph 3 of the Monetary Penalties Regulations as, broadly, the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA, in the 'relevant year'[8].

11. Our approach is rooted in legislation: the Monetary Penalties Regulations set the maximum monetary penalty that the OfS may apply for an individual breach of a condition of registration, as the higher of 2 per cent of qualifying income and £500,000. Calculating a monetary penalty by reference to 'qualifying income' is, therefore, consistent with the approach set out in legislation for calculating the maximum monetary penalty.

12. Where a provider does not have 'qualifying income' for the 'relevant year', we may calculate the 'baseline penalty' (under Step 1 – see below) by reference to 'qualifying income', if any, for the year in which we issue our notice of our intention to impose a monetary penalty on that provider. If a provider does not have 'qualifying income' in that current year, we may calculate the 'baseline penalty' (under Step 1 – see below) by reference to the nature of the breach, as provided for in our five-step approach. We will then apply our five-step approach to determine an appropriate monetary penalty which would not exceed £500,000, reflecting the limit set out in the Monetary Penalties Regulations.

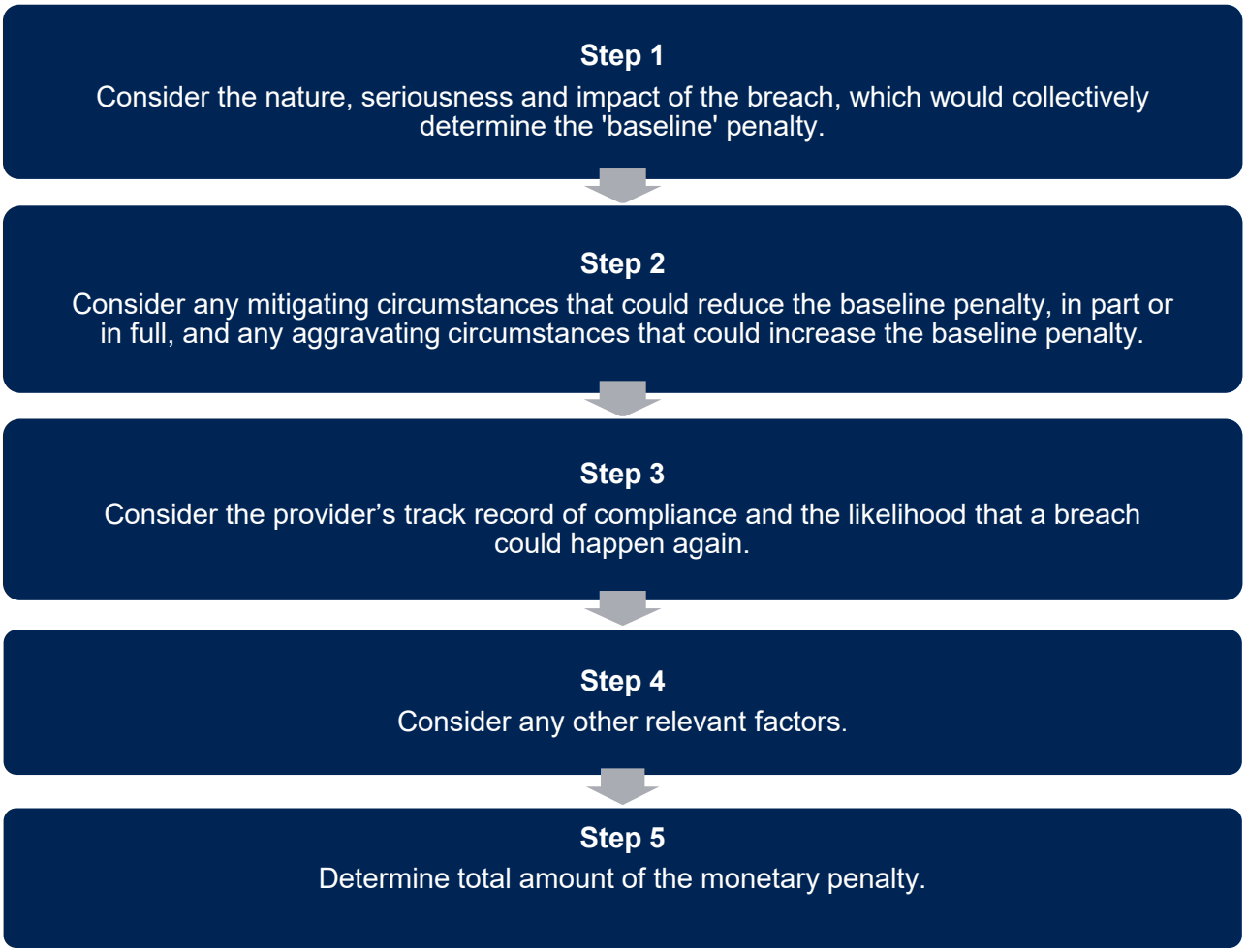
Our five-step process

13. We have set out our approach to the calculation of a monetary penalty, in a five-step process. This does not mean that each step in the process results in a separate 'decision'. Instead, we will take a more holistic approach – setting a 'baseline penalty' under Step 1 and then applying the steps, in the round, to calculate a monetary penalty (Step 5) that is proportionate in all the circumstances of the case. Our decision will be made after we have considered the different factors set out in **all** the steps.

14. Figure 1 summarises the five-step process, and the paragraphs that follow provide a more detailed explanation.

[8] Under paragraph 3 of the Monetary Penalties Regulations, 'relevant year' means the 'business year' of a registered higher education provider which immediately precedes the date of the OfS notice [of the OfS's intention to impose a monetary penalty], or if no such business year exists, the 12-month period which ends on the last day of the month preceding the month in which the date of the OfS notice falls.

Figure 1: Summary of five-step approach to determining the amount of a monetary penalty



Step 1

Consider the nature of the breach to determine the 'baseline' penalty. This will cover:

- the significance of the breach (for example, its seriousness and impact on students – past, present and future – of the provider and of registered providers more generally)
- the impact that an intervention would have on students – past, present and future – of the provider and of registered providers more generally
- the effectiveness of the proposed intervention
- any actual gain (financial or otherwise) made by the provider, or actual loss (financial or otherwise) avoided by the provider, as a result of the breach (including, where it can be quantified, the amount of any such gain or avoided loss)
- any potential gain (financial or otherwise) which the OfS estimates was made by the provider, or potential loss (financial or otherwise) which the OfS estimates was avoided by the provider, as a result of the breach

- any action taken by other regulators, or by other relevant bodies (including any directions or recommendations made by those bodies with which the provider has complied), to address the same or very similar matter(s) that gave rise to the OfS's findings of a breach
- whether the breach has otherwise created a lack of confidence in the higher education sector.

Step 2

Consider any mitigating or aggravating circumstances that could either reduce the baseline penalty, in part or in full, or increase it (for example, as evidenced in the provider's explanation which is provided during its engagement with the OfS in relation to the breach). This will cover:

- whether the breach was identified and promptly reported to the OfS by the provider, or alternatively reported by a third party
- the duration of the breach
- evidence that the breach was likely to have been deliberate, reckless or involved dishonesty (including a consideration of the provider's conduct and context, and any external factors that may have influenced that conduct)
- steps taken by the provider to mitigate or remedy matters that gave rise to a finding of a breach by the OfS
- the provider's co-operation with the OfS's enquiries and investigations
- the provider's behaviour since the breach.

Step 3

Consider the provider's formal track record of compliance (for example, whether there have been multiple breaches of the same or different conditions) and the likelihood that a breach would happen again.

Step 4

Consider any other relevant factors, for example:

- action the OfS has taken in similar cases (as set out in paragraph 167 of the regulatory framework)
- adjustment for deterrence, for example: where the OfS considers the absolute value of the penalty too small to be a deterrent to the provider or other providers; where similar action in the past has failed to improve compliance; or where the penalty may not act as a deterrent in light of the provider's income or net assets.

Step 5

Determine the appropriate monetary penalty. In doing so, we will consider the impact that the imposition of a monetary penalty would have on the financial viability and sustainability of the provider and whether such a penalty would be appropriate where a provider is in financial difficulty. We will also consider the impact that the imposition of a monetary penalty would have on the provider's staff, for example, where that imposition may impact the provider's financial viability or sustainability which could put employment at risk.

15. Where our five-step process indicates that we will consider the impact that a monetary penalty may have on the provider's staff or students (or on students of registered providers more generally), we will do so where such an impact is apparent from the provider's context or circumstances, or where the provider has itself referred to such an impact in its engagement with the OfS about the breach or the imposition of that monetary penalty. For the avoidance of doubt, the OfS does not intend to engage directly with students or the provider's staff about such matters.

16. As an example, a 'baseline penalty' (under Step 1) might be assessed at 1 per cent of a provider's qualifying income on the basis of the nature, seriousness and impact of the breach. An assessment of mitigation might then decrease the penalty by up to 100 per cent (to zero). Likewise, an assessment of aggravating circumstances might increase the penalty to up to the maximum stated in the Monetary Penalties Regulations. This is an illustrative example only. The 'baseline penalty', and the actual monetary penalty to be applied (if any), will depend on the circumstances of an individual case.

Representations and appeals

17. It is likely that the OfS will engage with the provider as part of its investigation into compliance concerns. The information provided by the provider during that process will inform the OfS's view of the nature of the breach and, in turn, the calculation of a monetary penalty. Furthermore, where we intend to make a finding of breach, we will notify the provider and it will have an opportunity to make representations about our provisional decision. We will consider those representations and other relevant factors in reaching a final decision about a breach.

18. Similarly, Schedule 3 of HERA requires us to notify a provider of our intention to impose a monetary penalty and provide it with an opportunity to make representations about that provisional decision. We may do this at the same time as we notify the provider of our intention to make a finding of breach, or subsequently. We will consider the provider's representations and other relevant factors in reaching a final decision about whether to impose a penalty and the amount of that penalty.

19. A provider may appeal to the First-tier tribunal against a final decision by the OfS to impose a monetary penalty and the amount of that penalty.

20. Under Paragraph 4 of Schedule 3 of HERA, any (part of a) monetary penalty that is unpaid when it is required to be paid carries interest at the rate specified in that paragraph.

21. The OfS can recover, as a civil debt, any amount of a monetary penalty that remains unpaid and any unpaid interest.

22. Under HERA, any monetary penalties received by the OfS, and any interest, must be paid to the UK government.[9]

Flexible payment terms

23. The OfS has discretion over the time period for payment of a monetary penalty and the ability to allow payment in instalments.[10]

24. We may consider flexible payment terms – payment deferral or payment in instalments – where, for example, the imposition of a monetary penalty might otherwise affect a provider's financial viability or sustainability, or otherwise have an adverse impact on the interests of students. This would ensure we are able to protect the interests of students while also addressing the provider's non-compliance in a proportionate way. Whether we do offer flexible payment terms will depend on the circumstances of the case.

25. A provider may appeal to the First-tier tribunal against a decision by the OfS to impose a monetary penalty, including any decision made by the OfS in relation to payment terms.

26. Where the OfS allows payment by instalments, or defers the payment date of a penalty, interest will not be charged if the provider makes the (instalment) payment(s) on or before the payment date or dates notified to that provider by the OfS.

Settlement discounts

Purpose of settlement discounts

27. Where we consider it appropriate, we may offer a settlement discount to a provider that agrees that it has breached a condition of registration and agrees to a monetary penalty at an early stage.

28. The purpose of offering a settlement discount is to:

    a. Save the OfS and the provider the resources that would be required to produce and respond to a provisional decision about a breach or to impose a monetary penalty.

    b. Encourage the provider to address the compliance concerns identified more quickly.

    c. Ensure other providers are aware of the penalty and the reasons it has been imposed as soon as possible.

    d. Ensure timely and effective action is taken to improve or restore student confidence.

[9] See paragraph 5 of Schedule 3 of HERA.

[10] See paragraph 2(6)(b) of Schedule 3 of HERA.

Availability of settlement discounts

29. A settlement discount is conditional on a provider:

    a. Admitting to the breach of condition(s), accepting that a breach has occurred and not publicly suggesting that it disagrees with the details of the breach set out in the settlement agreement (and this includes not making comments in a way that the OfS considers reasonably likely to become public).

    b. Not publicly suggesting that it disagrees with the imposition, amount or payment terms of a monetary penalty (and this includes not making comments in a way that the OfS considers reasonably likely to become public).

    c. Not challenging the imposition, amount or payment terms of a monetary penalty or appealing against it.

30. A provider can initiate a discussion with the OfS about an appropriate settlement discount as soon as it becomes aware of a potential breach of a condition of registration (this could be before we have begun an investigation relating to the breach).

31. Where a provider initiates a discussion about settlement at an early stage, for example where it admits to a breach before we have initiated any investigation, we may decide that we need to investigate the matter further before we progress with those discussions and/or agree a settlement. We may do this where we consider that we need more information to understand the extent of the breach and any detriment to students, or others, that results from that breach. We will not agree to a settlement unless we are satisfied that it is reasonable in the circumstances of the breach.

32. Where a provider seeks to initiate discussions at an early stage and a settlement is not agreed, the provider may seek to initiate discussions again at a later stage in the OfS's decision-making process.

33. A provider is not required to enter into settlement discussions. Each provider must decide whether it wants to do so, taking into account its own legal advice and the need to comply with other legal requirements.

34. We reserve the right not to enter into, or to abandon, any discussion about a settlement discount and continue with the process to determine a breach of a condition and a monetary penalty where we consider this to be appropriate. For example, a settlement discount may not be offered in the most serious cases or where we consider there to be significant aggravating factors (see Step 2 after paragraph 13 above), as this could undermine the credibility of our regulatory approach.

Differentiated settlement discounts

35. Where we propose to offer a settlement, we will do so on a differentiated basis in accordance with the fixed percentage amounts set out below. This will reflect the stage in the OfS decision-making process at which an agreement about a settlement is reached, and so the extent to which the OfS may avoid incurring costs:

a. A **30 per cent** discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a monetary penalty without a settlement) where settlement is reached **before** we issue a provisional decision about a breach.

b. A **20 per cent** discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a monetary penalty without a settlement) where settlement is reached **after** we issue a provisional decision about a breach (including where a provisional decision to impose a monetary penalty is issued at the same time) but **before** the expiry of the period in which the provider may make representations in respect of the provisional decision(s) (usually 28 days).

c. A **10 per cent** discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a monetary penalty without a settlement) where settlement is reached:

    i. in circumstances where a provisional decision about a breach was issued without issuing a provisional decision to impose a monetary penalty, **before** we issue a provisional decision to impose a monetary penalty; or

    ii. in circumstances where a provisional decision about a breach and a provisional decision to impose a monetary penalty were issued at the same time, **before** we issue a final decision about a breach.

36. The discounts set out above are not cumulative; only one (whichever is the highest that would apply) will be applied in any given case.

37. Where we agree to a settlement at an early stage, we will estimate the level of monetary penalty that would have been imposed if we had proceeded to a final determination about a breach and a monetary penalty, without a settlement. In doing so, we will have regard to our five-step process for calculating a monetary penalty. That monetary penalty will then be discounted in accordance with our differentiated discount model set out above.

38. We do not propose to offer a settlement discount later than is provided for in paragraph 35(c) above. After those points, the OfS will have carried out significant investigation and may have issued a final decision about a breach. The opportunities to save resources thereafter are minimal.

Our process for agreeing a settlement discount

39. Where we are minded to settle a case, we will set out our settlement proposal in a draft settlement agreement. This will include a summary of the issues which relate to the breach (and so the basis on which the breach would be (or has been) determined), the discounted monetary penalty and any related matters such as payment terms, our intentions in relation to costs recovery (see the next section of this document), and our intentions in relation to the publication of information about the breach and the settlement. The provider may then comment on that proposal.

40. We will consider the provider's comments and, if we decide to proceed with the settlement, we will issue a provisional decision to impose a monetary penalty on the basis set out in the draft

settlement agreement. If the provider agrees not to make representations in respect of that provisional decision, and not to appeal against or challenge the imposition of the monetary penalty, the settlement will be agreed. If the provider wishes to make representations in respect of that provisional decision to impose a monetary penalty, the settlement proposal will cease to be relevant. We will then continue with the process to determine a breach (if we have not already made a final determination in respect of that breach) and a monetary penalty.

41. A key policy objective of our settlement provision is ensuring that other providers are aware of the monetary penalty and the reasons that it has been imposed, as soon as possible. Doing so will highlight areas of regulatory concern and provide an incentive for other providers to comply with our requirements. We therefore expect, normally, to publish information about a settlement where we have imposed a monetary penalty. Our intentions in relation to publication will be made clear in any settlement proposal made to a provider and if the provider does not agree with these, it need not agree to the settlement.

42. Unless (and until) a final settlement is agreed, settlement discussions are intended to be confidential and therefore the OfS will always seek to maintain the confidentiality of the existence of settlement discussions and any admissions or statements made by the provider during such discussions. This means that where a settlement does not proceed to a final agreement for any reason, or settlement discussions covered wider issues than those covered by a final settlement agreement (such as statements about potential wider forms of wrongdoing that may indicate non-compliance with other conditions of registration), the OfS will seek to maintain confidentiality permanently in so far as that is legally possible. The OfS would expect providers to adopt a similar position in relation to the existence of settlement discussions and any statements made by the OfS.

43. In the spirit of maintaining confidentiality, the OfS does not intend to use admissions and statements made by the provider as evidence of wrongdoing (for example, for the purposes of establishing a breach of relevant conditions of registration and imposing sanctions) unless such admissions and statements form part of a final settlement agreement. However, the OfS may still use other admissions and statements made by the provider as intelligence of potential wrongdoing. This means that where settlement discussions do not proceed to a final settlement agreement, or a final settlement agreement is limited in scope, any admissions or statements made by the provider may be used by the OfS in the way it targets information-gathering activities such as investigations and monitoring. For example, if a final settlement agreement was reached in respect of a breach of a condition of registration relating to quality, any admissions or statements made by the provider which are relevant to conditions of registration on management and governance could result in the OfS opening an investigation into potential concerns about management and governance.

44. The OfS will not be able to give any absolute assurances about confidentiality and there will be circumstances where confidentiality cannot be maintained as a matter of law. This would include circumstances where the OfS is compelled to disclose information by the courts or another regulatory body. Providers will need to give careful consideration as to the precise information that is shared with the OfS during different stages of settlement discussions.

45. Once we have agreed a settlement with a provider and issued a final decision to find a breach of one or more conditions of registration and impose a monetary penalty, that normally concludes the matter for the particular breaches in respect of particular periods of time

specified in the OfS's decision.[11] We will not normally continue to investigate the issues underlying the particular breach(es) to which the settlement relates thereafter. Those issues, and so our understanding of the breach, will be set out in the settlement agreement and the OfS's decision. The main exception to this position would be in circumstances where any relevant OfS decisions were subject to a legal challenge by the provider or a third party, for example where the provider decided to challenge the amount of the monetary penalty imposed despite the settlement agreement.

Recovery of the OfS's costs relating to the imposition of sanctions

46. We may decide to recover the costs we incur in relation to the process that results in the imposition of sanctions, where we are empowered to do so under section 73 of HERA. The sanctions to which this relates are the imposition of a monetary penalty, suspension of a provider's registration with the OfS and removing a provider from the OfS Register.

47. We will calculate the internal and external costs we have incurred in carrying out these activities. This will include, but not be limited to, investigation costs, administration costs and the costs of obtaining expert advice (including legal advice).

48. The amount that we seek to recover will be appropriate to the circumstances of the breach and to the provider's circumstances. We will consider whether cost recovery is appropriate in circumstances where the provider is in financial difficulty.

49. We will also consider the impact that recovery of costs may have on the provider's staff or students, where such an impact is apparent from the provider's context or the particular circumstances of the case, or where the provider has itself referred to such an impact in its engagement with the OfS. For the avoidance of doubt, the OfS does not intend to engage directly with students or the provider's staff about such matters.

50. Under schedule 7 of HERA, a provider may require the OfS to provide a detailed breakdown of the amount of costs that we are seeking to recover. If a provider has any queries about that breakdown, it will be able to discuss those with the OfS.

51. Schedule 7 of HERA also sets out:

    a. The procedure that the OfS must follow if we wish to recover our costs.

    b. The provider's right of appeal to the First-tier tribunal against the requirement to pay (or the amount of) costs.

    c. The way in which the OfS may recover any unpaid amount of costs (including interest on that unpaid amount) as a civil debt.

[11] This means that there would be nothing to restrict the OfS from investigating a potential breach of the same conditions of registration in respect of the same or similar underlying issues for different time periods. For example, it would not restrict the OfS investigating a potential future breach.

d. That the sums received (costs and any interest) must be paid to the Secretary of State (unless, in respect of costs recovered, the Secretary of State, with the consent of the Treasury, directs otherwise).

52. Under schedule 7 of HERA, the requirement to pay costs is suspended where an appeal could be brought to the First-tier tribunal or is pending. Ultimately, the tribunal would decide who should bear the costs associated with the appeal process itself, in accordance with its own rules and procedures.

53. Where a provider agrees a settlement with the OfS in relation to the imposition of a monetary penalty (see previous section of this document), the issue of OfS costs recovery would be addressed as part of that settlement agreement.

Interest charges for late payment of OfS fees

54. The Registration Fees Regulations make provision for the calculation of registration fees and set out the process that the OfS must follow to notify a provider that a registration fee is payable. In particular, the OfS must notify the provider of the period within which a fee must be paid (and whether this is by lump sum or in instalments). That period must begin not less than 30 days beginning with the date on which the provider receives that notice.

55. The Registration Fees Regulations provide that the OfS may charge interest on any part of a registration fee which is unpaid at the time that it is required to be paid (in other words, for late payment of fees). The regulations specify the interest rate that is to be applied, being the 'Bank of England rate + 5'.[12] The regulations also state that the total amount of interest imposed must not exceed the amount of the fee. The monies received in interest charges are retained by the OfS.

56. As there is likely to be an administrative burden associated with imposing and recovering such charges, we will not impose interest charges for late payment when the charges are below a minimal amount, in other words where the administrative burden of recovering interest is disproportionate to the amount that would be recovered. This will depend on the individual circumstances of the case. We will consider whether charging interest is appropriate in circumstances where a provider is in financial difficulty. We will also consider the impact that charging interest may have on the provider's staff or students, where such an impact is apparent from the provider's context or the particular circumstances of the case, or where the provider has itself referred to such an impact in its engagement with the OfS. For the avoidance of doubt, the OfS does not intend to engage directly with students or the provider's staff about such matters.

57. The OfS may recover from the provider, as a civil debt, the unpaid amount of the registration fee and any unpaid interest.

58. The conditions of registration require providers to pay their registration fees and late payment (or non-payment) may constitute a breach of one or more of those conditions. Any interest charged for late payment would be in addition to any sanction imposed on the provider for a

[12] The 'Bank of England Rate' means the official bank rate as announced at the most recent meeting of the Bank of England Monetary Policy Committee. At the time of publication of this document, the Bank of England rate is 0.1%. Therefore, at the time of publication of this document (8 July 2021), the interest rate that would be applied is 5.1%.

breach of a condition of registration in relation to that late payment (and in addition to any costs in relation to the imposition of that sanction that the OfS seeks to recover under section 73 of HERA). Under the Registration Fees Regulations, we may decide to charge interest for late payment even where we do not impose a sanction on the provider for a breach of a condition in relation to that late payment.

59. Currently, the only fees which the OfS has power to charge are registration fees under section 70(1) of HERA. It is possible that in the future, the OfS would have the power to charge other kinds of fees under section of 71 HERA and that further regulations would be introduced under that section. In that eventuality, the OfS would need to review how the specific power had been expressed at the relevant time in order to consider how it should be used. However, if those regulations give the OfS the power to charge interest in relation to late payment of those other fees, the OfS would normally expect to apply the same policy position as is set out in this document.