The Federal Regulatory Outlook for Postsecondary Institutions

2021 NASASPS Virtual Conference
October 14, 2021
Syllabus

The New Department

Negotiated Rulemaking

Additional Machinations
The New Department
The New ED

• Miguel Cardona confirmed as Secretary on March 1, 2021.
  o Career spent in elementary and secondary education, most recently as Connecticut’s education commissioner.

• Additional new appointments announced on **January 21**, **February 3**, **April 9**, **June 11**, and **July 6**.
The New ED

• Ben Miller, Senior Advisor to the Chief of Staff, ED
  o Previously VP for Postsecondary Education at the Center for American Progress; senior policy advisor at ED under Obama.

• James Kvaal, Under Secretary of Education
  o Previously president of The Institute for College Access & Success and Deputy Director of Domestic Policy for Obama Domestic Policy Council.

• Richard Cordray, Chief Operating Officer of Federal Student Aid
  o Previously first director of CFPB and former Attorney General of Ohio.

• Toby Merrill, Deputy General Counsel, Office of the General Counsel
  o Founded and directed the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School, which represents low-income student loan borrowers in litigation against for-profit colleges and against the policies that enable them.
Negotiated Rulemaking
Negotiated Rulemaking

• The purpose of negotiated rulemaking
  o Process by which ED works to develop a rule in collaboration with representatives of groups who will be affected significantly by the rule.
  o Done through a series of meetings during which selected negotiators work with ED to achieve “consensus.”

• Selection of negotiators
  o ED solicits nominations for negotiators to represent specified groups.
  o After reviewing nominations, ED selects and announces committee, typically of 15-20 negotiators.
  o Committee members also may suggest additional negotiators to be added, subject to approval of the committee.
Negotiated Rulemaking

• Determination of issues
  o ED has an idea of where it wants to go, and typically will present negotiators with issues for discussion.
  o ED also solicits input from public before developing issue lists.
  o Committee members may suggest issues to be added, subject to approval of the committee.

• Possible outcomes
  o If consensus is achieved, ED uses that regulatory language in the proposed rule.
  o If consensus is not achieved, ED may elect to terminate the rulemaking, use regulatory language developed during the negotiations, or develop new regulatory language for all or a portion of its proposed rule.
The Neg Reg Cometh

• On May 26, 2021, ED announced its intent to host negotiated rulemakings covering 14 possible issue areas.

• On June 11, 2021, Biden administration released its first Unified Agenda of Federal Regulatory and Deregulatory Actions, which outlines nonbinding goals for regulatory actions, providing insight into the administration’s priorities for the upcoming year.

• ED indicated its expectation that negotiations would begin “no earlier than August 2021, with the committees meeting for up to three sessions of approximately five days each” and its expectation that the committees would “meet virtually.”
<table>
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<tr>
<th>Topics for Negotiated Rulemaking</th>
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<td>Change of ownership and control process</td>
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<td>Procedures for initial Title IV certification</td>
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<td>Standards of administrative capability</td>
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<td>State-defined Processes for Ability to Benefit</td>
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<td>Borrower defense to repayment</td>
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<td>Total and permanent disability discharges</td>
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<td>Closed-school loan discharges</td>
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<td>False certification discharges</td>
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<td>Loan repayment plans</td>
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<td>Public Service Loan Forgiveness</td>
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<td>Pre-dispute arbitration and class action waiver clauses</td>
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<td>Financial responsibility triggers and reporting requirements</td>
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<td>Gainful employment</td>
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<td>Pell grant eligibility</td>
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<td>90/10 Regulations</td>
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Coming Into Focus

• On August 10, 2021, following a round of public hearing, ED announced the creation of the Affordability and Student Loans (ASL) Rulemaking, which will consider nine issue areas, including the borrower defense to repayment rule.
  - The ASL Rulemaking will also include a Prison Education Program Subcommittee to consider proposed regulations to implement Pell Grant eligibility for incarcerated individuals.
  - ED observes “Seven of the 14 topics listed in the Negotiated Rulemaking Committee Notice... [these]remaining topics and other topics suggested in the public hearings and written comments provided to the Department may be considered by a separate rulemaking committee(s) formed at a later date.”

• On October 4, 2021, ED announced its intent to establish another rulemaking focused on the 90/10 Rule.
## Rulemaking Tranches

### Affordability and Student Loans Rulemaking
- 1. Borrower Defense to Repayment
- 2. Closed-school loan discharges
- 3. Total and permanent disability discharges
- 4. False certification discharges
- 5. Loan repayment plans (income contingent repayment)
- 6. Interest Capitalization on Federal Student Loans
- 7. Pre-dispute arbitration and class action waiver clauses
- 8. Pell Grants for Prison Education Programs
- 9. Public Service Loan Forgiveness

### 90/10 Rulemaking
- 1. 90/10 Regulations

### TBD Rulemaking
- 1. State-defined Processes for Ability to Benefit
- 2. Financial responsibility
- 3. Standards of administrative capability
- 4. Gainful employment
- 5. Change of ownership and control process
- 6. Procedures for initial Title IV certification
Negotiators

• Pursuant to Section 492(b)(1) of the HEA [20 U.S.C. § 1098a] ED must select negotiators “from individuals nominated by groups” that are “involved in student financial assistance programs... such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies.”

• ED is further obligated to select individuals “with demonstrated expertise or experience” in subjects under negotiation, and who reflect “diversity in the industry, representing both large and small participants, as well as individuals serving local areas and national markets.”
The Art of Selection

• As a practical matter, the Department can significantly impact the rulemaking both in its selection of the specific constituencies to be represented, and in its selection of the individuals to fill each position.
## 2021-2022 ASL Rulemaking

<table>
<thead>
<tr>
<th>Dependent students</th>
<th>Independent students</th>
<th>Student loan borrowers</th>
<th>Legal assistance organizations</th>
<th>Groups representing military / veteran borrowers</th>
<th>State attorneys general</th>
<th>State higher education executive officers</th>
<th>FFEL Program lenders and loan servicers</th>
<th>FFEL Guaranty agencies and guaranty agency servicers</th>
<th>Accrediting agencies</th>
<th>Financial aid administrators</th>
<th>General counsels and compliance officers</th>
<th>CFOs and business officers</th>
<th>Minority serving institutions and HBCUs</th>
<th>Two-year public institutions</th>
<th>Four-year public institutions</th>
<th>Private, nonprofit institutions</th>
<th>Private, for-profit institutions (450 students or less)</th>
<th>Private, for-profit institutions (451 students or more)</th>
</tr>
</thead>
</table>

## 2017-2018 BDR Rulemaking

| Students | Consumer advocacy organizations | Legal aid organizations that represent students | Groups representing military / veteran borrowers | State attorneys general | State higher education executive officers | FFEL Program lenders and loan servicers | FFEL Guaranty agencies and guaranty agency servicers | Accrediting agencies | Financial aid administrators | General counsels and compliance officers | CFOs and business officers | Minority serving institutions and HBCUs | Two-year public institutions | Four-year public institutions | Private, nonprofit institutions | Private, for-profit institutions (450 students or less) | Private, for-profit institutions (451 students or more) |
## Rulemaking Timeline to Date

<table>
<thead>
<tr>
<th>Date</th>
<th>Rulemaking Event</th>
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<tbody>
<tr>
<td>May 26, 2021</td>
<td>ED announces its intent to hold rulemakings covering 14 possible issue areas.</td>
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<tr>
<td>August 10, 2021</td>
<td>Following public hearings, ED announces the Affordability and Student Loans (ASL) rulemaking and solicits nominations for negotiators.</td>
</tr>
<tr>
<td>October 4, 2021</td>
<td>ED announces its intent to establish a rulemaking focused on the 90/10 Rule and sets schedule for hearings and comments.</td>
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<tr>
<td>Oct. 4-8, 2021</td>
<td>First session for ASL Main Committee</td>
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<tr>
<td>Oct. 18-20, 2021</td>
<td>First session for Prison Ed. Program Subcommittee</td>
</tr>
<tr>
<td>Oct. 26-27, 2021</td>
<td>Virtual public hearings for announced 90/10 rulemaking</td>
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<td>Nov. 1-5, 2021</td>
<td>Second session for ASL Main Committee</td>
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<td>Nov. 3, 2021</td>
<td>Deadline for written comments for announced 90/10 rulemaking</td>
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<tr>
<td>Nov. 8-10, 2021</td>
<td>Second session for Prison Ed. Program Subcommittee</td>
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<tr>
<td>Dec. 6-10, 2021</td>
<td>Third session for ASL Main Committee</td>
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## Projected Rulemaking Timeline

<table>
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<tr>
<th>Future Date</th>
<th>Future Rulemaking Event</th>
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<tbody>
<tr>
<td>Nov.- Dec. 2021</td>
<td>ED announces third rulemaking to cover remaining topic areas (the TBD Rulemaking)</td>
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<tr>
<td>Jan. - April 2022</td>
<td>ED holds negotiated rulemaking for 90/10.</td>
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<tr>
<td>May - July 2022</td>
<td>ED issues proposed regulations for ASL and 90/10 rulemakings.</td>
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<tr>
<td>Nov. 1, 2022</td>
<td>ED issues final rules for ASL and 90/10 rulemakings.</td>
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<tr>
<td>Nov. – Dec. 2022</td>
<td>ED hosts sessions for TBD Rulemaking.</td>
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<tr>
<td>May - July 2023</td>
<td>ED issues proposed regulations for TBD Rulemaking.</td>
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<tr>
<td>July 1, 2023</td>
<td>Effective date for new final rules for ASL and 90/10 rulemakings.</td>
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<tr>
<td>Nov. 1, 2023</td>
<td>ED issues final rules for TBD Rulemaking.</td>
</tr>
<tr>
<td>July 1, 2024</td>
<td>Effective date for new final rules for TBD Rulemaking.</td>
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ED’s 2021-22 Neg Reg

• The Department collects information, timelines, and a range of other materials relating to its negotiated rulemaking efforts on this [web page].
Additional Machinations
Title IX Redux

• On April 6, 2021, ED announced that it would be overhauling the Title IX regulations put into place by the Trump administration.
BDR Partial Relief

• On August 24, 2021, ED announced in an electronic announcement that borrowers with successful claims will be entitled to a rebuttable presumption of full student loan relief. The Department acknowledged that “there may be some cases where partial relief could be appropriate.”
FTC Press Release

• On October 6, 2021, the FTC **placed** 70 proprietary institutions “on notice” that it will investigate any false promises they make about their graduates’ job and earning prospects and other outcomes and will levy significant financial penalties against violators.
ED Enforcement Unit

• On October 8, 2021, ED announced new Office of Enforcement within Federal Student Aid.

• Led by Kristen Donoghue, former enforcement director of the CFPB, will “coordinate with other state and federal partners. In particular, FSA plans to work closely with the Federal Trade Commission.”
Presenter Profile & Disclaimer
Thompson Coburn LLP

- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.
Presenter Profile

• Practice and Experience
  o Assists institutions of higher education to navigate challenging legal and regulatory matters.
  o Counsels colleges and universities regarding strategic planning, governance, and complex substantive changes, including institutional mergers and acquisitions.
  o Represents institutions in administrative proceedings before the Department and other postsecondary regulators.

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