



NATIONAL ASSOCIATION OF STATE ADMINISTRATORS  
AND SUPERVISORS OF PRIVATE SCHOOLS

# The Federal Regulatory Outlook for 2024

Aaron Lacey & Katie Wendell | Thompson Coburn LLP

2024 NASASPS Annual Conference

April 7-10 | Charleston, SC

# Thompson Coburn LLP

- Full-service law firm with over 400 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
  - Provides regulatory counsel on federal, state, and accrediting agency laws and standards governing higher education.
  - Routinely assists with matters involving state authorization, student affairs, and corporate and transactional issues.
  - Dog Person (Yoshi)
- Contact Information
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Katie Wendel

Counsel

Higher Education Practice

# Presenter Profile

- Practice and Experience
  - Assists institutions of higher education to navigate challenging legal and regulatory matters.
  - Advises regarding strategic planning, governance, and complex substantive changes.
  - Represents institutions in proceedings before ED and other postsecondary regulators.
  - Dog Person (Louis & Asher)
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Aaron Lacey

Partner

Thompson Coburn LLP





# Syllabus

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# A Very Difficult Time

- “FAFSA Failure”
- E-App migration challenges
- eZ-Audit inaccessible
- Program Review delays
- Change in Ownership delays
- Sweet contempt threat
- BDR injunction upheld
- GE litigation
- Severe resource limitations



ABOUT US NEWSROOM SUBCOMMITTEES EVENTS CONTACT



## PRESS RELEASES

### Owens, Wilson to Hold Hearing on Ramifications of ED's FAFSA Failure

WASHINGTON, D.C., April 3, 2024



WASHINGTON — On Wednesday, April 10, at 10:15 a.m., the Subcommittee on Higher Education and Workforce Development will hold a [hearing](#) titled: “FAFSA Fail: Examining the Impact on Students, Families, and Schools.”

**Chairman Burgess Owens (R-UT) said:** “The Education Department’s FAFSA rollout has been defined by poor communication, negligence, and incompetence that has wreaked havoc on the entire university system. FAFSA delays have left millions of students in limbo, unsure of their academic futures and unable to access additional guidance or assistance. This hearing will examine the dire consequences of the FAFSA failure and its impact on students, families, and colleges.”

**Ranking Member Frederica Wilson (D-FL) said:** “As students are patiently working through the college application process, it is concerning that many continue to experience delays in the FAFSA process. As policymakers put the education architecture in place, administrators must ensure seamless execution. This is not happening, and we should have a clearer understanding of why. I look forward to hearing from our witnesses on this critical topic. We must remove obstacles that prevent students from accessing education.”

**What:**

Subcommittee hearing titled “FAFSA Fail: Examining the Impact on Students, Families, and Schools”

**When:**

10:15 a.m. on Wednesday, April 10, 2024

**Where:**

2175 Rayburn House Office Building

**Press:**

The hearing is open to the press and will be live-streamed on the [Committee's YouTube page](#).

###





# Overview of ED's Rulemaking Activity

# ED's Regulatory Agenda

- ED is presently working to complete an extraordinarily ambitious regulatory agenda.
- The [Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions](#) sets out status and projected schedules for ED's planned regulatory initiatives.

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OFFICE of MANAGEMENT and BUDGET  
EXECUTIVE OFFICE of the PRESIDENT

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U.S. General Services Administration GSA

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### Agency Rule List - Fall 2023

Department of Education

Agency	Agenda Stage of Rulemaking	Title	RIN
EDIEDOGC	Final Rule Stage	Adjustment of Civil Monetary Penalties for Inflation	<a href="#">1801-AA28</a>
EDIOESE	Proposed Rule Stage	Innovative Assessment Demonstration Authority	<a href="#">1810-AB80</a>
EDIOESE	Final Rule Stage	Impact Aid Program	<a href="#">1810-AB86</a>
EDIOSERS	Proposed Rule Stage	Randolph-Sheppard Act	<a href="#">1820-AB83</a>
EDIOSERS	Final Rule Stage	Individuals With Disabilities Education Act	<a href="#">1820-AB82</a>
EDIOCTAE	Proposed Rule Stage	Carl D. Perkins Career and Technical Education Act of 2006	<a href="#">1830-AA33</a>
EDIOCTAE	Final Rule Stage	Joint Rule Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator Provisions	<a href="#">1830-AA32</a>
EDIOPE	Proposed Rule Stage	Documentation of Foreign Source Gifts and Contracts	<a href="#">1840-AD50</a>
EDIOPE	Proposed Rule Stage	Federal TRIO Programs	<a href="#">1840-AD68</a>
EDIOPE	Proposed Rule Stage	Accreditation and Related Issues	<a href="#">1840-AD82</a>
EDIOPE	Proposed Rule Stage	State Authorization	<a href="#">1840-AD83</a>
EDIOPE	Proposed Rule Stage	Return to Title IV	<a href="#">1840-AD85</a>
EDIOPE	Proposed Rule Stage	Cash Management	<a href="#">1840-AD88</a>
EDIOPE	Proposed Rule Stage	Third-Party Servicers and Related Issues	<a href="#">1840-AD87</a>
EDIOPE	Proposed Rule Stage	Improving use of Deferments and Forbearances	<a href="#">1840-AD88</a>
EDIOPE	Proposed Rule Stage	Distance Education	<a href="#">1840-AD92</a>
EDIOPE	Proposed Rule Stage	Student Loan Relief	<a href="#">1840-AD93</a>
EDIOPE	Final Rule Stage	Partnerships With Faith-Based and Neighborhood Organizations	<a href="#">1840-AD67</a>
EDIOPE	Final Rule Stage	Direct Grant Programs, State-Administered Formula Grant Programs	<a href="#">1840-AD72</a>
EDIOPE	Final Rule Stage	Fulbright-Hays Doctoral Dissertation Research Abroad and Faculty Research Abroad Fellowship Program	<a href="#">1840-AD90</a>
EDIOPE	Final Rule Stage	Public Service Loan Forgiveness – Employer Eligibility	<a href="#">1840-AD91</a>
EDIFSA	Proposed Rule Stage	Cybersecurity Standards for Institutions of Higher Education to Comply With EO 13558 and NIST 800-171	<a href="#">1845-AA28</a>
EDIOCR	Proposed Rule Stage	Nondiscrimination on the Basis of Sex and Disability in Programs or Activities Receiving Federal Financial Assistance	<a href="#">1870-AA17</a>
EDIOCR	Proposed Rule Stage	Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of Education	<a href="#">1870-AA18</a>
EDIOCR	Final Rule Stage	Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance	<a href="#">1870-AA18</a>
EDIOCR	Final Rule Stage	Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria For Male and Female Athletic Teams	<a href="#">1870-AA19</a>
EDIOPEPD	Proposed Rule Stage	EDGAR Revisions	<a href="#">1875-AA14</a>
EDIOPEPD	Proposed Rule Stage	Family Educational Rights and Privacy Act	<a href="#">1875-AA16</a>
EDIOS	Proposed Rule Stage	Debt Collection Practices	<a href="#">1894-AA12</a>
EDIOS	Final Rule Stage	Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards	<a href="#">1894-AA11</a>

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# Negotiated Rulemaking

- You can view documentation, schedules, and a range of other materials relating to ED's ongoing negotiated rulemaking efforts on this [web page](#).
- This includes both the recently completed Student Loan Debt Relief negotiations and the ongoing Program Integrity and Institutional Quality negotiations.

The screenshot shows the U.S. Department of Education website. At the top, there is a navigation bar with 'Student Loans', 'Grants', and 'Laws'. The main heading is 'Negotiated Rulemaking for Higher Education 2023-2024'. Below this, there are four menu buttons: 'General Information', 'Student Loan Debt Relief', 'Program Integrity and Institutional Quality', and 'TRIO Subcommittee'. A note says 'Click on the link with ▼ to expand or collapse the information'. Under 'General Information', there is a paragraph explaining the purpose of the rulemaking and a link to a 'question and answer page'. Below that are two expandable links: 'Federal Register Notices and Fact Sheets' and 'Public Hearing Information'. The 'Student Loan Debt Relief' section lists committee members, protocols, and three sessions from October to December 2023. The 'Program Integrity and Institutional Quality' section lists committee members, protocols, and three sessions from January to March 2024. The 'TRIO Subcommittee' section lists committee members, protocols, and two sessions from January and February 2024.

U.S. Department of Education

Student Loans Grants Laws

## Negotiated Rulemaking for Higher Education 2023-2024

Click on the menu buttons for more information

General Information Student Loan Debt Relief Program Integrity and Institutional Quality TRIO Subcommittee

Click on the link with ▼ to expand or collapse the information

### General Information

This page provides information regarding the Department's negotiated rulemaking in 2023-2024 to make regulatory changes for the programs authorized by Title IV of the Higher Education Act of 1965, as amended. For more information about negotiated rulemaking in general, please see our [question and answer page](#).

Federal Register Notices and Fact Sheets▼

Public Hearing Information▼

### Student Loan Debt Relief

Committee Members List: [PDF \(219K\)](#) | [Revised PDF \(217K\)](#) | [Revised PDF \(206K\)](#) | [Revised PDF \(206K\)](#) | [Revised PDF \(207K\)](#)  
Committee Protocols: [PDF \(235K\)](#) | [Revised PDF\\* \(248K\)](#)

Session 1: [October 10-11, 2023](#)▼

Session 2: [November 6-7, 2023](#)▼

Session 3: [December 11-12, 2023](#)▼

### Program Integrity and Institutional Quality

Committee and Subcommittee Members List: [PDF\\* \(136K\)](#) | [Revised PDF\\* \(169K\)](#)  
Committee Protocols: [PDF\\* \(232K\)](#)

**New** [Session 2 Registration: Coming Soon](#)

**New** [Session 2 Public Comment: Coming Soon](#)

Session 1: [January 8 - 11, 2024](#)▼

Session 2: [February 5-8, 2024](#)▼

Session 3: [March 4-7, 2024](#)▼

### TRIO Subcommittee

**New** [Session 2 Registration: Coming Soon](#)

**New** [Session 2 Public Comment: Coming Soon](#)

Session 1: [January 12, 2024](#)▼

Session 2: [February 9, 2024](#)▼

# 2023 Completed Negotiated Rulemaking

July 1, 2024,  
effective date

- [July 10, 2023 \(88 FR 43820\)](#)
  - Income-driven repayment plans
- [October 10, 2023 \(88 FR 70004\)](#)
  - Financial Value Transparency and Gainful Employment
- [October 31, 2023 \(88 FR 74568\)](#)
  - Financial responsibility
  - State-defined processes for Ability to Benefit
  - Certification procedures for Title IV participation
  - Standards of administrative capability

Impact  
Opportunities

- Challenge rule through litigation



# 2024 Pending Negotiated Rulemaking

Student Loan Debt Relief  
Negotiated Rulemaking  
Completed in December 2023

- Student Loan Relief (NPRM: May 2024)

Program Integrity and  
Institutional Quality Negotiated  
Rulemaking Completed in March  
2024

- Accreditation and related issues (NPRM: October 2024)
- State authorization (NPRM: October 2024)
- Distance education (NPRM: October 2024)
- Return to Title IV (NPRM: October 2024)
- Cash management (NPRM: October 2024)
- Federal TRIO programs (NPRM: October 2024)

Notice of Intent for Negotiated  
Rulemaking

- Third-Party Servicers and Related Issues (NPRM: October 2024)
- Improving use of Deferments and Forbearances (NPRM: October 2024)

Impact Opportunities

- Coordinate with trade associations, participate in public meetings, nominate or serve as a negotiator
- Support negotiators, review draft language
- Schedule listening session with ED
- Comment on proposed rules, encourage others to comment
- Schedule an EO 12866 meeting with OMB
- Challenge rule through litigation

# 2024 Additional Pending Rulemakings

Proposed Rules  
Scheduled for Release  
in 2024

- Family Educational Rights and Privacy Act (NPRM: May 2024)
- Documenting Foreign Source Gifts & Contracts (NPRM: June 2024)
- Carl D. Perkins Career and Technical Ed. Act (NPRM: August 2024)
- Cybersecurity Standards for IHEs (NPRM: October 2024)
- Debt Collection Practices (NPRM: October 2024)

Impact Opportunities

- Coordinate with trade associations, participate in public meetings
- Comment on proposed rules, encourage others to comment
- Schedule an EO 12866 meeting with OMB
- Challenge rule through litigation



# Title IX Redux

- On April 6, 2021, the Biden administration [announced](#) that it would be overhauling the 2020 Title IX rule.
- On July 12, 2022, ED published its proposed [2022 Title IX Rule](#), and received over 235,000 comments.
- We currently anticipate the final rule will be issued in **June 2024**.
- The effective date is at ED's discretion as the Title IX rulemaking is not subject to the master calendar requirement.



U.S. Department of Education

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## The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment

Department Commemorates 50 Years of Protecting and Advancing the Rights of All Students

JUNE 23, 2022

Contact: Press Office, (202) 401-1576, [press@ed.gov](mailto:press@ed.gov)

Today, in celebration of the 50th anniversary of Title IX – the landmark civil rights law that has opened doors for generations of women and girls – the U.S. Department of Education released for public comment proposed changes to the regulations that help elementary and secondary schools and colleges and universities implement this vital legislation. The proposed amendments will restore crucial protections for students who are victims of sexual harassment, assault, and sex-based discrimination – a critical safety net for survivors that was weakened under previous regulations. The proposed regulations will advance educational equity and opportunity for women and girls across the country to ensure that every student in America, from kindergarten through a doctorate degree, can achieve her dreams.

"Over the last 50 years, Title IX has paved the way for millions of girls and women to access equal opportunity in our nation's schools and has been instrumental in combating sexual assault and sexual violence in educational settings," said U.S. Secretary of Education Miguel Cardona. "As we celebrate the 50th Anniversary of this landmark law, our proposed changes will allow us to continue that progress and ensure all our nation's students – no matter where they live, who they are, or whom they love – can learn, grow, and thrive in school. We welcome public comment on these critical regulations so we can further the Biden-Harris Administration's mission of creating educational environments free from sex discrimination and sexual violence."

The proposed regulations will advance Title IX's goal of ensuring that no person experiences sex discrimination, sex-based harassment, or sexual violence in education. As the Supreme Court wrote in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), it is "impossible to discriminate against a person" on the basis of sexual orientation or gender identity without "discriminating against that individual based on sex." The regulations will require that all students receive appropriate supports in accessing all aspects of education. They will strengthen protections for LGBTQI+ students who face discrimination based on sexual orientation or gender identity. And they will require that school procedures for complaints of sex discrimination, including sexual violence and other sex-based harassment, are fair to all involved. The proposed regulations also reaffirm the Department's core commitment to fundamental fairness for all parties, respect for freedom of speech and academic freedom, respect for complainants' autonomy, and clear legal obligations that enable robust enforcement of Title IX.

The proposed regulations would:

- Clearly protect students and employees from all forms of sex discrimination.
- Provide full protection from sex-based harassment.
- Protect the right of parents and guardians to support their elementary and secondary school children.
- Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its recurrence and remedy its effects.
- Protect students and employees who are pregnant or have pregnancy-related conditions.
- Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decisionmakers to evaluate the evidence.
- Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.
- Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics.
- Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights.



# Financial Value Transparency & Gainful Employment



# The Final 2023 GE Rule

- On October 10, 2023, ED [published](#) its final Financial Value Transparency and Gainful Employment (GE) rule.
- The rule is set to take effect on **July 1, 2024**, with data reporting required as early as **July 31, 2024**.
- Significant sub-regulatory guidance has begun to arrive, and more is anticipated in the coming months (e.g., electronic announcements, dear colleague letters).



## Financial Value Transparency and Gainful Employment

A Rule by the Education Department on 10/10/2023

PUBLISHED DOCUMENT

Start Printed Page 70004

**AGENCY:**  
Office of Postsecondary Education, Department of Education.

**ACTION:**  
Final regulations.

**SUMMARY:**  
The Secretary establishes and amends regulations related to gainful employment (GE) to address ongoing concerns about educational programs designed to prepare students for gainful employment in a recognized occupation, but that instead leave them with unaffordable amounts of student loan debt in relation to their earnings, or with no gain in earnings compared to others with no more than a high school education. The Secretary separately seeks to enhance transparency by providing information about financial costs and benefits to students at nearly all academic programs at postsecondary institutions that are eligible to participate in title IV of the Higher Education Act of 1965, as amended (HEA).

**DATES:**  
These regulations are effective July 1, 2024.

**FOR FURTHER INFORMATION CONTACT:**  
Joe Massman. Telephone: (202) 453-7771. Email: [GE24@ed.gov](mailto:GE24@ed.gov).

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

**SUPPLEMENTARY INFORMATION:**  
**Executive Summary**  
**Purpose of This Regulatory Action**  
The Federal Government makes significant annual investments under title IV of the HEA through programs that provide financial assistance to help students pay

**DOCUMENT DETAILS**

Printed version:  
[PDF](#)

Publication Date:  
10/10/2023

Agency:  
Department of Education

Dates:  
These regulations are effective July 1, 2024.

Effective Date:  
07/01/2024

Document Type:  
Rule

Document Citation:  
88 FR 70004

Page:  
70004-70193 (190 pages)

CFR:  
34 CFR 600  
34 CFR 668

Agency/Docket Number:  
Docket ID ED-2023-OPE-0089

RIN:  
1840-AD57

Document Number:  
2023-20385

**DOCUMENT STATISTICS**

Page views:  
2,406  
as of 10/21/2023 at 10:15 am EDT

**DOCUMENT STATISTICS**

**ENHANCED CONTENT**

# An Extraordinary Expansion

- ED will calculate and disclose D/E rates and a new Earnings Premium metric for every Title IV program at every Title IV institution, meaning both non-GE and GE programs.
- These metrics, along with other data, will be made available to prospective and current students through a new ED website, and ED will label failing programs as “**low-earning**” or “**high-debt-burden**,” per the agency’s determination.
- It still will be the case that only GE programs can lose Title IV eligibility. But failing graduate-level, non-GE programs also will be sanctioned.
- The new rule also includes **significant** reporting and disclosure requirements for all institutions.

# Impact Projections (non-GE)

- ED projects over 842 public programs (555,000 students) and 640 private, non-profit degree programs (264,400 students) would fail at least one of the D/E rate or Earnings Premium tests.
- “Rates of not passing at least one of the metrics are particularly high for professional programs in law (CIP 22, about 19 percent of law programs representing 29 percent of enrollment in law programs), theology (CIP 39, about 7 percent, 25 percent) and health (CIP 51, about 10 percent, 19 percent).”
- ED projects 390 graduate-level, non-GE programs would fail and be subject to sanctions (122,000 students).
- Note that ED excluded 82.7% of non-GE programs from the data set because they had fewer than 30 students in the two-year completer cohorts.



# Impact Projections (GE)

- ED projects 193 public GE programs (38,000 students), 73 private, non-profit degree programs (32,600 students), and 1,440 proprietary GE programs (620,800 students) would fail at least one of the D/E rate or Earnings Premium tests.
- Of the 1,440 proprietary GE programs that fail one of the two tests, 939 (65%) are undergraduate certificate programs that fail only the Earnings Premium threshold test.
- The highest rate of failure is in Personal and Culinary Services, where about 73% of enrolled students are in programs that would have failing metrics (primarily under the Earnings Premium).
- Note that ED excluded 87.7% of GE programs from the data set because they had fewer than 30 students in the two-year completer cohorts.

# Implementation Roadblo

- Already the rule is being challenged in court, like the prior versions.
- ED also may struggle to timely implement the rule given current resource constraints.
- The results of the 2024 presidential election will impact the rule's viability.

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

AMERICAN ASSOCIATION OF  
COSMETOLOGY SCHOOLS

and

DUVALL'S SCHOOL OF COSMETOLOGY,  
L.L.C.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
EDUCATION

and

MIGUEL CARDONA, in his official capacity as  
Secretary of the U.S. Department of Education,

Defendants.

Case Number: 4:23-cv-1267

PLAINTIFFS' ORIGINAL COMPLAINT

INTRODUCTION

1. This is an action to forestall the third iteration of a twice-failed regulation that is a product of the government's contempt for the proprietary education industry, promulgated without regard for what the agency's openly flawed data say or how many socially beneficial small businesses will close, under the guise of addressing a problem that those most harmed by the regulation do not cause.

2. Plaintiffs, the American Association of Cosmetology Schools ("AACCS") and DuVall's School of Cosmetology, L.L.C. ("DuVall," and collectively, "Plaintiffs"), bring this action to challenge the latest attempt by the United States Department of Education

# GE Court Challenges

- In December 2023, the **American Association of Cosmetology Schools** filed suit in the U.S. District Court for the Northern District of Texas. The parties agreed to a summary judgment briefing scheduling, but the deadlines are not until July. Notably this is after the July 1 implementation date.
- A second suit was filed by the **Ogle School Management** and others on March 20, 2024, also in the U.S. District Court for the Northern District of Texas. A memorandum in support of a preliminary injunction was filed on March 21, a response to the motion is due on April 12, and reply is due on April 24.
- Whether the rule takes effect on July 1, 2024, will likely turn on whether a preliminary injunction is issued.



# Guidance and Delays

- On March 29, ED released [DCL \(GEN-24-04\)](#), which provides an overview of the new rule.
- The DCL also delays the initial data reporting date from July 31 to October 1 for all programs and offers additional detail regarding the transitional reporting option.
- Thereafter, on April 5, ED launched its new [FVT/GE Topics Page](#), which provides policy guidance, publications, and operational information, including a new [FAQ](#).

## (GE-24-02) Financial Value Transparency and Gainful Employment Topics Page and FAQs Now Available

Print

POSTED DATE: April 05, 2024  
AUTHOR: Federal Student Aid  
ELECTRONIC ANNOUNCEMENT ID: GE-24-02  
SUBJECT: Financial Value Transparency and Gainful Employment Topics Page and FAQs Now Available

On October 10, 2023, the Secretary published final regulations in the *Federal Register* (88 FR 70004) [regarding](#) Financial Value Transparency and Gainful Employment (FVT/GE) requirements that apply to most educational programs that are eligible to participate in the student financial assistance programs authorized under *Title IV of the Higher Education Act of 1965*, as amended (HEA).

Today, the United States Department of Education (the Department) is pleased to announce the availability of an [FVT/GE Topics page](#) on Federal Student Aid's Knowledge Center. This page provides institutions with a repository for regulations, policy guidance, publications, and operational information. It will be updated as additional information is released.

The Topics page also includes [Frequently Asked Questions](#) on the following topics related to FVT/GE:

- General
- Debt to Earnings Rates
- Earnings Premium
- Warnings
- Disclosures and Acknowledgements
- Reporting

The FAQs will be updated periodically and include the date of the update. New and/or updated questions and answers will be marked NEW.

### Contact Information

We thank you for your cooperation in the implementation of the new FVT/GE regulations. If you have policy questions about these regulations, please direct them to [GE24@ed.gov](mailto:GE24@ed.gov).

# Implementation Timeline

July 1, 2024

Effective date of the new FVT/GE Rule

October 1, 2024

Deadline to report initial round of data

December 31, 2024

Deadline for initial certification of GE programs

Jan. – June 2025

ED issues first round of determinations to schools

October 1, 2025

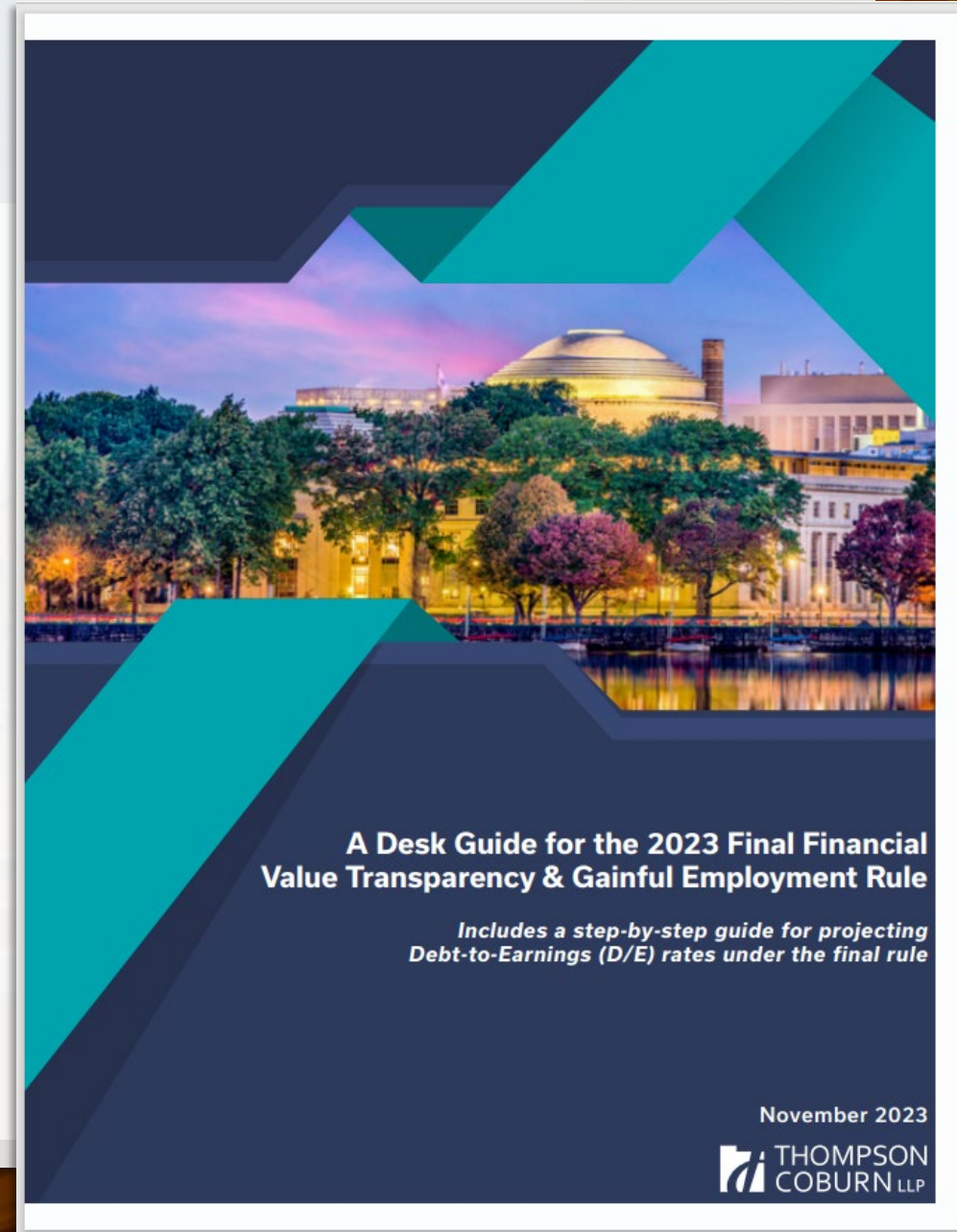
Deadline to report most recent award year data

July 1, 2026

Disclosure, acknowledgement, and warning requirements begin

# FVT/GE Desk Guide

- Our Desk Guide includes a brief overview of the final rule, as well as a step-by-step guide for projecting D/E rates and earnings premiums.
- The Desk Guide will be distributed to webinar registrants, and we are happy to provide a copy upon request (please email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com)).





# Webinar: FVT/GE Series

**THOMPSON COBURN LLP**

## ED's New Financial Value Transparency and Gainful Employment Rule

Higher Education Webinar Series  
November 7, 2023

0:00 / 2:43:11

### Higher Education

Thompson Coburn LLP - 2 / 71

- 1 The Higher Education Regulatory Outlook for 2024 Thompson Coburn LLP 1:53:37
- ▶ ED's New Financial Value Transparency and Gainful Employment Rule Thompson Coburn LLP 2:43:12
- 3 Responding to Student Borrower Defense to... Thompson Coburn LLP 1:14:37
- 4 Affirmative Action in Higher Education: Impact of SFFA v... Thompson Coburn LLP 1:08:08
- 5 ED's Proposed Gainful Employment and Financial... Thompson Coburn LLP 1:59:00
- 6 A review of ED's new third-party servicer guidance and... Thompson Coburn LLP 1:42:41
- 7 Safeguarding the Data and Your Compliance Program -... Thompson Coburn LLP 1:15:43
- 8 The Higher Education Regulatory Outlook for 2023 Thompson Coburn LLP 1:48:20
- 9 ED's Proposed Borrower Defense to Repayment Rule:... Thompson Coburn LLP 2:12:07



# Borrower Defense to Repayment in 2024

# BDR Claim Characteristics

- In response to FOIA requests filed by the National Student Legal Defense Network, the Department has supplied data regarding the number of BDR claims filed and pending, organized by year and institution.
- These data sets are currently available on the [NSLDN website](#).

Excel copy-of-2022-bdr-claims-by-school - View-only

File Home Insert Draw

Undo Redo Edit a copy

General

C19

	A	B	C	D	E	F	G	H
1	1. The total number of borrower defense claims <u>filed</u> from July 1, 2022 to July 31, 2022, broken down by institution;						51,800	
2								
3	2. The total number of borrower defense claims <u>granted</u> between July 1, 2022 to July 31, 2022, broken down by institution;						1,000	
4								
5		a. Of the granted claims, the total number that received monetary relief, broken down by institution;					N/A*	
6								
7		b. Of the granted claims, the total dollar amount discharged, broken down by institution;					N/A*	
8								
9	3. The total number of borrower defense claims <u>denied</u> between July 1, 2022 to July 31, 2022, broken down by institution.						0	
10								
11	4. The total number of borrower defense applications <u>pending</u> decision*, broken down by institution.						302,700	
12								
13	* For cases that were opened on and before July 31, 2022 and were pending as of August 18, 2022.							
14	Summary data provided is rounded to the nearest hundred.							



# BDR Claim Characteristics

- ED's responses to the FOIA requests indicate that over 600,000 claims had been filed by December 31, 2022.
- ED also indicates that of the claims that were opened on or before December 31, 2022, 443,500 were still pending as of January 20, 2023.
- The claims pending involved over **4,900** different institutions, or about **83%** of Title IV-eligible institutions of higher education.
- We anticipate that the number of claims increased in 2023.

BDR Claims Filed	
Before 2015	51
2015	8,801
2016	83,623
2017	80,554
2018	51,063
2019	67,294
2020	52,656
2021 (1/1 - 10/14)	70,039
2022 (April)	7,670
2022 (May and June)	69,300
2022 (July)	51,800
2022 (August)	29,200
2022 (October)	16,300
2022 (November)	22,600
2022 (December)	5,500
<b>Total</b>	<b>616,451</b>

# The Fifth Circuit Injunction

- The Biden administration's rule was published in the Federal Register on [Nov. 1, 2022](#) (2022 Rule) and took effect July 1, 2023.
- In February 2023, the Career Colleges and Schools of Texas (CCST), an association of proprietary schools, challenged the 2022 Rule under various theories, including arguments that it exceeds ED's statutory authority under the Higher Education Act, that it is arbitrary and capricious under the Administrative Procedures Act, and that it violates the Due Process Clause of the Constitution.
- CCST asked the court to enjoin the enforcement of the regulation until the court decides on the merits of the case. A federal district judge in Texas denied CCST's request.

# The Fifth Circuit Injunction

- On appeal, however, a three-judge Fifth Circuit panel granted an [emergency injunction](#) pending appeal with respect to the 2022 Rule.
- As a result, ED was prevented from enforcing the borrower defense (and closed school loan discharge) provisions of the 2022 Rule nationwide.

United States Court of Appeals  
for the Fifth Circuit

\_\_\_\_\_  
No. 23-50491  
\_\_\_\_\_

CAREER COLLEGES AND SCHOOLS OF TEXAS,

*Plaintiff—Appellant,*

*versus*

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL  
CARDONA, *Secretary, U.S. Department of Education, in his official capacity  
as the Secretary of Education,*

*Defendants—Appellees.*

\_\_\_\_\_  
Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:23-CV-433  
\_\_\_\_\_

Before JONES, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellant's Opposed Emergency Motion for Injunction Pending Appeal of the borrower-defense and closed-school provisions of a "Rule" governing student loan discharges, 87 Fed. Reg. 65904 (Nov. 1, 2022), is GRANTED. *See* 5 U.S.C. § 705; *see also Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360, 384 (5th Cir. 2018), *judgment entered sub nom. Chamber of Com. of Am. v.*



# The Fifth Circuit Injunction

- On April 4, 2024, the Court of Appeals officially reversed the district court's denial of a preliminary injunction and remanded the case, postponing the effective date of the rule pending final judgment in the litigation.
- The Fifth Circuit found not only that CCST would suffer irreparable harm, but also that CCST **would likely succeed on the merits of its case.**
- Meanwhile, the 1994, 2016, and 2019 Rules remain in effect and ED continues to process claims.

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

April 4, 2024

Lyle W. Cayce  
Clerk

\_\_\_\_\_  
No. 23-50491  
\_\_\_\_\_

CAREER COLLEGES AND SCHOOLS OF TEXAS,

*Plaintiff—Appellant,*

*versus*

UNITED STATES DEPARTMENT OF EDUCATION;  
MIGUEL CARDONA, *Secretary, U.S. Department of Education,*  
*in his official capacity as the Secretary of Education,*

*Defendants—Appellees.*

\_\_\_\_\_  
Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:23-CV-433  
\_\_\_\_\_

Before JONES, DUNCAN, and WILSON, *Circuit Judges.*

EDITH H. JONES, *Circuit Judge:*

An association of Texas career colleges and schools challenges the Department of Education's new regulations that will significantly facilitate certain student loan discharges while creating uncertainty, complexity and potentially huge liability for the association's members. The Rule overturns recent regulations issued by the previous Administration and upends thirty years of regulatory practice. The district court declined to issue a preliminary injunction against the Rule solely on the basis that the plaintiffs had not

# The Sweet Settlement: Claim Periods

Claims Filed Before June 22, 2022

For a borrower who attended a school listed on [Exhibit C](#), the borrower's loans will be discharged in full without adjudication. For a borrower who did not attend a school listed on Exhibit C, ED will review the application under the 2016 Rule. **ED will not require evidence outside of the written application, require proof of reliance, or apply any statute of limitations.** Rather, ED will determine whether the application states a claim that, if presumed to be true, would assert a valid basis for borrower defense under the applicable regulation. ED must render decisions within specified periods based on how long the claim has been pending, and no later than July 28, 2025. **If ED does not render a decision within the required period, the borrowers receive full, automatic relief.**

Claims Filed Between June 22, 2022, and November 15, 2022

- ED will review the applications under the 2016 Rule and issue a decision no later than January 28, 2026. **If ED does not render a decision within the required period, the borrowers receive full, automatic relief.**

Claims Filed After November 15, 2022

- Not covered by *Sweet*. Adjudicated under the prevailing BDR framework.

# BDR Claims Guidance

- ED published [an electronic announcement](#) on Nov. 8, 2023, confirming it is focused on claims filed between June 23, 2022, to November 15, 2022, and indicating that it hopes to complete all notifications relating to this cohort by **April 2024**.
- It observes that the vast majority of schools receiving notices “have fewer than 100 applications” and indicates that for the minority of schools that have “over 500 applications” filed during this period, it will reach out later in the year with further guidance.
- ED also acknowledges that it is not conducting any substantive review of the applications (e.g., determining whether an application even asserts a valid basis for a BDR claim) before sending them to institutions.



# Sweet Agitation

- Meanwhile, on March 1, ED conceded they were in breach of the Sweet settlement, as some borrowers still had not seen loans timely discharged. ED blamed **loan servicers** for the failure to comply.
- On March 19, after plaintiffs filed a motion to enforce the settlement agreement, the Court ordered ED and their loan servicers to “show cause why they should not be held in contempt for frustrating the settlement.”
- A hearing has been set for April 24.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,  
Plaintiffs, No. C 19-03674 WHA  
v.  
MIGUEL CARDONA, et al.,  
Defendants. **ORDER RE LOAN SERVICERS**

Today, plaintiffs, a class of student-loan borrowers, filed a motion to enforce the settlement agreement (Dkt. No. 397). Pursuant to Paragraph IV.A.1 of that agreement, the Department of Education was required to effectuate full settlement relief for borrowers entitled to such relief no later than January 28, 2024, one year after the effective date (Dkt. Nos. 246-1 at 6; 382 at 10). In a letter sent to plaintiffs' counsel on March 1, 2024, attached to plaintiffs' motion as Exhibit 17, counsel for defendants acknowledged that “for borrowers who are entitled to, but have not yet received, full settlement relief pursuant to Paragraph IV.A.1, the Department is in material breach of the Agreement” (Dkt. No. 397-3 at 127). In so doing, counsel stated, in pertinent part:

The Department continues to work urgently to more reliably determine the status of class member relief, to investigate the circumstances of class members who have not received timely relief, and to resolve issues so that class members receive relief as quickly as possible. As an integral part of that work, the Department also continues to engage with [loan] servicers, including by instructing them to prioritize resolving Sweet relief

# BDR Response Guide

- Institutions are welcome to use our BDR response guide to assist with formulating processes to evaluate and respond to BDR claims.
- The guide is available on our higher education resources page, and we are happy to provide a copy upon request (please email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com)).



## Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

Last Updated: August 2023

Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education ("ED") to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a "borrower defense to repayment" or "BDR" claim.<sup>1</sup> On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.<sup>2</sup> On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide [injunction](#) of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.<sup>3</sup> Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, "Responding to Student BDR Claims," available [here](#). Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.<sup>4</sup>

### I. Initial Assessment of the Claim

When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED's response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student's statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

<sup>1</sup> Congress introduced the BDR concept in 1993, when it directed ED to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]." 20 U.S.C. § 1087e(h); see also 34 C.F.R. § 685.206; 34 C.F.R. § 685.222.

<sup>2</sup> See 87 Fed. Reg. 65904 (Nov 1, 2022).

<sup>3</sup> In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download [here](#).

<sup>4</sup> In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.



# Webinar: Responding to BDR Claims



Search



## Responding to Student Borrower Defense to Repayment (BDR) Claims: 2023 Edition

Higher Education Webinar Series

September 21, 2023



### Higher Education

Thompson Coburn LLP - 1 / 68



Responding to Student Borrower Defense to...

Thompson Coburn LLP



Affirmative Action in Higher Education: Impact of SFFA...

Thompson Coburn LLP



ED's Proposed Gainful Employment and Financial...

Thompson Coburn LLP



A review of ED's new third-party servicer guidance an...





# Programmatic Accreditation, State Authorization, and Closure

# New PPA Requirements

- As of July 1, new rules relating to professional licensure programs, programmatic accreditation, and state closure law compliance will become conditions of participation expressly set forth in the PPA.
- These requirements must be satisfied for any Title IV eligible program being offered in a covered State.

# New PPA Requirements

## Covered States

Any State in which the institution is located.

Any State in which students enrolled by the institution in distance education or correspondence courses are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2).

Any State in which a student who enrolls in a program on or after July 1, 2024, attests that they intend to seek employment.



# New PPA Requirements

For any **Covered State**,  
an institution must  
determine that each  
Title IV eligible  
program it offers...

- Satisfies the applicable educational requirements for **professional licensure or certification** requirements in the State so that a student who enrolls in the program and seeks employment in that State after completing the program qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.
- Is **programmatically accredited** if the State or a Federal agency requires such accreditation, including as a condition for employment in the occupation for which the program prepares the student, or is programmatically pre-accredited when programmatic pre-accreditation is sufficient according to the State or Federal agency.
- Complies with all State **laws related to closure**, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds.

# Programs Must Meet New Requirements

- In the commentary, ED makes clear that it added “§ 668.14(b)(32)(i) and (ii) to require all programs that prepare students for occupations requiring programmatic accreditation or State licensure to **meet** those requirements.”
- ED observes that if programmatic or licensure requirements exist “an institution **must** follow them with respect to the students attending from those States. That also means that if an institution cannot determine that its program meets the education requirements for licensure or certification, then it **cannot offer the program** to future students in that State.”

# Webinar: State Authorization

The screenshot shows a YouTube video player interface. At the top, there is a search bar and navigation icons. Below the search bar are three logos: THOMPSON COBURN LLP, wcet (WICHE Cooperative for Educational Technologies), and SAN (STATE AUTHORIZATION NETWORK, a division of WCET). The main title of the video is "ED's Evolving State Authorization and Professional Licensure Requirements", with the subtitle "Higher Education Webinar Series" and the date "April 4, 2024". The video player shows a still image of an open book with a smartphone and a pair of glasses on top. The video progress bar is at 0:01 / 1:47:25. On the right side, there is a playlist titled "Higher Education" with 9 items, each with a thumbnail and a duration.

THOMPSON COBURN LLP

wcet  
WICHE Cooperative for Educational Technologies

SAN  
STATE AUTHORIZATION NETWORK  
a division of WCET

## ED's Evolving State Authorization and Professional Licensure Requirements

Higher Education Webinar Series

April 4, 2024

Play (k)

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### Higher Education

Thompson Coburn LLP - 71 / 71

- 1 The Higher Education Regulatory Outlook for 2024  
Thompson Coburn LLP  
1:53:37
- 2 ED's New Financial Value Transparency and Gainful...  
Thompson Coburn LLP  
2:43:12
- 3 Responding to Student Borrower Defense to...  
Thompson Coburn LLP  
1:14:37
- 4 Affirmative Action in Higher Education: Impact of SFFA v...  
Thompson Coburn LLP  
1:08:08
- 5 ED's Proposed Gainful Employment and Financial...  
Thompson Coburn LLP  
1:59:00
- 6 A review of ED's new third-party servicer guidance and...  
Thompson Coburn LLP  
1:42:41
- 7 Safeguarding the Data and Your Compliance Program - ...  
Thompson Coburn LLP  
1:15:43
- 8 The Higher Education Regulatory Outlook for 2023  
Thompson Coburn LLP  
1:48:20
- 9 ED's Proposed Borrower Defense to Repayment Rule: ...  
Thompson Coburn LLP  
2:12:07





# The Minimum- Maximum Length Rule

# The Minimum-Maximum Length Rule

- For each GE program, an institution must limit the number of hours in the program to the greater of:
  - the required **minimum** number of clock hours, credit hours, or the equivalent required for training in the recognized occupation if the State has established such a requirement or as established by any Federal agency; or
  - another State's required minimum number of clock hours, credit hours, or the equivalent if the institution can document that a majority of the students resided in the other State, were employed in the other state, or the other State is part of the same metropolitan statistical area as the institution's home State.

# The Minimum-Maximum Length Rule

- There is an exception for occupations where the State entry level requirements for the job “include the completion of an associate or higher-level degree” or “where the program is delivered entirely through distance education or correspondence courses.”
- In the commentary, ED also clarifies that students may not receive partial funding for a program that exceeds the maximum length. “The Department determined that it did not have the legal authority to **partially fund** a program, nor did it believe such an approach was appropriate given the potential harms to students who enroll in partially funded programs...”





# Financial Responsibility Reporting

2024 NASASPS Annual Conference

April 7-10 Charleston, SC

# Financial Responsibility Reporting

- ED's new rule revises significant aspects of the financial responsibility regulations.
- Notably, the revisions to 34 CFR §668.171 amend reporting obligations, which require institutions of higher education to report certain "triggering events" to the ED.
- If an institution fails to make a required notification, ED may take administrative action, to include the initiation of a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs, or determine that the institution is not financially responsible.

# Mandatory Triggering Event

- Except for the mandatory triggers that require a recalculation of the institution's composite score, a Mandatory Triggering Event constitutes an **automatic** failure of financial responsibility.
- For any mandatory triggers that result in a recalculated composite score of less than 1.0, and for those mandatory triggers that constitute automatic failures of financial responsibility, ED will require the institution to provide financial protection, unless the institution demonstrates that the event is resolved or that insurance covers the loss.
- The financial protection required is not less than 10 percent of the total title IV, HEA funding in the prior fiscal year.



# Discretionary Triggering Events

- ED **may** conclude that an institution is not able to meet its financial or administrative obligations if ED determines that a discretionary triggering event is likely to have a significant adverse effect on the financial condition of the institution.
- For those discretionary triggers that ED determines will have a significant adverse effect on the financial condition of the institution, ED will require financial protection of not less than 10 percent of the total title IV, HEA funding in the prior fiscal year.

# Updated Reporting Guide

- We are finalizing an updated financial responsibility reporting guide and will distribute that guide shortly.
- It will also be available on the resources page of our website.



THOMPSON  
COBURN LLP

## Financial Responsibility Reporting Under the Borrower Defense to Repayment Rule

Last Updated: August 1, 2021

On September 23, 2019, the U.S. Department of Education published the final version of its 2019 "borrower defense to repayment" rule (the "2019 Rule"). The 2019 Rule, which took effect on July 1, 2020, revised the financial responsibility regulations that require institutions of higher education to report certain "triggering events" to the Department (located at [34 CFR 668.171](#)). If an institution fails to make a required notification under the 2019 Rule, the Department may take administrative action against the institution, to include the initiation of a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs.

On the following pages, we provide a chart that details the reporting obligations under the 2019 Rule. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to [FSAFRN@ed.gov](mailto:FSAFRN@ed.gov).<sup>1</sup> The Department has not specified any required form or content for notices made under the 2019 Rule. However, in a [Q&A document](#) issued on June 3, 2019, the agency offered recommendations.<sup>2</sup> Institutions should continue to watch for updated guidance from the Department concerning the reporting of triggering events. The Department also has announced its intent to revisit the financial responsibility regulations in a forthcoming negotiated rulemaking.<sup>3</sup>

<sup>1</sup> The Department established this email address for reporting purposes in [guidance](#) issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the borrower defense rule (the "2016 Rule"). As of August 1, 2021, the Department has not issued any further guidance concerning how to report triggering events.

<sup>2</sup> As of August 1, 2021, the Department has not issued any further guidance concerning the form or content of notices of triggering events.

<sup>3</sup> Additional information regarding the Department's negotiated rulemaking agenda for 2021-2022 is located [here](#). It is unlikely that any new regulations concerning financial responsibility reporting would become effective prior to July 1, 2023.





# Sub-Regulatory Activity



# New TPS Guidance

- On Feb. 15, 2023, ED published [Dear Colleague Letter \(GEN-23-03\)](#) detailing new requirements and responsibilities for third-party servicers and institutions.
- On April 11, 2023, following significant feedback, ED [announced](#) that it would significantly delay implementation of the controversial guidance and provided important policy clarifications.
- Notably, the [Unified Agenda](#) still suggests that ED intends to create a new TPS rule and indicates October 2024 as the target date for an NPRM.

## (GEN-23-03) Requirements and Responsibilities for Third-Party Servicers and Institutions (Updated Feb. 28, 2023)

Print

PUBLICATION DATE: February 15, 2023  
DCL ID: GEN-23-03  
SUBJECT: Requirements and Responsibilities for Third-Party Servicers and Institutions (Updated Feb. 28, 2023)

SUMMARY: This letter updates guidance to institutions that contract with a third-party servicer (TPS) to administer any aspect of the institution's participation in the student assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA).

### Note

On Feb. 28, 2023, we updated this letter to extend the public comment period, establish a future effective date for the guidance, and extend the reporting deadline for institutions and third-party servicers.

On Feb. 16, 2023, we corrected the content of the table titled "Recruitment- and Application-Related Activities" to add information that was inadvertently omitted during the publication process.

Dear Colleague:

Since we issued our most recent Dear Colleague Letters regarding third-party servicers, the U.S. Department of Education (Department) has reviewed numerous contractual arrangements between institutions and outside entities. These reviews have confirmed that most activities and functions performed by outside entities on behalf of an institution are intrinsically intertwined with the institution's administration of the Title IV programs and thus the entities performing such activities are appropriately subject to TPS requirements. The HEA makes clear that agreements to administer "any aspect" of an institution's participation in the Title IV programs fall within the scope of the Department's TPS oversight authority, 20 U.S.C. § 1088(c). The information gathered in the Department's review highlighted the need for an updated list of functions and activities that fall within the scope of the TPS requirements.

In particular, the Department is revising its guidance concerning the functions of student recruiting and retention, the provision of software products and services involving Title IV administration activities, and the provision of educational content and instruction. The Department is aware that a large and growing industry has developed to provide one or more of these services as a means of

# Incentive Comp. Redu

- On Feb. 15, 2023, ED also [announced](#) that it would be revisiting prior guidance on how institutions compensate their recruiters.
- ED is specifically focused on the role of online program managers, which provide academic and recruiting services to many institutions of higher education.

## U.S. Department of Education Launches Review of Prohibition on Incentive Compensation for College Recruiters

The Department is also issuing guidance to increase transparency over college and university contractors

FEBRUARY 15, 2023

Contact: Press Office, (202) 401-1576, [press@ed.gov](mailto:press@ed.gov)

The U.S. Department of Education announced today that it will hold virtual listening sessions on the impact of Department guidance on how institutions of higher education may compensate their recruiters. The Department is looking to hear from the public about how an exception contained in the guidance has affected the growth of online enrollment and associated federal student loan debt.

"Online education has the potential to meet the needs of many students and lower costs," said Under Secretary James Kvaal. "But we are concerned about the growth in loan debt and want to ensure students get value for their money. These listening sessions are part of the Department's commitment to undertake a careful, fair, and thorough review of the rules around how contractors recruit students for online programs. This process will give the public a chance to make its thoughts known on any possible changes."

The Higher Education Act prohibits institutions of higher education from providing a commission or bonuses to individuals or entities based on securing enrollment or financial aid. This prohibition is known as the ban on incentive compensation. In 2011, the [Department issued guidance](#) related to the ban, which created an exception for third parties if they provide a bundled set of services, which can include recruitment.

Since issuing the guidance, the number of students recruited by entities operating under this exception has increased, particularly through online programs operated by third-party entities, including Online Program Managers (OPMs).

Given the growth in online enrollment and associated federal student debt, the Department is seeking public input to understand the impact of this exception and whether any updates are necessary to the guidance.

The Department is interested in comments from a wide range of stakeholders including institutions, faculty, OPMs and other contractors, advocates, researchers, borrowers, and students on the benefits and disadvantages of the exception for bundled services, how the guidance has impacted institutions and students, and how the Department can better ensure compliance with the prohibition on incentive compensation. The listening session notice includes additional questions for stakeholders to address. A draft version of the listening session notice can be found [here](#).

The Department will also accept written feedback from the public on these questions through March 16, 2023 (Docket ID ED-2023-OPE-0030).

The virtual listening sessions will be held from 1 p.m. to 4 p.m. (EST) on March 8 and 9. Individuals who would like to present comments of up to three minutes must register by sending an email to [margo.schroeder@ed.gov](mailto:margo.schroeder@ed.gov) no later than 12 p.m. (EST) on the business day prior to the listening session at which they want to speak. The message should include the name of the speaker, the email address of the speaker, and one or more dates and times during which the individual would be available to speak. Individuals who want to observe the listening sessions are also required to [register](#) for each day in which they wish to observe.

### Updated third-party servicer guidance

Today, the Department also released updated [guidance](#) that clarifies when organizations that contract with institutions are considered regulated entities known as third-party servicers. In particular, the guidance clarifies when companies and others who provide recruitment services for colleges will fall into this category.





# Student Loan Relief Rulemaking



# Student Loan Relief Rulemaking

- In this rulemaking, ED focused not on revising existing regulations, but on using existing statutory authority to create new rules permitting loan relief to specific groups of borrowers.
- Negotiators met for three rounds of discussion, held in October, November, and December, respectively. No further rounds are anticipated.
- Institutions had 4 seats at the table, out of 16 (two were added during negotiations).
- A proposed rule has not yet been issued, but the [Unified Agenda](#) indicates that ED is presently targeting May 2024 for its publication.
- If the proposed rule is indeed released in May 2024, this likely would allow ED sufficient time to complete its review of public comments and to publish a final rule by November 1, 2024, resulting in a July 1, 2025, effective date.

# Student Loan Relief Rulemaking

Proposals reaching consensus included those that would permit ED to waive loans based on...

- A borrower meeting loan repayment plan requirements even if the borrower hasn't enrolled in the plan (30.84).
- Certain actions taken by ED against a school (e.g., termination of eligibility, denial of recertification, other loss of eligibility due to failure to meet student outcome standards or deliver sufficient financial value) (30.86).
- When a **program** or institution has closed and ED is investigating or has determined that the **program** or institution failed to meet student outcome standards, to deliver sufficient financial value, or to satisfy GE standards (30.87, 30.88).
- If a borrower meets criteria for closed school loan discharge but has not applied (682.403(b)(2)).
- If an institution lost Title IV eligibility because of CDR failure and the borrower was part of the affected cohort (682.403(b)(3)).



# Program Integrity and Institutional Quality Rulemaking



# 2024 Program Integrity Rulemaking

- In this rulemaking, ED focused on revising a range of existing regulations concerning cash management, **state authorization**, **distance education**, R2T4, accreditation, and the TRIO programs. Institutions had 7 seats at the table out of 15.
- Negotiators met for three rounds of discussion in January, February, and March, and the TRIO subcommittee met twice over that period.
- Consensus was only reached on one topic (the TRIO programs). As such, ED will be free to propose its preferred language on all other topics.
- A proposed rule has not yet been issued, but the [Unified Agenda](#) indicates that ED is presently targeting October 2024 for its publication.
- If the proposed rule is released in October 2024, this would mean July 1, 2026, would be the **earliest possible** effective date.

# 2024 Program Integrity Rulemaking

## State Authorization

- ED proposes to require that reciprocity agreements, among several new requirements, allow any member State to enforce its own “applicable general purpose State laws and regulations outside of the **initial** approval for State authorization of distance education...” and “applicable State laws related to **closure**, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds...”
- ED also proposes that if an institution is authorized to offer distance education under a reciprocity agreement “[a]s a condition of participation, the institution may not be authorized through reciprocity in a State where it enrolled more than 500 students in the two most recently completed award years.”
- ED proposes that the **governing board** of any entity that oversees a reciprocity agreement may only include representatives from State regulatory and licensing bodies, enforcement agencies, and attorneys general offices.

# 2024 Program Integrity Rulemaking

## Distance Education

- ED proposes creating a virtual location for institutions that includes all students who are being instructed entirely through distance education.
- ED proposes prohibiting **clock-hour** programs provided via distance education from being offered through asynchronous learning and excluding clock-hour online asynchronous coursework from the definition of “a week of instructional time.” Does **not** impact **credit-hour** programs.
- ED proposes to define “distance education course” as a course “in which instruction takes place exclusively as described in the definition of distance education in this section notwithstanding residency experiences and in-person non-instructional requirements, including orientation, testing, academic support services.”
- ED proposes to require institutions to take attendance “for each distance education course...”



# Program Integrity Rulemaking

## Accreditation and related issues

- ED proposes revisions aimed at ensuring commissioner independence and strengthening recognition requirements, including that the “majority of members of the agency's decision-making body” are not “executive officers or board members of the agency’s accredited institutions or programs.”
- ED proposes to limit the time an institution can be out of compliance with accrediting standards to the shorter of either the length of the longest program at an institution or two years. However, compliance with student achievement standards may extend to the lesser of four years or 150 of the longest program. An additional year of compliance may also be allowed for good cause.
- ED proposes to revise the rules governing accretor **substantive change** policies and **teach-out plans**.

# Program Integrity Rulemaking

## Return to Title IV

- ED proposes various changes to R2T4 calculations for instances when an enrolled student does not begin attendance or in select withdrawal scenarios.
- ED proposes to codify existing guidance requiring attendance-taking institutions to determine a student's date of withdrawal within 14 days of the last date of attendance.

## Cash Management

- ED proposes a prohibition on including the cost of books and supplies in tuition and fees, citing particular concern over the inclusion of equipment kits at cosmetology schools. ED also seems to be trying to get at OPM relationships.
- ED proposes to require institutions to issue a credit balance to any student who receives Title IV aid and has any amount exceeding tuition and fees, even if this includes non-Federal funds (i.e., scholarships, grants, or private loans).

## Federal TRIO Programs

- ED proposes revisions to expand participation in several TRIO programs to more students from disadvantaged backgrounds.



# TC Extra Credit

2024 NASASPS Annual Conference

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# TC Extra Credit | Resources Page



## HIGHER EDUCATION RESOURCES

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

## WEBINARS/TRAINING RESOURCES



This presentation provides an



On May 19, 2022, the U.S.



Significant revisions to the

# TC Extra Credit | REGucation Blog



## Time to develop protocols for responding to borrower defense claims (despite Sweet and Fifth Circuit injunction)

👤 Jeff Fink 👤 Scott Goldschmidt 👤 Aaron Lacey 📅 September 1, 2023



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On August 7, 2023, the Fifth Circuit Court of Appeals issued a nationwide [injunction](#) in *Career Colleges and Schools of Texas v. Cardona*, preventing the U.S. Department of Education (ED) from enforcing the latest version of its [borrower defense to repayment \(BDR\) rule](#), which was published in 2022 ([2022 BDR rule](#)). Meanwhile, ED continues processing BDR claims under the June 2022 [settlement](#) reached in the *Sweet v. Cardona* litigation, as well as under the existing BDR rule, which was published by the Trump administration in 2019 ([2019 BDR rule](#)). In fact, we have observed a decided



# TC Extra Credit | Webinars & Training Series

The screenshot displays a YouTube video player interface. At the top left is the YouTube logo. A search bar is located at the top center. The video title is "Affirmative Action in Higher Education: Impact of *SFFA v. Harvard* and *SFFA v. UNC*", with the subtitle "Higher Education Webinar Series" and the date "July 20, 2023". The video player shows a thumbnail of an open book with glasses on it. The video progress bar is at 0:00 / 1:08:07. On the right side, a playlist titled "Higher Education" is visible, containing four items:

- 1. Responding to Student Borrower Defense to... (1:14:37)
- 2. Affirmative Action in Higher Education: Impact of SFFA... (1:08:08)
- 3. ED's Proposed Gainful Employment and Financial... (1:59:00)
- 4. A review of ED's new third-party servicer guidance an... (1:19:41)



# TC Extra Credit | Compliance Materials



## Institutional Loans: Compliance Considerations

Last Updated: July 2021

For a wide range of reasons, institutions of higher education frequently determine to offer students the opportunity to finance all or part of their education using some form of institutional credit. These arrangements can vary greatly, from a simple, short-term, no interest payment plan to a fully-formed, traditional, interest-bearing loan. Schools should be aware, however, that in many cases, such arrangements will qualify as a "private education loan" under federal law, subjecting the institution to a multitude of federal regulations that must be followed. These arrangements also will frequently be subject to state consumer finance laws, and in some instances, to state laws governing the authorization of postsecondary institutions.

Staying apprised of these federal and state laws, and administering an institutional student loan program in accordance with their complex requirements, is a significant challenge. This is particularly true where institutions operate campuses in multiple jurisdictions, have students who reside in multiple jurisdictions, or offer a variety of student financing options (e.g., loans, payment plans, retail installment contracts). Compliance is critical, however, as the ramifications for noncompliance can be severe. Furthermore, federal and state regulators have made clear that they intend to aggressively enforce the regulatory framework that applies to student financing opportunities offered by schools.<sup>1</sup> Indeed, institutions of higher education that offer private education loans should expect meaningful and coordinated scrutiny from the U.S. Department of Education (the "Department"), the Consumer Financial Protection Bureau (the "CFPB"), state attorneys general, and other regulators.

The purpose of this memorandum is to provide an overview of certain significant federal requirements that institutions of higher education should consider when contemplating an institutional loan program, or any other student financing opportunity. **We strongly emphasize that this document does not provide an exhaustive list of all legal requirements related to the offering of such loans, and in particular, does not address applicable state laws and regulations, which vary based on the jurisdiction(s) in which an institution is operating.** We encourage institutions contemplating any form of student financing opportunity (even simple payment plans), to confer with counsel and other qualified advisors to determine whether the opportunity is subject to federal or state laws governing private education loans or other extensions of credit, and to develop a plan for compliance.

1. By way of example, in May 2021, the Biden Administration selected Richard Cordray, the former director of the CFPB to serve as the senior official overseeing the federal student aid programs.



## Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

Last Updated: August 2023

Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education ("ED") to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a "borrower defense to repayment" or "BDR" claim.<sup>1</sup> On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.<sup>2</sup> On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide *injunction* of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.<sup>3</sup> Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, "Responding to Student BDR Claims," available [here](#). Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.<sup>4</sup>

### I. Initial Assessment of the Claim

When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED's response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student's statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

<sup>1</sup> Congress introduced the BDR concept in 1993, when it directed ED to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]." 20 U.S.C. § 1087(e)(1); see also 34 C.F.R. § 685.206, 34 C.F.R. § 685.222.

<sup>2</sup> See 87 Fed. Reg. 65904 (Nov. 1, 2022).

<sup>3</sup> In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download [here](#).

<sup>4</sup> In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.



## Financial Responsibility Reporting Under the Borrower Defense to Repayment Rule

Last Updated: August 1, 2021

On September 23, 2019, the U.S. Department of Education published the final version of its 2019 "borrower defense to repayment" rule (the "2019 Rule"). The 2019 Rule, which took effect on July 1, 2020, revised the financial responsibility regulations that require institutions of higher education to report certain "triggering events" to the Department (located at 34 C.F.R. 688.171). If an institution fails to make a required notification under the 2019 Rule, the Department may take administrative action against the institution, to include the initiation of a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs.

On the following pages, we provide a chart that details the reporting obligations under the 2019 Rule. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to [FSAPR@ed.gov](mailto:FSAPR@ed.gov). The Department has not specified any required form or content for notices made under the 2019 Rule. However, in a Q&A document issued on June 3, 2019, the agency offered recommendations.<sup>1</sup> Institutions should continue to watch for updated guidance from the Department concerning the reporting of triggering events. The Department also has announced its intent to revisit the financial responsibility regulations in a forthcoming negotiated rulemaking.<sup>2</sup>

1. The Department established this email address for reporting purposes in guidance issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the borrower defense rule (the "2016 Rule"). As of August 1, 2021, the Department has not issued any further guidance concerning how to report triggering events.

2. As of August 1, 2021, the Department has not issued any further guidance concerning the form or content of notices of triggering events.

3. Additional information regarding the Department's negotiated rulemaking agenda for 2021-2022 is located [here](#). It is unlikely that any new regulations concerning financial responsibility reporting would become effective prior to July 1, 2023.



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# Questions?

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