



An Update Regarding ED's Regulatory Agenda

Aaron Lacey & Katie Wendel | Thompson Coburn LLP

2023 NASASPS Annual Conference

April 30 – May 3 | Phoenix, Arizona

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.
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Presenter Profile

- Practice and Experience
 - Assists institutions of higher education to navigate challenging legal and regulatory matters.
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Aaron Lacey

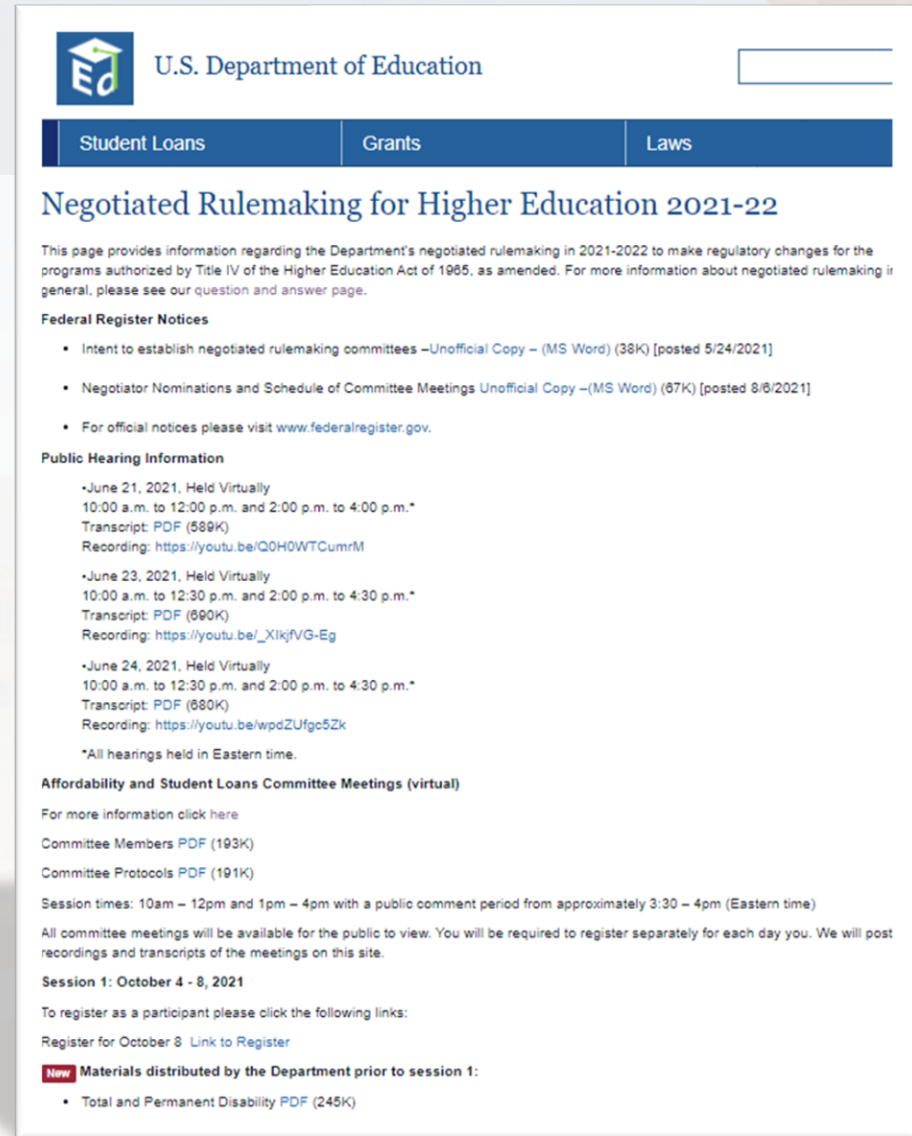
**Partner & Chair
Higher Education Practice**



Status of ED's Title IV Rulemakings

Negotiated Rulemaking

- ED is presently working to complete an extraordinarily ambitious regulatory agenda.
- You can view documentation, schedules, and a range of other materials relating to its ongoing negotiated rulemaking efforts on this [web page](#).



The screenshot shows the U.S. Department of Education website. At the top left is the ED logo and the text "U.S. Department of Education". To the right is a search bar. Below this is a navigation bar with three tabs: "Student Loans", "Grants", and "Laws". The main heading is "Negotiated Rulemaking for Higher Education 2021-22". Below the heading is a paragraph of introductory text. The page is organized into sections: "Federal Register Notices" with three bullet points, "Public Hearing Information" with three entries for June 21, 23, and 24, 2021, "Affordability and Student Loans Committee Meetings (virtual)" with links for more information, committee members, and protocols, and "Session 1: October 4 - 8, 2021" with registration links. A "New" banner highlights "Materials distributed by the Department prior to session 1:" with a link to a PDF.

U.S. Department of Education

Student Loans Grants Laws

Negotiated Rulemaking for Higher Education 2021-22

This page provides information regarding the Department's negotiated rulemaking in 2021-2022 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

- Intent to establish negotiated rulemaking committees –Unofficial Copy – (MS Word) (38K) [posted 5/24/2021]
- Negotiator Nominations and Schedule of Committee Meetings Unofficial Copy –(MS Word) (67K) [posted 8/8/2021]
- For official notices please visit www.federalregister.gov.

Public Hearing Information

- June 21, 2021, Held Virtually
10:00 a.m. to 12:00 p.m. and 2:00 p.m. to 4:00 p.m.*
Transcript: PDF (589K)
Recording: <https://youtu.be/Q0H0WTCumrM>
- June 23, 2021, Held Virtually
10:00 a.m. to 12:30 p.m. and 2:00 p.m. to 4:30 p.m.*
Transcript: PDF (690K)
Recording: https://youtu.be/_XlkjVVG-Eg
- June 24, 2021, Held Virtually
10:00 a.m. to 12:30 p.m. and 2:00 p.m. to 4:30 p.m.*
Transcript: PDF (680K)
Recording: <https://youtu.be/wpdZUfge5Zk>

*All hearings held in Eastern time.

Affordability and Student Loans Committee Meetings (virtual)

For more information click here

Committee Members PDF (193K)

Committee Protocols PDF (191K)

Session times: 10am – 12pm and 1pm – 4pm with a public comment period from approximately 3:30 – 4pm (Eastern time)

All committee meetings will be available for the public to view. You will be required to register separately for each day you. We will post recordings and transcripts of the meetings on this site.

Session 1: October 4 - 8, 2021

To register as a participant please click the following links:

Register for October 8 [Link to Register](#)

New Materials distributed by the Department prior to session 1:

- Total and Permanent Disability PDF (245K)

Completed Title IV Rulemakings

Final rule has
already been
published.
July 1, 2023, is
effective date.

Impact
Opportunities

- [Borrower defense to repayment](#)
 - Closed-school loan discharges
 - Total and permanent disability discharges
 - False certification discharges
 - Interest capitalization on student loans
 - Pre-dispute arbitration and class action waivers
 - Public service loan forgiveness
 - [Change in ownership process and standards](#)
 - Pell Grants for prison education programs
 - 90/10 rule
-
- Challenge rule through litigation

Pending Title IV Rulemakings

Proposed rule issued January 11, 2023.

- [Income-driven repayment plans](#)

Proposed rules expected in April. July 1, 2024, is likely effective date.

- Gainful employment
- State-defined processes for Ability to Benefit
- Certification procedures for Title IV participation
- Financial responsibility
- Standards of administrative capability

Impact Opportunities

- Comment on proposed rule, encourage others
- Schedule an EO 12866 meeting with OMB
- Challenge rule through litigation

Future Title IV Rulemakings

Notice of rulemaking
expected in April.

July 1, 2025, is
likely the earliest
effective date.

Impact
Opportunities

- Accreditation and related issues
- State authorization
- Distance education
- Return to Title IV
- Cash management
- Third-party servicers and related issues
- Improving use of deferments and forbearances
- Federal TRIO programs

- 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 rule, encourage others
- Schedule an EO 12866 meeting with OMB
- Challenge rule through litigation



Status of the Title IX Rulemaking

Title IX Redux

- On April 6, 2021, 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 anticipate a final rule in May 2023.
- 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

Search...

Student Loans

Grants

Laws

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

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 *Boastock 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.



Policy & Enforcement Activity

ED's Focus on Consumer Protection

- Richard Cordray, Chief Operating Officer of Federal Student Aid
 - First director of the CFPB and former Attorney General of Ohio.
- Sartaj Alag, Senior Advisor to Chief Operating Officer
 - Former Chief Operating Officer of CFPB
- Kristen Donoghue, Chief Enforcement Officer of Federal Student Aid
 - Former enforcement director of CFPB
- Bonnie Latreille, Student Loan Ombudsman
 - Formerly in office of CFPB student loan ombudsman and co-founder of the Student Borrower Protection Center
- Toby Merrill, Deputy General Counsel
 - Founder of the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School. "The Project represents low-income student loan borrowers in litigation against for-profit colleges and against the policies that enable them."

ED Enforcement Unit

- On October 8, 2021, ED announced new Office of Enforcement within Federal Student Aid.
- Led by Kristen Donoghue, former enforcement director of the CFPB, will “coordinate with other state and federal partners. In particular, FSA plans to work closely with the Federal Trade Commission.”

U.S. Department of Education to Establish an Enforcement Office Within Federal Student Aid

Office will vigorously investigate and bring actions against schools that cheat students and taxpayers

OCTOBER 8, 2021

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

Today, the U.S. Department of Education announced the establishment of an Office of Enforcement within Federal Student Aid, reporting directly to the chief operating officer. The Office of Enforcement will strengthen oversight of and enforcement actions against postsecondary schools that participate in the federal student loan, grant, and work-study programs. Today's action restores an office that was first established in 2016, but deprioritized in the previous administration.

"Vigorously ensuring that schools are adhering to the federal student aid program rules and delivering quality education to students is critical in America's ability to build back better," said Under Secretary James Kvaal. "The Administration will prioritize Federal Student Aid's effective oversight and enforcement of postsecondary schools."

The Enforcement Office will be led by Kristen Donoghue, as the chief enforcement officer, who will report directly to FSA Chief Operating Officer Richard Cordray. Donoghue joined FSA in July as a senior advisor to the chief operating officer, bringing a wealth of enforcement and leadership experience. Donoghue previously served as the enforcement director of the Consumer Financial Protection Bureau (CFPB), where she led a 140-person office responsible for enforcement of federal consumer financial laws covering a range of financial services companies including the largest banks in the country.

Under her leadership, the CFPB pursued hundreds of investigations and filed numerous significant public enforcement actions, including obtaining the highest civil money penalty in the CFPB's history, a \$1 billion fine against Wells Fargo. Most recently, Donoghue served as a managing vice president at Capital One Bank, where she headed a team focused on legal and regulatory compliance.

"Kristen brings a strong enforcement track record to this role," said Chief Operating Officer Richard Cordray. "Her experienced leadership will drive greater accountability for schools and better educational outcomes for the students we serve."

The Enforcement Office will proactively identify and address major problems across institutions that pose widespread risks to students and taxpayers. The office will work closely with the Partner Participation and Oversight Office on a risk-based approach to oversight and compliance. It will comprise four existing divisions:

- **Administrative Actions and Appeals Services Group:** This group fines, limits, suspends, terminates, and imposes emergency actions against postsecondary institutions that participate in the federal student aid programs. The group also issues actions, such as revocations and recertification denials; initiates debarment and suspension proceedings against individuals and other parties; and resolves appeals of final audit and program review determinations.
- **Borrower Defense Group:** This group analyzes borrower defense to repayment claims and recommends appropriate dispositions to Department leadership. The group communicates with postsecondary institutions about borrower defense claims and coordinates across FSA and with investigative and enforcement divisions of federal and state agencies related to individual borrower defense claims.
- **Investigations Group:** This group evaluates indicators of potential misconduct or high-risk conduct by postsecondary institutions and third-party servicers, and investigates institutions' compliance with federal laws, regulations, and the terms of program participation. This group will collaborate with other agencies that have complementary enforcement resources, such as the Department of Justice, Consumer Financial Protection Bureau, Federal Trade Commission, and state attorneys general.
- **Resolution and Referral Management Group:** This group tracks and resolves referrals, reports of suspicious activity, allegations, and complaints about institutions and individuals that participate in the federal student aid programs. FSA receives feedback from sources that include the general public; students; school officials; individuals within FSA and the Department; and external oversight and higher education stakeholders, such as the Department's Office of Inspector General, U.S. Department of Defense, U.S. Department of Veterans Affairs, and Consumer Financial Protection Bureau.

As part of FSA's heightened enforcement activities and actions to uphold civil law and promote borrower protection, FSA will coordinate with other state and federal partners. In particular, FSA plans to work closely with the Federal Trade Commission, which earlier this week announced a major shift in its enforcement priorities to focus on postsecondary schools that illegally engage in unfair and deceptive acts or practices.

Aggressive Protection

- On March 16, 2022, ED [warned](#) schools that it will act aggressively when it finds misrepresentations made to servicemembers and veterans by schools.
- “[T]he Department will ensure that institutions engaging in misrepresentations are held accountable... it will address such violations and seek all appropriate corrective measures.”

(GENERAL-22-14) FSA Enforcement Bulletin, March 2022 – Substantial Misrepresentations When Recruiting Servicemembers and Veterans

Print

POSTED DATE: March 16, 2022

AUTHOR: Office of Enforcement

ELECTRONIC ANNOUNCEMENT ID: GENERAL-22-14

SUBJECT: FSA Enforcement Bulletin, March 2022 – Substantial Misrepresentations When Recruiting Servicemembers and Veterans

The U.S. Department of Education (Department) enforces the requirements of the *Higher Education Act of 1965 (HEA)* intended to curb deceptive recruitment and enrollment practices. The Department may engage in enforcement action if it determines that an eligible institution has engaged in substantial misrepresentation, as defined under [34 CFR Part 668, Subpart F](#). Enforcement measures may include limitation or termination of an institution's participation in the *Title IV* programs. Substantial misrepresentations subject to this prohibition include those regarding the nature of an institution's educational program, its financial charges, or the employability of its graduates.

The Department is monitoring complaints and borrower defense to repayment (borrower defense) applications from veterans, servicemembers, or their family members (i.e., military-connected students) who report that school personnel or representatives suggested during the enrollment process that their *GI Bill*® benefits would cover all of the costs of a degree, only to be told later that they would have to take out student loans to finish the program. Some of these students even report that student loans were taken out in their name without their knowledge.¹

The Department is aware of the following allegations regarding some institutions:

- Military-connected students were led to believe that their *GI Bill*® benefits would cover the entire cost of their education, only to later find out that they would have to take out loans to complete their courses and graduate. Others were told to sign paperwork without realizing that they were signing up for loans, or they were told to fill out loan applications as a backup plan while being falsely advised that the loans would not be necessary because their benefits would cover the costs of their education.
- Military-connected students were pressured to start classes before their *GI Bill*® benefits were determined or verified, often applying for *Title IV* grants and loans without a clear understanding of the transaction or that they could end up with a loan balance.

Co-Signor Policy (Part 1)

- On March 23, 2022, ED [announced](#) that, in some cases, “corporations or other legal entities that have, or could have, direct or indirect effects on the institution’s administrative capability or financial responsibility” may have to guarantee the regulatory liabilities of the school.

POSTED DATE: March 23, 2022

AUTHOR: Federal Student Aid

ELECTRONIC ANNOUNCEMENT ID: GENERAL-22-16

SUBJECT: Updated Program Participation Agreement Signature Requirements for Entities Exercising Substantial Control Over Non-Public Institutions of Higher Education

This Electronic Announcement outlines the general circumstances in which entity owners of eligible institutions of higher education (institutions) will be required to sign Program Participation Agreements.

Current PPA Signature Requirements

A Program Participation Agreement (PPA) conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of 34 CFR 668.14

[Title IV](#), HEA program regulations, and any additional conditions specified in the PPA that the Secretary requires the institution to meet.

Currently, a PPA must be signed by the official at the institution who has the authority to sign on behalf of the institution. That individual is typically the institution’s chief executive officer, president, chancellor, or other designated official. In appropriate cases, FSA also requires authorized representatives of owner entities or individuals to sign the PPA. These requirements remain in effect.

Updated PPA Signature Requirements

To better ensure that taxpayers are protected in the event of school closure, approved borrower defense claims, or when other liabilities are owed to the U.S. Department of Education (Department) and to provide more accountability, consistent with 34 CFR 668.14, the Department may require additional signatures on an institution’s PPA when an institution seeks initial certification or recertification, or when it undergoes a change of ownership under 34 CFR § 600.31(a).

By entering into a PPA, an institution agrees that it will comply with the provisions of § 668.15 relating to factors of financial responsibility and that it will comply with the provisions of § 668.16 relating to standards of administrative capability. Thus, to ensure financial responsibility, the Department may in certain cases require signatures from corporations or other legal entities that have, or could have, a direct or indirect effect on the institution’s financial responsibility. The Department uses a rebuttable presumption that the following entities have or could have a direct or indirect effect on the institution’s administrative capability or financial responsibility if they:

- Are the sole member of, or hold a 100 percent direct or indirect equity or voting interest in the institution;
- Hold less than a 100 percent interest but otherwise exercise (either directly or indirectly) substantial control over the institution; or

Tip Hotline Established

- On November 10, 2022, ED actively [solicited](#) “information from knowledgeable sources about potential violations of the Higher Education Act and its implementing regulations.”
- “FSA welcomes and encourages information from current or former employees, vendors, or contractors of institutions of higher education, third-party servicers, third party lead generators, students, or any other relevant individual about potential violations.”

(GENERAL-22-84) FSA Enforcement Bulletin, November 2022 – Department of Education and Federal Student Aid Invite Tips and Information from Knowledgeable Sources on Potential Violations by Institutions

Print

POSTED DATE: November 10, 2022

AUTHOR: Office of Enforcement

ELECTRONIC ANNOUNCEMENT ID: GENERAL-22-84

SUBJECT: FSA Enforcement Bulletin, November 2022 – Department of Education and Federal Student Aid Invite Tips and Information from Knowledgeable Sources on Potential Violations by Institutions

How to Submit a Tip

In furtherance of its oversight responsibilities, Federal Student Aid (“FSA”) issues this bulletin to solicit information from knowledgeable sources about potential violations of the Higher Education Act and its implementing regulations. FSA has established a new avenue for knowledgeable sources to provide information about potential violations of the HEA and its implementing regulations directly to FSA’s [Office of Enforcement](#). FSA welcomes and encourages information from current or former employees, vendors, or contractors of institutions of higher education, third-party servicers, third party lead generators, students, or any other relevant individual about potential violations. Knowledgeable sources with information about potential violations may submit relevant tips and information by visiting [Ed.gov/FSATips](#) or sending an email directly to FSATips@ed.gov.

Confidentiality

Although you may request that the Office of Enforcement keep your identity confidential, it cannot guarantee complete confidentiality. Be advised:

- Confidentiality only applies to your identity and contact information, not to the information provided (i.e., the Office of Enforcement may, if necessary, share the facts and circumstances provided by you).
- To the extent consistent with law enforcement needs and as permitted by federal laws (including the Privacy Act, the Freedom of Information Act, and any applicable Department of Education and FSA regulations), the Office of Enforcement will make a good faith effort to honor a request for confidentiality. However, it may be required to disclose your identity pursuant to a federal law (such as the Privacy Act, the Freedom of Information Act, and any applicable Department of

Low-Value Programs

- On January 11, 2023, the same day ED released its proposed rule regarding income-driven repayment plans, it also published a [Request for Information](#) “regarding how best to identify low-value postsecondary programs.”
- It appears that this could be the first step towards applying a debt-to-earning metric to all programs at all institutions.

Request for Information Regarding Public Transparency for Low-Financial-Value Postsecondary Programs

A Notice by the Education Department on 01/11/2023

This document has a comment period that ends in 18 days. (02/10/2023)

[SUBMIT A FORMAL COMMENT](#)

PUBLISHED DOCUMENT



AGENCY:

Office of the Under Secretary, U.S. Department of Education.

ACTION:

Request for information.

SUMMARY:

The U.S. Department of Education (Department) is requesting information in the form of written comments that may include information, research, and suggestions regarding how best to identify low-value postsecondary programs. The Office of the Under Secretary solicits these comments to identify the best ways to calculate the metrics that may be used to identify low-financial-value programs and inform technical considerations.

DATES:

We must receive your comments on or before February 10, 2023.

ADDRESSES:

Comments must be submitted via the Federal eRulemaking Portal at [regulations.gov](https://www.regulations.gov). However, if you require an accommodation or cannot otherwise submit your comments via [regulations.gov](https://www.regulations.gov), please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

The Department strongly encourages you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), the Department strongly encourages you to convert the PDF to "print-to-PDF" format, or to use some other commonly used

DOCUMENT DETAILS

Printed version:

PDF

Publication Date:

01/11/2023

Agency:

Department of Education

Date:

We must receive your comments on or before February 10, 2023.

Comments Close:

02/10/2023

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88 FR 1567

Page:

1567-1569 (3 pages)

Agency/Docket Number:

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2022-28608

DOCUMENT DETAILS

DOCUMENT STATISTICS

Page views:

1,929

as of 01/23/2023 at 4:15 pm EST

DOCUMENT STATISTICS

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 concerning study abroad programs, clinical relationships, and other impacted arrangements.

(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. Redux

- 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

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 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.

Co-Signor Policy (Part 2)

- On March 1, 2023, ED [announced](#) that, in some cases, “individuals who exercise substantial control over institutions” may be required “to assume personal liability for financial losses which may be incurred by the federal government.”
- This could include “a member of the board of directors, the chief executive officer, or other executive officer of the institution or of an entity that holds a substantial ownership interest in the institution.”

POSTED DATE: March 01, 2023

AUTHOR: Federal Student Aid

ELECTRONIC ANNOUNCEMENT ID: GENERAL-23-11

SUBJECT: Establishing Personal Liability Requirements for Financial Losses Related to the Title IV Programs

On March 23, 2022, the U.S. Department of Education (Department) published an [Electronic Announcement](#) notifying institutions of higher education (institutions) that, in certain circumstances, it would require additional signatures on an institution's Program Participation Agreement (PPA) from individuals representing corporations or other legal entities that have, or could have, direct or indirect effects on the institution's administrative capability or financial responsibility. The Department took this action to increase the accountability of corporations and other entities with substantial control over institutions.

To further strengthen accountability and better ensure that taxpayers are protected in the event of school closures, approved borrower defense claims, or outstanding liabilities owed to the Department, the Department is issuing this Electronic Announcement to clarify its process for considering when to require certain *individuals* who exercise substantial control over institutions to assume personal liability for financial losses which may be incurred by the federal government. This Electronic Announcement describes the process the Department will use when it considers imposing signature requirements for PPAs that will apply to individuals in their personal capacity, rather than corporations and other entities. This process will provide the Department with additional tools for ensuring compliance with the legal requirements of the Title IV programs and recouping funds to cover financial losses incurred by the federal government.

Personal Liability for Losses Related to the Title IV Programs Under the Higher Education Act

Section 498 of the Higher Education Act of 1965, as amended (HEA), ([20 U.S.C. § 1099c](#) [↗](#)), gives the Department the authority to require the assumption of personal liability (or financial guarantees) from individuals who own or exercise substantial control over institutions. 20 U.S.C. 1099c(e)(1)(B) provides that the Secretary may, to the extent necessary to protect the financial interest of the United States, require the assumption of personal liability by an individual who exercises substantial control over an institution participating in Title IV programs. Under these provisions, personal liability may be imposed for financial losses to the federal government, student assistance recipients, and other program participants for funds under Title IV, and for civil and criminal monetary penalties authorized under Title IV.

Additionally, 20 U.S.C. § 1099c(e)(2)(A) specifies that the Department may determine that an individual exercises substantial control over a participating institution if the Department determines that the individual:

- directly or indirectly controls a substantial ownership interest in the institution;
- either alone or together with other individuals, represents, under a voting trust, power of attorney,

Secret Shopping Initiative

- On March 14, 2023, ED [announced](#) that it will begin using secret shoppers to “evaluate recruitment, enrollment, financial aid, and other practices of postsecondary institutions to help identify potentially deceptive or predatory practices used to recruit and enroll students.”

Education Department Announces Use of Secret Shopping to Protect Students, Crack Down on Institutions that Lure Students with Lies

Builds on Biden-Harris Administration's ongoing commitment to holding low-performing and predatory schools accountable

MARCH 14, 2023

Contact: Press Team, (202) 401-1576, press@ed.gov

The U.S. Department of Education (Department) [announced today](#) that the Enforcement Office of Federal Student Aid (FSA) will use secret shoppers as an additional tool to monitor postsecondary institutions' compliance with the laws and regulations governing their participation in the federal student aid programs. In particular, secret shoppers will evaluate recruitment, enrollment, financial aid, and other practices of postsecondary institutions to help identify potentially deceptive or predatory practices used to recruit and enroll students.

“Secret shopping is another tool in FSA's toolbox as we expand our oversight work to hold predatory schools accountable,” said FSA Chief Operating Officer Richard Cordray. “Our focus—as always—is to ensure that students, borrowers, families, and taxpayers are not being preyed upon to make a quick buck.”

Specifically, secret shoppers will look for misrepresentations regarding the transferability of credits, job placement rates, completion and withdrawal rates, graduates' future earning potential, career services, the cost of attendance, the amount of federal student aid, and accreditation status, along with any other practices that may violate the laws and regulations governing an institution's participation in the federal student aid programs.

Findings from secret shopping may serve as evidence to support an ongoing investigation or review, or provide a basis for opening a new investigation or review. Where appropriate and permitted, FSA will refer findings from its secret shopping efforts to other Department offices, including the Office of Inspector General, and share findings with other law enforcement partners at the state and federal levels.

“Schools that engage in fraud or misconduct are on notice that we may be listening, and they should clean up accordingly,” said Kristen Donoghue, FSA's chief enforcement officer. “But schools that treat current and prospective students fairly and act lawfully have nothing to fear from secret shopping.”

Improving Student Outcomes by Bolstering School Oversight

This work represents some of the latest progress on the Biden-Harris Administration's ongoing [commitment](#) to improving student outcomes, including by holding low-performing and predatory schools accountable for swindling students out of time and money and leaving taxpayers holding the bill.

In October 2021, the Department reinvigorated school oversight and accountability efforts within FSA by [reestablishing an Enforcement Office](#) and hiring a chief enforcement officer, who reports directly to FSA's chief operating officer. That has already paid dividends. For example, in fiscal year 2022, FSA:

- Initiated dozens of actions, including denying 10 school recertifications; revoking six Provisional Program Participation Agreements, which enable schools to participate in the Title IV program; and issuing two terminations, five suspensions, seven debarments, and



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CONTRIBUTORS

ED further delays third-party servicer guidance, clarifies significant policies

[Aaron Lacey](#) [Scott Goldschmidt](#) [Christopher Murray](#)  April 12, 2023



On April 11, 2023, the U.S. Department of Education (the "Department") announced that it would further delay implementation of its controversial "third-party servicer" ("TPS") guidance, which was released this February. It also provided significant policy clarifications to the regulated community concerning study abroad programs, clinical relationships, and other impacted arrangements. [READ MORE](#)

FSA issues GLBA Safeguards Rule guidance

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The Higher Education Regulatory Outlook for 2023

January 24, 2023 | [View Recording](#)

ED's Proposed Borrower Defense to Repayment Rule: A Detailed Examination

July 29, 2022 | [View Recording](#)

ED's New Title IX Rule: A Careful Review and Suggestions for Public Comment

July 7, 2022 | [View Recording](#)

ED's Increased Scrutiny of College Contracts with Online Program Managers

May 17, 2022 | [View Recording](#)

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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 668.371). 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 FSAPRR@ed.gov.¹ 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.² 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.³

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.



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.¹ 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.



90/10 Rule Compliance Strategies & Considerations

Last Updated: March 2023

To remain eligible to participate in the federal student aid programs, proprietary institutions must comply with the "90/10 rule." This rule, as amended by Section 2013 of the American Rescue Plan Act of 2021 (the "Act"), requires proprietary institutions to derive at least 10 percent of their revenue from sources other than "Federal education assistance funds."¹ Federal education assistance funds are defined in the Act as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution[.]"²

In late 2021, the U.S. Department of Education ("ED") engaged in a negotiated rulemaking to implement the changes detailed in the Act. As part of this process, ED proposed a number of significant revisions to the 90/10 rule. Consensus ultimately was reached by negotiators, and final regulations were published by ED on October 28, 2022.³ These final regulations apply to institutional fiscal years beginning on or after January 1, 2023.

Given the significance of these regulatory changes, and the challenges they create for many proprietary institutions, we determined to create this compilation of strategies we have seen used for managing 90/10 rule compliance. 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 See 20 U.S.C. §1094(a)(24).

² *Id.*

³ See 87 FR 65426 (Oct. 28, 2022).



Thank You!

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