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Financial Responsibility, Administrative Capability, Certification Procedures, and Ability to Benefit

Summary of Final Rules – November 2023

Less than a month after issuing final regulations on financial value transparency and gainful employment, the Department of Education finalized a second set of rules to address the agency's concerns over institutional accountability and consumer protection. **These regulations will go into effect on July 1, 2024.**

The new rules address regulatory provisions governing financial responsibility, administrative capability, certification procedures, and ability to benefit. Within these broad categories, the regulations specifically address numerous issues of critical importance to institutions of higher education, including, but not limited to:

- Transcript withholding;
- Career services;
- Financial aid counseling and disclosures;
- Compliance with state laws governing licensure requirements and closures;
- Discontinuation of academic programs affecting more than 25 percent of Title IV students;
- Completion rates;
- Oversight of institutional expenditures on academic services versus marketing and recruitment;
- Increased circumstances under which institutions may be provisionally certified and increased restrictions on such institutions; and
- Financial responsibility, including teach-out plans for colleges at risk of closure and other changes.

A detailed summary of the new rules is below, following a brief description of the history of the regulations.

History

The new rules have a somewhat confusing history. The regulations stem from the negotiated rulemaking on Institutional and Programmatic Eligibility that concluded in March 2022. In May 2023, the Department issued a massive set of proposed regulations that addressed financial value transparency and gainful employment, as well as the provisions contained in these regulations. Concerned that the entire package would not be ready for release before the anticipated government shutdown on September 30, 2023, the Department split the package into two sets of final rules.

The first set of final rules – on financial value transparency and gainful employment – was published in September 2023 to ensure they would go into effect next year. (HEA Title IV regulations must be released by November 1 in order to go into effect on the following July 1.) When the government did not shut down, the Department was able to publish this second set of final rules ahead of the November 1 deadline.

Administrative Capability

The regulations add a series of new requirements that institutions must meet in order to demonstrate that they are capable of administering their Title IV programs.

Financial aid counseling. Institutions must ensure that students and families accept the most beneficial types of aid to them and provide information on cost of attendance, net price, and the type of aid available, among other things.

Career services. Institutions are required to provide adequate career services to students. In determining whether services are adequate, the Department will consider factors such as the number and distribution of staff, the services the institution has promised to its students, and the presence of partnerships with recruiters and employers who regularly hire graduates.

Clinical or externship opportunities. Institutions must provide students, within 45 days of completion of required coursework, with accessible clinical or externship opportunities that are related to, and required by, the program that the students are enrolled in.

Disbursement of funds. Institutions must disburse funds to students in a timely manner consistent with the needs of the students. It is important to note that the Department does not consider disbursements to meet students' needs if, among other conditions, the institution has multiple, verified student complaints, high rates of withdrawals due to delays in disbursements, has delayed disbursements until after students have earned 100 percent of their title IV eligibility, per return to title IV requirements, or has delayed disbursements to falsely pass the 90/10 ratio.

Revenue from Gainful Employment programs. Institutions must ensure that at least half of the Title IV revenue received by an institution is not from programs that fail the gainful employment (GE) rule.

Negative accreditation or eligibility action. Institutions must not be subject to any significant negative action by a state, federal, or accrediting agency and have not lost eligibility to participate in another federal educational assistance program.

Principals and affiliates. Institution must not have any principal or affiliate of the institution, or any individual who exercises substantial control of the institution be convicted of fraud or other crime involving government funds, or have past or current controlling connections to another institution whose misconduct or closure contributed to liabilities to the federal government in excess of five percent of Title IV funds due to misconduct.

Competency. The institution must not lack the ability to administer Title IV aid competently.

The regulations also further clarify requirements for evaluating a high school diploma if an institution has reason to believe it is not valid. Previously, regulations allowed institutions to follow their own procedures for validating a high school diploma, but the Department now requires institutions to follow adequate procedures, which must, among other things, include:

- Obtaining documentation from the high school that confirms the validity of the high school diploma, such as transcripts, written descriptions of course requirements, or written and signed attestations by principals or executive officers; and
- Confirming that the diploma is not disqualified based on a list of new criteria, such as that the diploma: 1) is obtained from a high school that appears on a published list from the Secretary of schools that issue invalid diplomas; 2) has been determined to be invalid by the Department, a relevant state agency, or through a court proceeding; 3) or was obtained from an entity that requires little or no secondary instruction or coursework.

Certification Procedures

The regulations create a more rigorous process for certifying institutions to participate in Title IV programs by adding new requirements on institutions via the program participation agreement (PPA).

Automatic demotion to provisional certification. An institution's certification becomes provisional if the institution is not financially responsible or any owner or interest holder also owns another institution with fines or liabilities owed to the Department and is not making payments regarding the liability.

Three-year limit. In a change from the proposed rules, provisional certification status for institutions will remain at a maximum of three years. The Department specifies that it may institute a shorter provisional period of 6 months, if deemed appropriate.

No automatic renewal. If the Department has not acted on an application for approval to participate in Title IV programs within 12 months, it no longer automatically approves the applicant.

Discretionary provisional certification requirements. If an institution is provisionally certified, the Secretary can do the following:

- For institutions determined by the Secretary to be at risk of closure:
  - Require a teach-out plan or agreement; and
  - Require a records retention plan.
- Prohibit the release of holds on transcripts for institutions at risk of closure, closing, or not seen as financially responsible or administratively capable;
- Restrict the addition of new programs or locations;
- Restrict the rate of growth, new enrollments of students, or Title IV volume in one or more programs;
- Place restrictions on the institution providing a teach-out plan on behalf of another institution;
- Restrict the acquisition of another institution, which may include the posting of financial protection no less than 10 percent of the acquired institution's Title IV volume in the prior fiscal year;
- Require institutions to report additional information, which may include cash balances, student rosters, and student complaints;
- Place limitations on institutions entering into a written arrangement with another institution;

- Require institutions to hire a monitor and submit marketing and other recruiting materials for review and approval if they have been engaged in misrepresentations, aggressive recruiting practices, or violated incentive compensation rules; and
- Require reporting to the Department within 21 days of the receipt of any governmental civil investigative demand, subpoena, request for documents or information, or other formal inquiry related to marketing or recruitment of prospective students, the awarding of financial aid for enrollment at the school, or the provision of education services for which federal aid is provided.

Supplementary performance measures. As the Department determines whether to certify, or condition the participation of an institution under provisional certification or as part of the PPA, it may consider including the following, at either the program or institutional level:

- The withdrawal rates of students within 100 percent or 150 percent of the published program length;
- A comparison of the amounts an institution spent on instruction, instructional activities, academic support, support services, to the amounts spent on recruiting, advertising, and other pre-enrollment expenditures; and
- Licensure pass rates, though only for institutions that are required to submit them.

Authorized representative. An authorized representative of the institution or any person who is an authorized representative of an entity with direct or indirect ownership of the institution must sign the PPA.

Eligibility limit for GE programs. For Title IV eligibility purposes, any institution that has GE programs must limit the number of hours for the program to the greater of the minimum number of hours required in the state for training in the recognized occupation or, another state's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student so long as certain requirements are met.

State licensing requirements. For distance education programs that lead to state licensure or certification, institutions are required to meet state licensing requirements in: 1) the states where the institution is located; 2) the states where each student enrolled in a distance education program is located upon initial enrollment; or 3) the states where students attest that they intend to seek employment. Institutions are also required to disclose to prospective and current students whether their programs that lead to licensure meet, or do not meet, state licensing requirements.

State laws related to closure. Institutions are required to ensure that their distance education programs comply with all state laws related to closure. Laws related to closure are defined to include those related to record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds. Institutions are required to meet this requirement regardless of their participation in NC-SARA.

Ban transcript withholding in certain situations. Upon request by a student, institutions must provide an official transcript that includes all the credits for payment periods in which the student received Title IV funds and for which all institutional charges were paid (or included in an agreement to pay) at the time the request was made. Institutions are also banned from withholding transcripts if they are at risk of closure or if the balance owed resulted from an error in administering a Title IV program or any fraud or misrepresentation by the institution or its personnel.

Reporting requirements for new nonprofit institutions. When nonprofit institutions are initially certified to participate in Title IV programs, or undergo a change in ownership, they are required to submit reports on accreditor agency actions, state authorization agency actions, and any new servicing agreements until the Department has reviewed two complete consecutive financial statements and compliance audits or approves their conversion request, whichever is later. The institution also must report on communications from the Internal Revenue Service (IRS) or any state or foreign country related to tax-exempt or nonprofit status as long as the institution participates as a nonprofit institution.

Financial Responsibility

The Department has strengthened its ability to identify high-risk events that impact an institution's financial stability and given its enforcement mechanisms more teeth by significantly increasing the list of mandatory and discretionary triggers that initiate, or may initiate, Department action. If an institution is deemed not to be financially responsible, the Department will require them to provide financial protection, such as a letter of credit, unless the institution demonstrates that the event is resolved or that insurance covers the loss.

Ability to meet financial or administrative obligations. The Department added the following to determine whether an institution meets its financial or administrative obligations:

- An institution fails to make repayments for any debt or liability arising from its participation in Title IV;
- An institution fails to make a payment regarding an undisputed financial obligation for more than 90 days;
- An institution fails to satisfy payroll obligations in accordance with its published payroll schedule; and
- An institution borrows funds from retirement plans or restricted funds without authorization.

Additional mandatory triggers. To address fraud and abuse by institutions, the following are added as additional mandatory triggering events that would automatically deem an institution to not be financially responsible (if any of these events occur, an institution will have 21 days to report to the Department):

- If the following legal or administrative actions occur:
    - For an institution with a composite score of less than 1.5 that has entered against it a final monetary judgment or award, even if it has not been paid, and as a result the recalculated composite score is less than 1.0;

  - An institution that is sued, on or after July 1, 2024, by a federal or state authority to impose an injunction, establish fines or penalties, or obtain financial relief, or in a qui tam action in which the United States intervened, but only if the federal or state action has been pending for 120 days and either no motion to dismiss has been filed or it has been denied;
  - The Department has initiated action to recover from the institution the cost of adjudicated claims in favor of borrowers under BDR provisions and the recalculated composite score is less than 1.0; or
  - The institution has submitted an application for a change in ownership that has entered against it a final monetary judgment or award, or enters into a monetary settlement resulting from a legal proceeding or monetary administrative proceeding at any point through the end of the second full fiscal year after the change in ownership has occurred, and as a result the recalculated composite score is less than 1.0.
- If the institution is required by a state, the Department, a federal agency, accrediting agency, or other oversight body to submit a teach-out plan or agreement for reasons related in whole or in part to financial concerns;
- If at least 50 percent of Title IV revenue is received from failing GE programs;
- If a proprietary institution does not derive at least 10 percent of its revenue from sources other than federal education assistance;
- If the two most recent cohort default rates are 30 percent or greater, unless the institution has filed a challenge, appeal, or an adjustment and that challenge, appeal, or adjustment results in a passing score;
- For institutions owned at least 50 percent by a publicly held entity, foreign or domestic:
  - If the Security Exchange Commission (SEC) issues an order suspending or revoking the registration of the controlling entity pursuant to 12(j) or (k) of the Exchange Act; or
  - If the SEC files an action against the entity in district court or issues an order instituting proceedings pursuant to section 12(j) of the Exchange Act; or
  - If the exchange the entity's securities are listed on notifies the entity of noncompliance or delists the securities; or
  - The entity fails to file a required annual or quarterly report with the SEC by the prescribed or extended due date; or
  - If the entity is subject to an event, notification, or condition by a foreign exchange or oversight authority that the Department determines is equivalent to those identified in this section.
- If there has been a loss in eligibility to participate in another federal educational assistance program;
- If there was a distribution of funds in the first two quarters of a fiscal year after a contribution received in the final quarter of the previous fiscal year that resulted in a recalculated composite score of less than 1.0;
- If, because of an action taken by the Department, the institution is subject to a default or other adverse condition; and
- If an institution declares a state of financial exigency or enters receivership.

Additional discretionary triggers. Much like mandatory triggering events, discretionary triggering events can determine if an institution is financially responsible; however, the Department has the discretion to determine whether there is a material adverse effect before deciding that an institution is not financially responsible. The following new triggering events have been added:

- Submission of teach-out plans or agreements for non-financial reasons;
- Fluctuations in student aid funds from year to year;
- Indicators of a change in financial conditions;
- Pending borrower defense claims;
- A discontinuation of a significant share of academic programs affecting at least 25 percent of enrolled Title IV students;
- The closure of institutional locations that enroll more than 25 percent of its Title IV students;
- The inability to meet state licensing requirements and the state agency notifies the institution that it will withdraw its licensure or authorization;
- Disclosures of current or pending legal investigations by an exchange-listed entity that owns at least 50 percent of an institution;
- Facing loss of education assistance funds from another federal agency;
- Any other event or condition that the Department learns about if the Department determines it will likely have a significant adverse effect on the financial condition of the institution;
- If an institution's accrediting agency or a federal, state, local, or Tribal authority places the institution on probation, or issues a show-cause order, or equivalent status that poses a risk to its accreditation, authorization, or eligibility;
- If the institution or any entity included in the financial statements submitted in the current or prior fiscal year is subject to default or other adverse condition under a line of credit or other financing arrangement:
    - If the adverse condition allows a creditor to impose fines, increased collateral requirements, a change in contractual obligations, an increase in interest rates, or other sanctions, penalties, or fees;
    - If any creditor of the institution takes action to terminate, withdraw, limit, or suspend a loan agreement or other financing arrangement or calls due a balance on a line of credit;
    - If the institution enters into a line of credit or other financing arrangement whereby the institution may be subject to default or other adverse conditions as a result of any action taken by the Department; or
    - The institution has a judgment awarding monetary relief entered against it that is subject to appeal or under appeal.
- If an institution is required to provide additional financial reporting due to a failure to meet the financial responsibility standards or due to a change in ownership, it has negative cash flows, failure of other financial ratios, cash flows that significantly miss the projections submitted to the Department, withdrawal rates increase significantly, or other indicators of a significant change in the financial condition of the institution; and
- If there are pending claims for borrower relief discharge and the Department has formed a group process to consider such claims and, if approved, those claims could be subject to recoupment.

Exception for audited financial statements. If an institution is determined to not be financially responsible due to a mandatory or discretionary trigger, it will be required to provide financial protection. Financial protection goes beyond letters of credit to also include options for cash collateral and other means. This financial protection can be released if the institution submits the audited financial statements of the two most recent fiscal years that show the financial situation at the institution has improved such that the institution would no longer meet the triggers.

Change of ownership. To specifically address the financial responsibility of institutions that undergo a change in ownership, the Department establishes requirements for institutions to meet, including the submission of audited financial statements of its two most recently completed fiscal years prior to the change in ownership, same day balance sheets, and the need to have positive net assets without donor restrictions the day after the change in ownership for private, nonprofit institutions, among other requirements.

- The failure or inability to provide the two most recent years of audited financial statements prior to the change in ownership initiates a requirement for a letter of credit or cash to the Department between 10 and 25 percent of the most recently completed year's Title IV funds.

Secretarial discretion. The Secretary is allowed to override the documentation on audited financial statements if he decides that diminished liquidity, ability to continue operations, or ability to continue as a going concern has not been alleviated, even if the disclosure provides that those concerns have been alleviated.

Ability to Benefit

Eligible career pathway program (ECPP). Currently, there is no definition of ECPP in the regulations, so the Department is adding the definition included in the Higher Education Act. Students are eligible to access student aid funding if they were first enrolled in an ability-to-benefit program prior to July 1, 2012, or in an ECPP.

Compliance requirements. The final regulation requires that at least one ECPP must be approved by the Department at each participating institution.

Approved state process. One of the three ways for a student to qualify for ability to benefit is to successfully complete a process created by the state that is approved by the Secretary. The Department clarifies the requirements for states that want to offer an ability-to-benefit process for students.