

The Federal Regulatory Outlook for 2024: A View from Washington

Thompson Coburn LLP | April 28, 2025



2025 NASASPS Annual Conference

NATIONAL ASSOCIATION OF STATE ADMINISTRATORS
AND SUPERVISORS OF PRIVATE SCHOOLS

April 27-30 | St. Louis, MO

Thompson Coburn LLP

- Full-service law firm with over 400 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, Birmingham, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Presenter Profile

- Practice and Experience
 - Represents institutions, trade associations, private companies, and investors before Congress and the Executive Branch.
 - Assists education sector clients navigate existential threats or create new markets.
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 - Assists institutions of higher education to navigate challenging legal and regulatory matters.
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Aaron Lacey

Partner & Co-Chair
Higher Education Practice

Presentation Preamble

Disclaimer

- Laws and policies are updated regularly. If you are reviewing these slides after April 2025, please keep in mind that changes may have occurred.

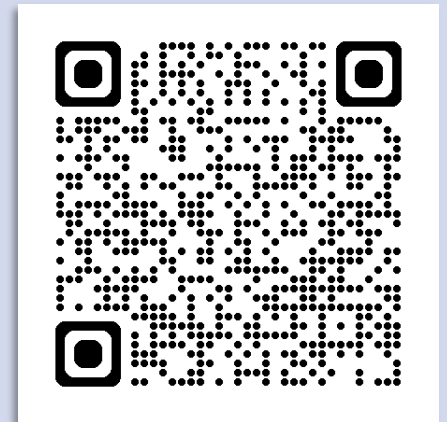
Live Links

- The hyperlinks in these slides (including the PDF) are active and will take you to the underlying resources.

TC Extra Credit

- All TC resources referenced in the presentation are free and can be accessed [here](#) or by scanning the QR code to the right.

Magical QR Code



Syllabus

Hill Update

The State of ED

Recent Rule and Policy Developments

Status of Key Higher Education Litigation

Hill Update

Key Ed Legislators in 119th Congress

Senate Education Authorizers

- Chairman Cassidy (R-LA)
- Ranking Member Sanders (D-VT)

Senate Education Appropriators

- Chairman Capito (R-WV)
- Ranking Member Baldwin (D-WI)

House Education Authorizers

- Chairman Walberg (R-MI)
- Ranking Member Scott (D-VA)

House Education Appropriators

- Chairman Aderholt (R-AL)
- Ranking Member DeLauro (D-CT)

Budget Reconciliation and Higher Ed

- The **Republican Party** will control the legislative and executive branches for at least the next two years. However, the GOP's margin for control in the House is historically slim.
- Republicans may pursue **partial HEA reauthorization** utilizing the budget reconciliation process.
- In early April, Congress passed a **budget resolution**, which is a critical step in unlocking reconciliation.
- The floor for education committee cuts is **\$1.5 billion**, and the ceiling for cuts is **\$330 billion**.

Budget Reconciliation and Higher Ed



- Congressional Republicans will be relying heavily on the ideas in the CCRA to find up to \$330 billion in savings from education to pay for the legislation, and, specifically, are counting on approximately \$240 billion in savings from eliminating the SAVE loan repayment program.
- The CCRA is a mixed bag for institutions.
 - **Pros:** Regulatory relief, limits ED's regulatory authority
 - **Cons:** Eliminates PLUS Loan program, caps aggregate student loan borrowing, caps total aid to median cost of college, creates a risk-sharing system
 - **Neutral:** Streamlines loan repayment plans

Budget Reconciliation and Higher Ed



- The Senate does not have a companion bill to CCRA. HELP Chair Cassidy has been quiet on his education priorities for reconciliation.
- We have some hints of the types of policies that Senate Republicans may choose to include from recent Senate bills.
 - College Transparency Act
 - Borrowing limits, elimination of PLUS Loans, streamline repayment programs
- The **Senate historically wins** on complex education legislation, so we do not yet have a clear roadmap of what's ahead.

What's Next on Reconciliation

- EdWorkforce and HELP will be working to draft and finalize their legislative language in the coming months.
- Provisions that **save money** will be prioritized.
- Provisions that cost money, like short-term Pell Grants, will likely be excluded, though there may be a few concepts with small net costs that could be included.
- The statutory **elimination of ED** will not be considered in budget reconciliation.
- Pell Grants are projected to begin **running a deficit**, which could explode to \$98 billion shortfall by FY 2035. A permanent fix to the shortfall is unlikely to come in reconciliation.

Action Items for Institutions

- **Educate yourself** on what is in CCRA. Work with your colleagues and trade associations to understand the impact of these legislative changes on your institution.
- Prepare a **short summary** of what you like and what needs improvement.
- Meet with your legislators to **share your feedback**, specifically the impact of proposed changes on their district or state.
- The reconciliation process is just starting, and its fate is far from certain. Now is the time to **mobilize and engage**.

The State of ED

Reduction in Force

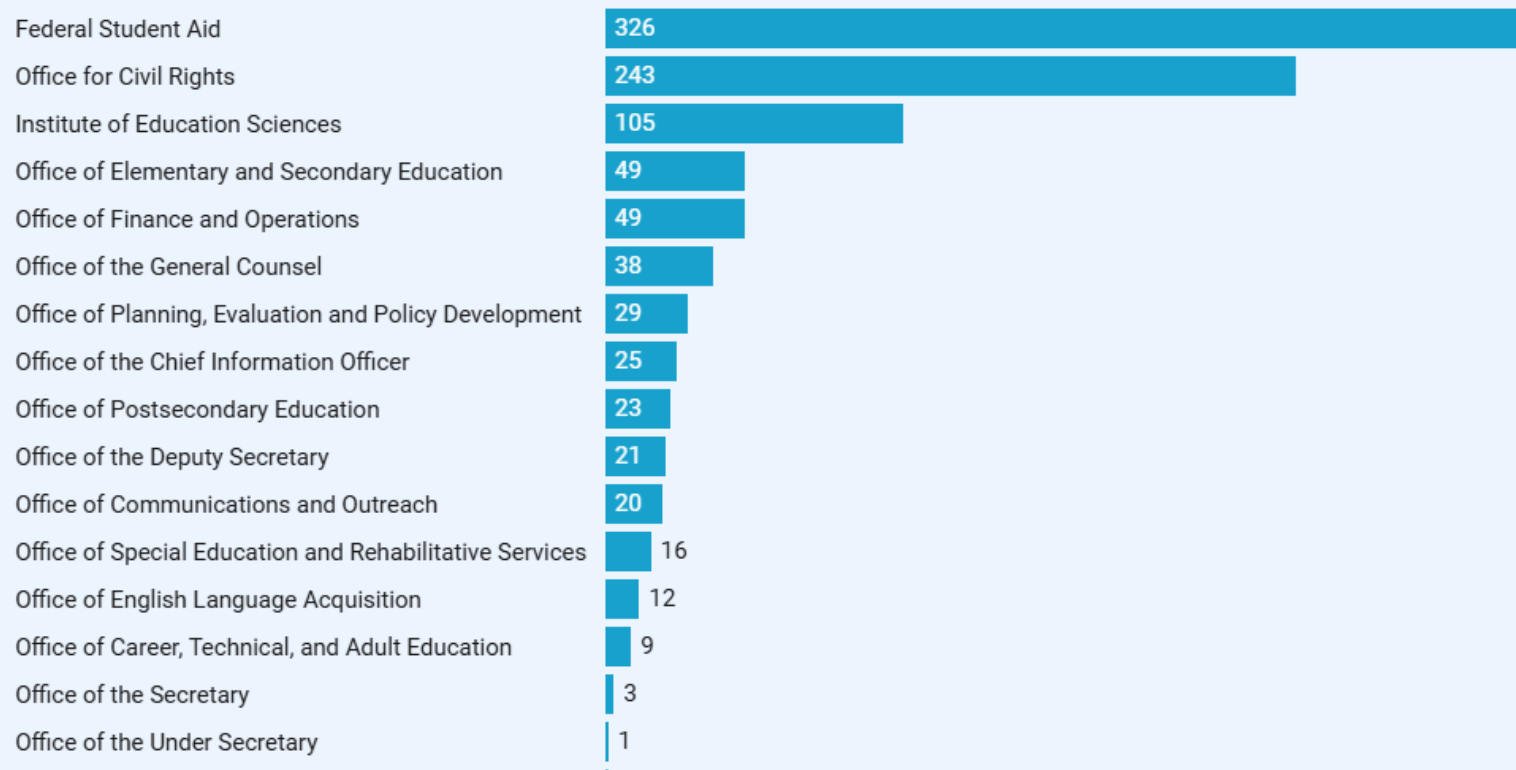
- On March 11, ED initiated a reduction in force (RIF) that, according to ED's [Newsroom](#), reduced the agency from about 4,130 to about 2,180.
 - 259 employees accepted the [Deferred Resignation Program](#)
 - 313 employees accepted the Voluntary Separation Incentive Payment
- According to ED, employees impacted by the RIF will receive full pay and benefits until June 9, and severance or retirement benefits based upon length of service.

ERN Data and Charts

- Education Reform Now (ERN), a non-partisan, nonprofit think tank, obtained a list of union employees who were part of the RIF and shared a [de-identified data set](#) including 969 employees.
- ERN analyzed the data and provided [three illustrative charts](#) demonstrating that FSA and OCR experienced the deepest cuts.

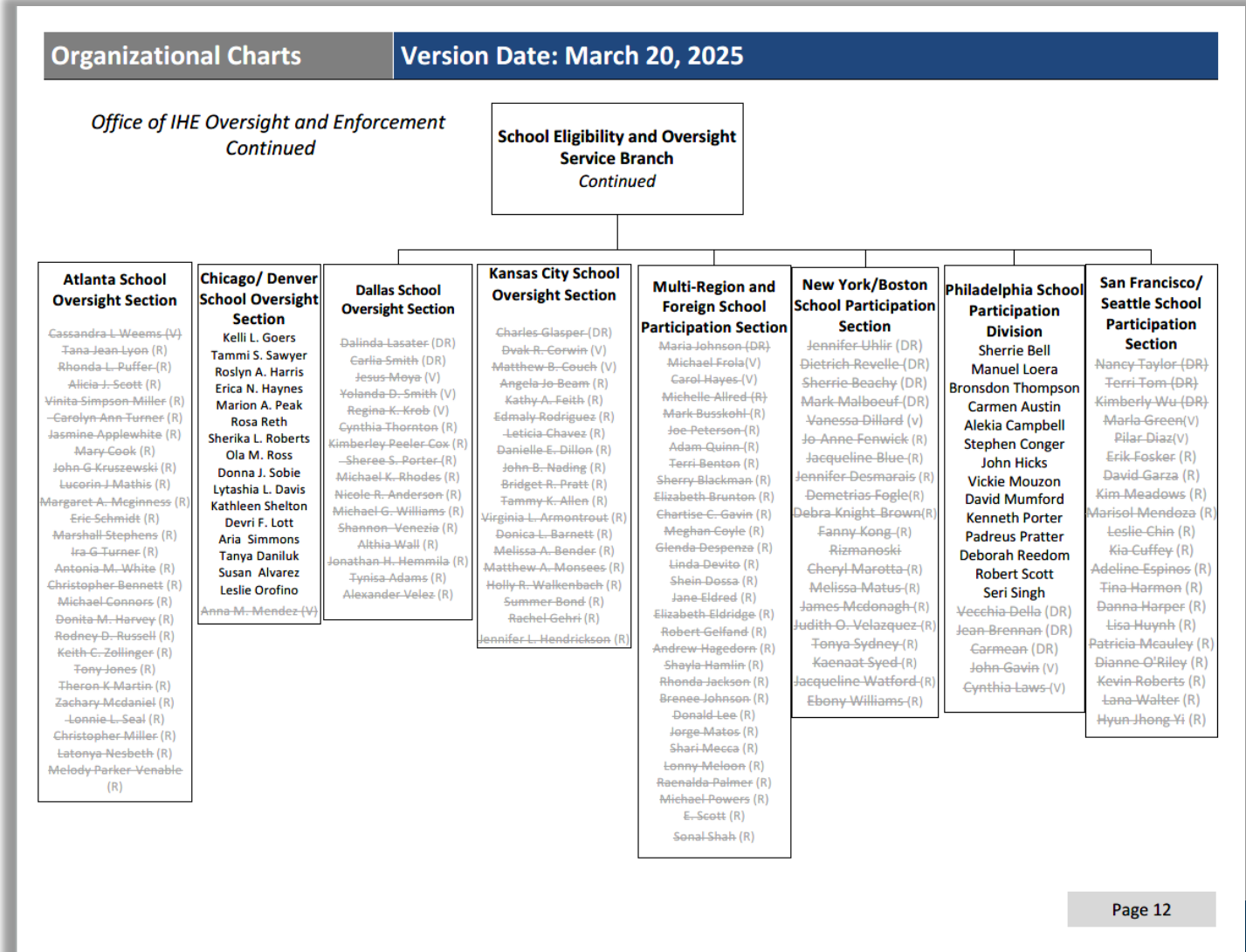
A Snapshot of who Got Cut at ED on March 11

The number of employees who received notification they were being put on leave.



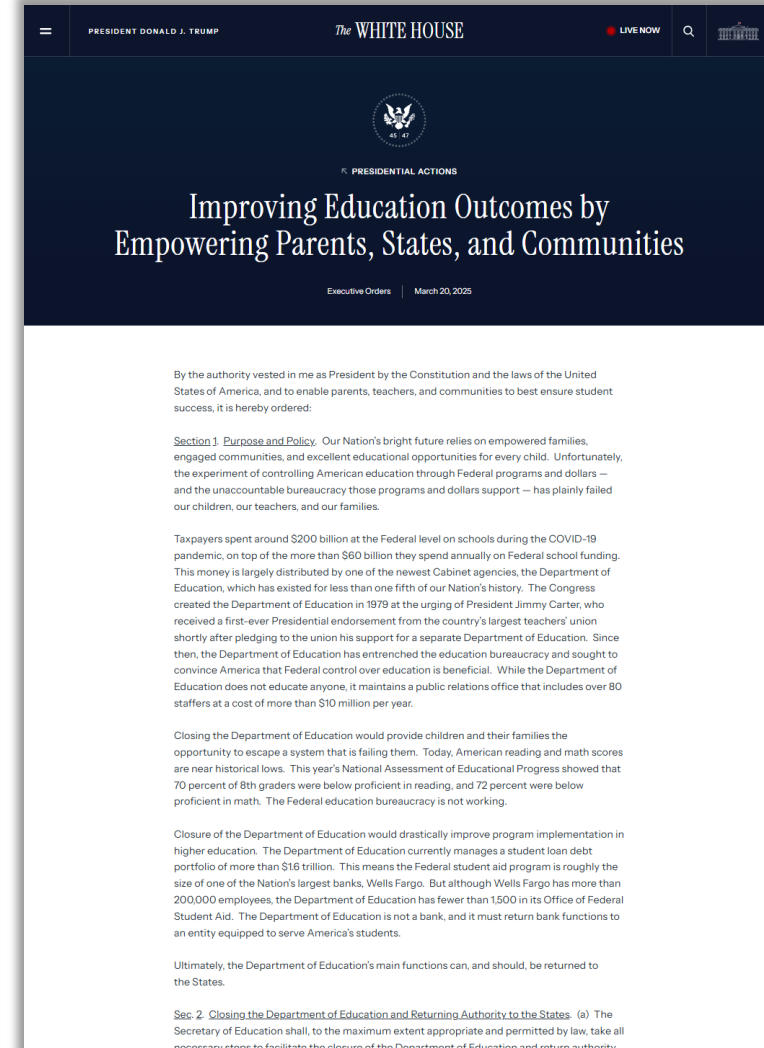
Eligibility and Oversight Hit Hard

- An ED organizational chart dated March 20 shows the significant cuts to the FSA case teams.
- But for Chicago and Philadelphia, all teams were eliminated entirely, including the Multi-Region and Foreign School.
- This also would appear to cover the Financial Services Group, the Third-Party Servicer Group, and the Critical Response Division.



Dismantling ED

- On March 20, the President signed an [executive order](#) directing his administration to begin working to eliminate ED.
- The order called upon Secretary Linda McMahon “take all necessary steps to facilitate the **closure of the Department of Education**” to the “maximum extent appropriate and permitted by law.”

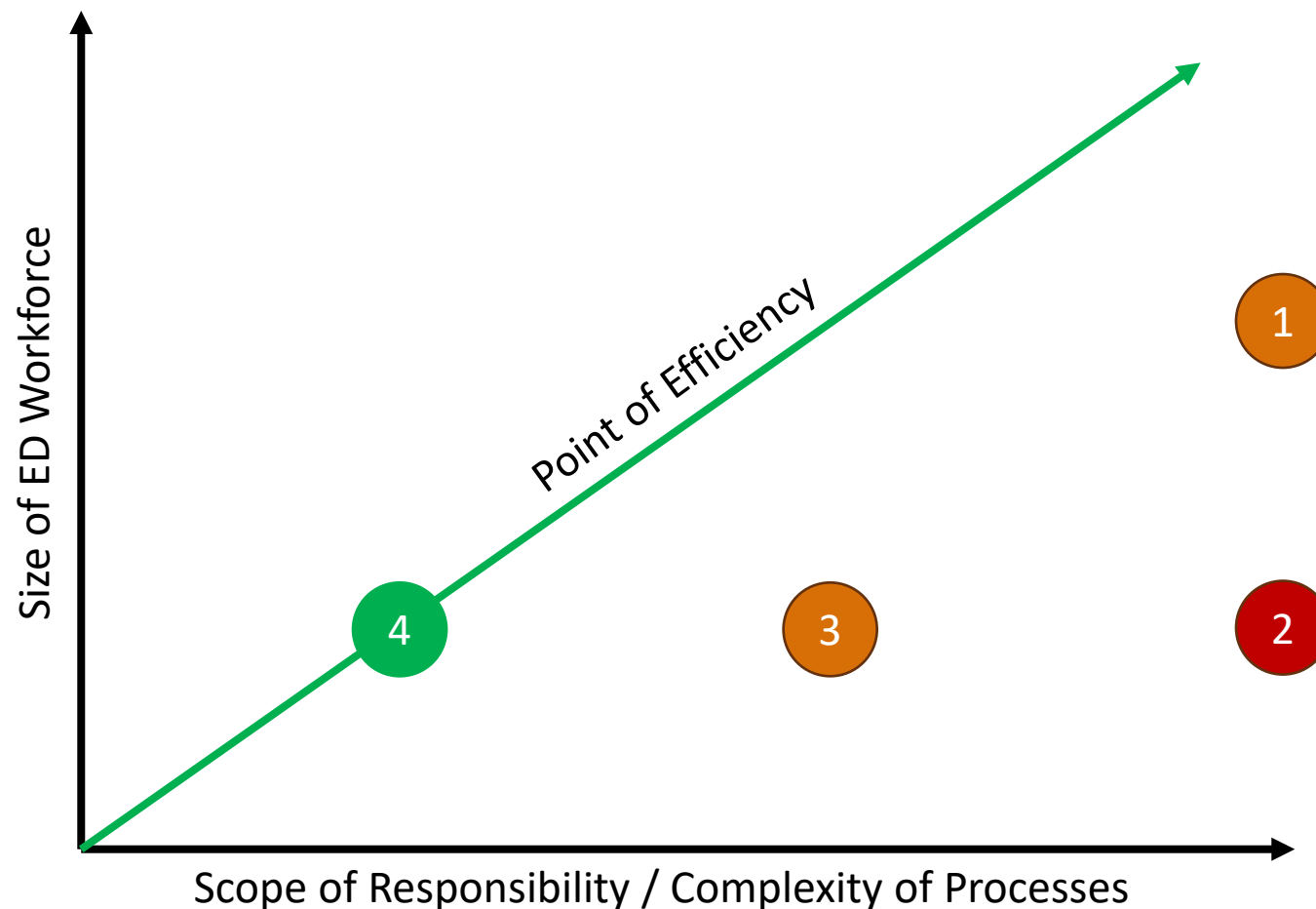


Dismantling ED

- On March 21, President Trump announced that the Small Business Administration (“SBA”) “will handle all of the student loan portfolio” adding that “it will be serviced much better than it has been in the past.” (emphasis added).
- On the same day, White House Press Secretary Karoline Levitt stated that “when it comes to student loans and Pell Grants, those will still be run out of the Department of Education.”
- Given these contrasting remarks, **it is unclear** whether Trump’s intention is to transfer servicing of the student loan portfolio to SBA or to entirely transfer administration of the federal financial aid programs to SBA.

Thinking About ED Efficiency

- In the wake of the RIF and EO, we anticipate that ED's efficiency is at its nadir.
- In the coming months, as ED reduces the agency's scope of responsibility and the complexity of processes, it's efficiency should increase.



Senior Staff Selections

Nicholas Kent, Under Secretary of Education

- Recently served as Deputy Secretary of Education for the Commonwealth of Virginia. Prior to serving in the Youngkin Administration, was the Chief Policy Officer at Career Education Colleges and Universities. Confirmation anticipated in early Summer.

James Bergeron, Deputy Under Secretary

- Most recently served as President and CEO of the National Council of Higher Education Resources, the Director of Education and Human Services Policy for the U.S. House of Representatives Committee on Education and the Workforce, and Legislative Director for Rep. Buck McKeon.

Mary Christina Riley, Assistant Secretary for Legislation and Congressional Affairs

- Previously served as Professional Staff for the House Committee on Education and the Workforce under then-Chairwoman Foxx. Served as Senior Advisor in the Office of Legislation and Congressional Affairs at the Department during first Trump administration.

FSA Communications Centralized

- Following the RIF, Acting Under Secretary James Bergeron observed that “[a]lthough certain regional offices and staff that handle matters impacting institutions of higher education (such as program reviews, changes in ownership, and program participation agreements) were impacted by the RIF, these important functions are being transferred to other offices and experts.”
- The same day, ED notified schools that FSA is now centrally responding to all questions related to completion of the E-App and general school eligibility inquiries, which schools should direct to CaseTeams@ed.gov. Support also continues to be available at 1-800-848-0978.

FSA Realignment Underway



Area of Responsibility	Contact	Email
All Matters Involving Office of Institutions of Higher Education Oversight and Enforcement	Jeremy Early Acting Branch Chief/Section Chief	Jeremy.Early@ed.gov
Eligibility Questions for IHEs in Chicago/Denver, San Francisco/Seattle, Dallas and Kansas City regions	Tammi Sawyer	Tammi.Sawyer@ed.gov
Eligibility Questions for IHEs located in the previous New York/Boston, Philadelphia, and Atlanta regions	Sherrie Bell	Sherrie.Bell@ed.gov
Audit Resolution	Bronsdon Thompson	Bronsdon.Thompson@ed.gov
Program Review	Jason Charlton Manuel Loera	Jason.Charlton@ed.gov Manuel.Loera@ed.gov
Changes in Ownership/Mergers	Kelli Goers	Kelli.Goers@ed.gov
HCM2 Submissions	Jason Charlton	Jason.Charlton@ed.gov

Action Items for Institutions

- Ensure all institutional personnel who might receive **communications from ED** are watching for updates.
- Identify and prioritize any circumstance where feedback or approval is required from ED, or a submission is due to ED, by a **fixed deadline**.
- Where program reviews, audits, investigations, certifications and recertifications, and other such processes are underway, but no deadline or adverse consequence is looming, **remain patient**.

Action Items for Institutions

- Assume pending **policy inquiries** with individual FSA staff will not be successfully transitioned; identify new staff and resubmit for assistance.
- Understand and distinguish among actions that require only **notice** and actions that require **approval**.
- Consider timing strategic initiatives so that critical interactions with ED will occur in 6 to 12 months, or later.

Recent Rule and Policy Developments

Negotiated Rulemaking Announced

- On April 4, ED [announced](#) its intention to hold negotiated rulemaking. Specific topics of interest include:
 - Potential topics that would **streamline current federal student financial assistance program regulations** while maintaining or improving program integrity and institutional quality.
 - Refining definitions of a qualifying employer for the purposes of determining eligibility for the Public Service Loan Forgiveness program.
 - Pay As You Earn (PAYE) and Income Contingent Repayment (ICR) repayment plans.

Public Hearings

- ED will hold two public hearings to discuss the rulemaking agenda.
 - The in-person public hearing will be held on April 29, 2025, at the U.S. Department of Education located at 400 Maryland Ave. SW, Barnard Auditorium, Washington, DC.
 - The virtual public hearing will be held on May 1, 2025.
- Additional details will be posted to ED's new [negotiated rulemaking website](#).

Resumption of Default Collections

- On April 21, ED [announced](#) that it would resume the collection of defaulted student loans for the first time since March 2020.
- The agency indicated that at the same time it will be initiating a “communication and outreach campaign” to educate borrowers regarding their options.
- ED stated that as part of this effort, it will be restarting the [Treasury Offset Program](#), which permits various forms of garnishment (e.g., wages, SS benefits, tax refunds) in the event borrowers do not make a payment, enroll in an income-driven repayment plan, or sign up for loan rehabilitation.

April 23 HE Executive Orders

- Transparency Regarding Foreign Influence at American Universities
- Reforming Accreditation to Strengthen Higher Education
- White House Initiative to Promote Excellence and Innovation at HBCUs
- Preparing Americans for High-Paying Trade Jobs of the Future
- Restoring Equality of Opportunity and Meritocracy

Accreditation Executive Order

- On April 23, the President signed an EO criticizing accreditors for failing in their “responsibility to students, families, and American taxpayers” and abusing “their enormous authority.”
- The EO references poor student outcomes and rising debt and asserts that “accreditors have remained improperly focused on compelling adoption of discriminatory ideology, rather than on student outcomes.” The EO states that “federal recognition will not be provided to accreditors engaging in unlawful discrimination in violation of Federal law.”

Accreditation Executive Order

- Among other things, the EO directs:
 - ED to “hold accountable” accreditors “who fail to meet the applicable recognition criteria or otherwise violate Federal law,” including by requiring institutions to comply with DEI directives.
 - ED and the AG to “investigate” and “terminate unlawful discrimination by American law schools” and to “assess whether to suspend or terminate the Council’s status as an accrediting agency under Federal law...”
 - ED and the AG to “investigate” and “terminate unlawful discrimination by American medical schools or graduate medical education entities” and to “assess whether to suspend or terminate [LCME or ACGME] status as an accrediting agency under Federal law...”

Accreditation Executive Order

The EO also directs
ED to take steps to
ensure...

- accreditation requires higher education institutions to provide high-quality, high-value academic programs free from unlawful discrimination or other violations of Federal law;
- barriers are reduced that limit institutions from adopting practices that advance credential and degree completion and spur new models of education;
- accreditation requires that institutions support and appropriately prioritize **intellectual diversity amongst faculty** in order to advance academic freedom, intellectual inquiry, and student learning;
- accreditors are not using their role under Federal law to encourage or force institution to violate State laws, unless such State laws violate the Constitution or Federal law; and
- accreditors are prohibited from engaging in practices that result in credential inflation that burdens students with additional unnecessary costs.

Accreditation Executive Order

To achieve these goals, ED is directed to...

- resume recognizing new accreditors to increase competition and accountability in promoting high-quality, high-value academic programs focused on student outcomes;
- mandate that accreditors require member institutions to use data on program-level student outcomes to improve such outcomes, without reference to race, ethnicity, or sex;
- promptly provide to accreditors any noncompliance findings relating to member institutions issued after an investigation conducted by OCR under Title VA or Title IX;
- launch an experimental site to accelerate innovation and improve accountability by establishing new flexible and streamlined quality assurance pathways for higher education institutions that provide high-quality, high-value academic programs;
- increase the consistency, efficiency, and effectiveness of the accreditor recognition review process, including through the use of technology;
- streamline the process for higher education institutions to **change accreditors** to ensure institutions are not forced to comply with standards that are antithetical to institutional values and mission; and
- update the Accreditation Handbook to ensure that the accreditor recognition and reauthorization process is transparent, efficient, and not unduly burdensome.

Foreign Gifts Executive Order

- On April 23, the President also signed an EO focused on increasing enforcement of the existing HEA requirement that institutions report significant sources of foreign funding.
- The EO directs ED to increase enforcement and transparency efforts, and to “take appropriate steps to require universities to more specifically disclose details about foreign funding, including the true source and purpose of the funds...”
- The EO also directs ED to “ensure that certification of compliance by higher education institutions” is material for the receipt of federal funds.

Action Items for Institutions

- With the regulatory environment changing so rapidly, it is critical to stay apprised of key developments. We recommend following agency websites, reliable trade publications, news outlets specializing in higher education, and reliable service providers.
- Sign up for automatic emails and newsletters so you do not have to go hunting!
- Be sure to **keep complying** with existing rules and policies, notwithstanding rumblings regarding change.

Status of Key Higher Education Litigation

Brand New Litigation Summary Page



REGUCATION Last Updated: April 4, 2025 | 15 minute read | Tres Cleveland , Brandt Hill , Lorrie Hargrove , Evan Moltz , Anna S. Knouse

Higher Ed Litigation Summary

Thompson Coburn's Higher Education Litigation Summary is your resource for legal updates on key rulings and ongoing cases shaping the higher education sector. This installment covers updates related to Gainful Employment, the Bare Minimum Rule, BDR, Student Loan Forgiveness, Title IX, False Claims Act, Nonprofit Institution Status, Federal Funding Freeze, DEI Executive Orders, and the Executive Order Directing the Closure of ED.

Gainful Employment



Bare Minimum Rule



Borrower Defense to Repayment



Student Loan Forgiveness



DEI Executive Order Litigation

- On January 20 and 21, President Trump issued two DEI Executive Orders collectively directing the federal government to identify and eliminate illegal DEI activities.
- On February 3, 2025, higher education officials, restaurant workers, and the City of Baltimore together filed a lawsuit challenging the DEI EOs. The court granted a preliminary injunction, but the government appealed, and the Fourth Circuit agreed to stay the preliminary injunction pending the appeal.

DEI Executive Order Litigation

- Several other cases also have been filed challenging the DEI EOs. No ruling on the merits have been made in these cases, but in one Illinois case, the court granted a limited preliminary injunction that applies only to the Department of Labor and anyone “in active concert or participation with.”
- **Status:** Currently, the DEI EOs are in force now as to ED.

DEI DCL Litigation

- On February 14, ED published a DCL warning institutions that if they operate illegal DEI programming, they risk the loss of federal funds.
- On February 25, a large teachers union sued ED, seeking a preliminary injunction of the DCL and suspension of the deadline for state and local education agencies to certify compliance under Title VI and *SFFA v. Harvard*.
- On April 24, 2025, the court stayed the DCL pending final resolution by the court. It did not stay the Frequently Asked Questions or the End DEI Portal, nor the Certification requirement. The stay effectively precludes enforcement of the DCL nationally against any higher education entity.

DEI DCL Litigation

- In a second lawsuit filed March 5, the NEA and ACLU also challenge the DCL and seek a preliminary injunction. On April 24, 2025, the Court entered a preliminary injunction order, enjoining ED from enforcing or implementing the DCL, the Frequently Asked Questions, the End DEI Portal, and the certification requirement, against the plaintiffs, their members, and any entity that employs, contracts with, or works with one or more plaintiffs or one or more of plaintiffs' members.
- The DCL has been challenged in a third lawsuit filed on April 15, 2025, by the NAACP. On April 24, 2025, the court entered an order granting in part the plaintiff's motion for preliminary injunction, preliminary enjoining ED's enforcement of the Certification Provision.

DEI DCL Litigation

- **Status:** Effectively, enforcement of any penalties threatened by the DCL, the Frequently Asked Questions, the End DEI Portal, and the Certification requirement have been stayed for now, with the stay buying institutions additional time to determine what compliance with what this administration legally wants will be.

ED RIF & Dismantle ED EO Litigation

- Following ED's March 11 RIF, on March 13, plaintiffs, including nineteen states and DC, filed suit in Massachusetts arguing that the reduction in force violated the separation of powers and the APA.
- The next day, another suit filed in DC moved to enjoin ED's reduction of force and "decimation" of its Office of Civil Rights on the basis that it, among other things, violates the APA and Fifth Amendment protections.

ED RIF & Dismantle ED EO Litigation

- On March 20, 2025, the President issued an EO directing the Secretary of Education “to the maximum extent appropriate and permitted by law, take all necessary steps” to close ED.
- Two lawsuits have been filed, one in Maryland and one in Massachusetts, each arguing that the Dismantle EO violates the Constitution’s “take care” and “spending” clauses, the separation of powers, and the APA. In both cases, plaintiffs are seeking a preliminary injunction.

ED RIF & Dismantle ED EO Litigation



- Given the overlapping issues in the two Massachusetts cases (one involving the RIF and the other the Dismantle EO), the government asked for permission to file a consolidated, and identical, response brief in both cases.
- **Status:** In the DC RIF litigation, and the MD Dismantle EO litigation, there is not yet any ruling on the motions for preliminary injunctions. On April 25, 2025, the Massachusetts court heard oral arguments on the motions for preliminary injunction in the combined RIF/Dismantle cases. There have been no rulings on the motions for injunction to date.

GE Litigation

- Two separate lawsuits were filed in the North District of Texas challenging the 2023 GE Rule.
- In June 2024, the district court declined to grant a preliminary injunction. The two suits were consolidated in July 2024, and in September 2024, the parties filed cross motions for summary judgment.
- In February 2025, after President Trump assumed office, ED asked the court for a 90-day stay of the litigation “to allow the new Administration to become familiar with and evaluate [its] position regarding the issues in this case.”
- **Status:** The court granted the motion and extended the remaining summary-judgment briefing deadlines through May 16, 2025, (or four days after the stay is terminated). ED also has postponed GE reporting requirements until September 30, 2025.

Borrower Defense Litigation

- The Biden administration's BDR rule (2022 BDR Rule) was slated to take effect July 1, 2023.
- In February 2023, a career school group sued ED seeking to invalidate the 2022 BDR Rule, and in April 2024, the Fifth Circuit directed the district court to enter a nationwide injunction.
- **Status:** The government appealed, and on January 10, 2025, the Supreme Court said it would take the case. On January 24, the Trump administration asked the Supreme Court to put its review of the appeal on pause in order "to allow for the Department to reassess the basis for and soundness of the borrower-defense regulations." On February 6, 2025, the Supreme Court agreed to the administration's request.

SAVE Plan Litigation

- In July 2023, ED published a final rule creating a new plan to expand federal student loan borrowers' eligibility for loan forgiveness. Effective July 1, 2024, the "SAVE Rule" would have allowed borrowers to be eligible for loan forgiveness if they made repayments for 10 years at substantially lower amounts compared to prior regulations.
- In early 2024, two groups of states challenged the SAVE Rule in court (one in Missouri and one in Kansas), arguing that its early forgiveness and lower payment provisions were not authorized by statute and therefore violated the APA

SAVE Plan Litigation

- In the Missouri litigation, the Eighth Circuit Court of Appeals granted a preliminary injunction effective August 2024, blocking the entire SAVE Plan.
- ED appealed and asked the Supreme Court to vacate the injunction pending the appeals. The Supreme Court denied ED's request, and in February 2025, the Eighth Circuit dismissed ED's appeal of the district court's preliminary injunction.
- On April 14, 2025, the district court ordered the parties to file a joint status report by May 5, 2025, including a proposed schedule for the remainder of the litigation.

SAVE Plan Litigation

- In the Kansas litigation, the district court issued a preliminary injunction order in June 2024. ED appealed the order to the Tenth Circuit, but the Tenth Circuit stayed the appeal while awaiting the Eighth Circuit's decision.
- Proceedings in the Kansas litigation continue to be stayed with the parties filing periodic status reports.

SAVE Plan Litigation

- **Status:** Following the Eighth Circuit's dismissal of ED's appeal, the parties normally would file motions for summary judgment in the district court. Given the current administration's position regarding student loan forgiveness generally, we think it unlikely ED will attempt to defend the SAVE Rule moving forward.
- **However,** ED may take steps to preserve it long enough that Republicans in Congress can use its elimination to hit savings goals outlined as part of reconciliation.

Debt Relief (Plan B) Litigation

- In April 2024, ED published a proposed rule that, like the SAVE Rule, also would have forgiven loan balances for qualifying borrowers.
- **Status:** In September 2024, the US District Court for the Southern District of Georgia issued a preliminary injunction of the proposed rule. This rule was never issued in final form and was formally withdrawn by ED in December 2024.

REGucation

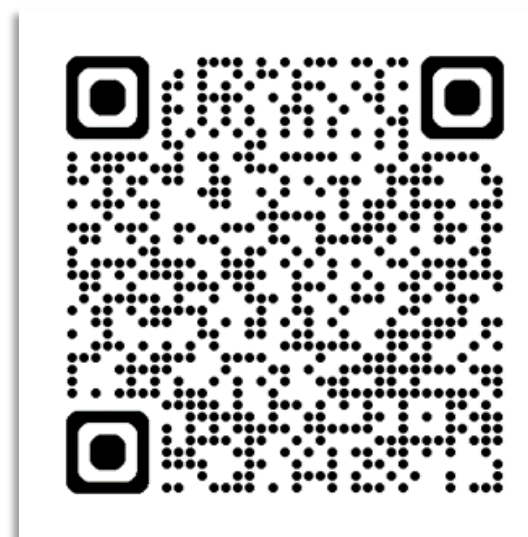
(TC's Free Resources Platform)

REGucation Platform



Home_Higher Education Resources

higher education resources



EMAIL

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!

Compliance Resources



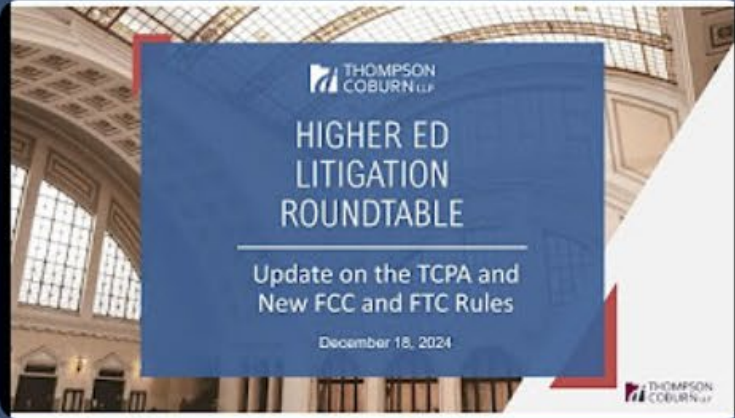
Webinars/Training Resources



Blog Posts



REGucation | Presentations



HIGHER ED LITIGATION ROUNDTABLE
Update on the TCPA and New FCC and FTC Rules
December 18, 2024

Higher Education
by Thompson Coburn LLP
Playlist • 78 videos • 1,006 views

▶ Play all



Update on TCPA and New FCC & FTC Rules

Thompson Coburn LLP • 121 views • 1 month ago



Examining Title VI Compliance for Institutions of Higher Education

Thompson Coburn LLP • 42 views • 1 month ago



The Latest on ED's Financial Value Transparency and Gainful Employment Rule

Thompson Coburn LLP • 1K views • 4 months ago



REGucation | Higher Education Blog



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January 30, 2025 | 4 minute read

[One-to-One is Done: The Eleventh Circuit Scraps the FCC's New Consent Rule Under the TCPA, Inviting Future Challenges to Written Consent Altogether](#)



blogs, regucation

January 24, 2025 | 5 minute read

[President Trump's Executive Order Banning Illegal DEI Policies: What Does It Mean for Higher Education?](#)



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January 17, 2025 | 4 minute read

[A Dogfight of a Removal Battle: A Supreme Court Decision with Higher Ed Impact](#)



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January 13, 2025 | 2 minute read

[The Merry-Go-Round Continues: Supreme Court to Review 2022 Borrower Defense to Repayment Final Rule](#)



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January 30, 2025 | 4 minute read



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January 24, 2025 | 5 minute read



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January 17, 2025 | 4 minute read



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January 13, 2025 | 2 minute read

REGucation | Litigation Summary

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Gainful Employment



Bare Minimum Rule



Borrower Defense to Repayment



Student Loan Forgiveness



REGucation | Compliance Materials



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.¹ On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.² 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.³ 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.⁴

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.

¹ 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.

² See 87 Fed. Reg. 65904 (Nov. 1, 2022).

³ 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](#).

⁴ 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 Guide (2024)

Last Updated: July 1, 2024

On July 1, 2024, the U.S. Department of Education's new *Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit* rule takes effect (the "2024 Rule").¹ The 2024 Rule implements a wide range of changes relating to financial responsibility, including the significant revision and expansion of the reporting obligations at 34 CFR § 668.171, which require institutions to report certain "triggering events" to the Department.² These reporting requirements are meant to alert the agency that an institution "may not be able to meet its financial responsibilities."³ If an institution fails to report a triggering event within the requisite timeframe, the Department may take administrative action, to include determining that the institution is not financially responsible, or initiating a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs (the "Title IV Programs").⁴ If an institution reports a triggering event (or the Department otherwise becomes aware that an event has occurred), the Department may determine that the institution is not financially responsible and take various administrative actions, depending on the nature and significance of the event reported. Institutions should review the 2024 Rule carefully for additional information regarding the consequences of reporting triggering events and the opportunities to mitigate such consequences.

Below, we provide a guide to the reporting obligations under the 2024 Rule, as set forth in the regulatory text. Because the 2024 Rule, like the existing financial responsibility reporting framework, distinguishes between a Mandatory Triggering Event and a Discretionary Triggering Event, we have divided the chart to identify which triggering events fall into each category. Triggers should be reported to the Department through the Document Center, available on the Common Origination and Disbursement (COD) website, and by emailing the FSA Financial Analysis Division at FSAFinancialAnalysisDivision@ed.gov. For information concerning the form and content of the submissions, please see the Department's June 27, 2024 [Electronic Announcement](#).

On May 17, 2024, the current administration posted a [Q&A website](#) that addresses certain aspects of the new reporting requirements implemented by the 2024 Rule. We strongly encourage institutions to review the Department's Q&A website and any other relevant guidance to determine, among other things, whether the agency is interpreting the regulatory text in a manner that may expand or otherwise modify the reporting obligations as described in the 2024 Rule (and detailed in the chart below).

- ¹ The final 2024 Rule was published in the Federal Register on October 31, 2023. See 88 Fed. Reg. 74568 (Oct. 31, 2023). It revises the financial responsibility regulations at 34 CFR §§ 668.23, 668.171, 668.174, 668.175, and 668.176. The 2024 Rule also revises the financial responsibility factors applicable to institutional changes in ownership, currently in § 668.15, moving them to § 668.176.
- ² Triggering events, as explained by the Department, are external events or financial circumstances that may not appear in an institution's annual financial statements and are not yet reflected in the institution's calculated composite score. See 88 Fed. Reg. 74569 (Oct. 31, 2023).
- ³ 88 Fed. Reg. 74568 (Oct. 31, 2023).
- ⁴ 34 CFR § 668.171(f)(2) (July 1, 2024).

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Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the [American Rescue Plan Act of 2021](#) (the "Act"), a \$1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."¹ Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "Federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "Federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

¹ 34 C.F.R. § 668.14(a)(16); see also 20 U.S.C. § 1094(a)(24).

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