Education ADVISORY ■

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Biden-Harris Administration Expands Oversight and Monitoring of Colleges and Universities

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The Biden-Harris Administration has finalized regulations that drastically expand the Department of Education's toolbox to oversee and monitor higher education institutions facing financial risk. Hidden in the shadow of the department's expansive gainful-employment and financial value transparency rules, the new regulations bolster the department's oversight and enforcement authority.

Effective July 1, 2024, the regulations (and its attendant fact sheet) will, among other things, mandate reporting to the department of certain events or triggers that may result in a request for a letter of credit, require institutions to provide heightened financial aid counseling and career services, prevent institutions from withholding course credits from students' transcripts when those credits are paid for with federal financial aid funds, and require institutions to provide additional documents to demonstrate compliance with ability to benefit (ATB) state processes for accessing financial aid. Here's what's coming and how your institution's practices must adapt.

Setting the Scene

The Biden-Harris Administration's regulatory moves stem from the Administration's agenda to regulate so-called "risky" colleges and hold financially troubled institutions accountable for business decisions that adversely affect students. In the wake of the closures of some institutions, and students' reported difficulties finding employment after graduation and repaying federal student loans, the Administration has staked out an aggressive stance on regulating the higher education sector and, in particular, for-profit institutions. The new rules comprise four broad categories: (1) reporting requirements and enforcement authority tied to triggering events; (2) stricter compliance requirements for federal student aid programs authorized under Title IV of the Higher Education Act of 1965; (3) new certification requirements; and (4) added reporting rules and documentation requirements related to state ATB processes.

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Key Takeaways

Institutions must report financial "triggers" within 21 days

The final regulations enumerate several "triggers" an institution must report to the department within 21 days—up from 10 days in the proposed regulations. When these triggering events occur, the department may request letters of credit or other forms of financial protection from the reporting institution to ensure it is not at serious risk of closure. Some triggering events mandate that the department act; others allow the department the option to act.

Notably, the final regulations depart from the proposed regulations by allowing the department to evaluate whether, in its discretion, some triggers will require the subject institution to provide proof of or implement financial protections. However, when an institution first seeks to participate as a public college or immediately after it converts to a public college, the department will request proof that the institution has its state's full faith and credit backing.

"Mandatory" triggering events that will require the institution to provide financial protection include:

- Certain legal or administrative actions, such as monetary judgments or settlements, suits by federal or state authorities, qui tam actions in which the United states has intervened, and recoupment actions instituted by the department under the borrower defense to repayment regulations.
- Withdrawal of an owner's equity that results in a failing composite score.
- When 50% of the institution's Title IV programs fail to meet the gainful employment rules.
- Certain Securities and Exchange Commission actions against publicly listed entities.
- Failure to meet the 90/10 revenue rule that requires for-profit colleges to derive at least 10% of their revenue from sources other than Title IV.
- Certain negative creditor events, a declaration of financial exigency, or the filing for a federal or state receivership.

"Discretionary" triggering events include one of 14 events, such as when a college or university:

- Is subject to an adverse federal, state, or accreditor action.
- Suffers financial defaults, delinquencies, creditor events, or judgments.
- Experiences significant fluctuation in federal student aid volume.
- Reports high annual dropout rates.
- Faces pending borrower defense to repayment claims.
- Discontinues academic programs or closes locations that enroll more than 25% of its Title IV students.
- Takes any other action the department determines is likely to have a significant adverse effect on the institution's financial condition.

For those discretionary triggers that the department determines will have a significant adverse effect on the financial condition of the institution, the department will require the institution to provide financial protection.

Institutions must meet stricter administrative capability criteria

The department will have greater authority to oversee and enforce institutions' compliance with statutory requirements surrounding federal student aid programs. Those institutions that the department deems not capable of administering

Title IV programs, as in the case of triggering events, may be required to furnish financial protection or have their participation in federal student aid programs curtailed, suspended, or terminated.

The regulations encompass most financial aid communications institutions may send students. Financial aid communications will be required to include the institution's cost of attendance, the source and type of aid offered, whether aid must be earned or repaid, the net price, and deadlines for accepting, declining, or adjusting award amounts. Along with these changes, institutions must provide financial aid counseling that the department deems adequate.

Institutions must also develop and follow procedures to evaluate the validity of a student's high school diploma—an easing of the proposed regulations' weightier requirement that an institution verify an online student's diploma in his or her home state. And institutions must deliver career services deemed adequate by the department and provide, within 45 days of a student finishing his or her coursework, geographically accessible clinical or externship options if required for the completion of a student's selected course of study, other than post-graduate clinical experiences (e.g., medical residencies).

Importantly, the regulations will also limit institutions from having a principal or affiliate whose misconduct or institutional closure contributed significantly to federal government liabilities. The department will also consider whether an institution engages in "substantial misrepresentation" or so-called "aggressive" recruitment of new students as part of the administrative capability analysis.

Institutions will be subject to new certification conditions

As an added condition of the department's Program Participation Agreement (PPA), institutions will face new conditions for certification of their participation in federal financial aid programs. These conditions include allowing the department to request teach-out plans or agreements from provisionally certified institutions at risk of closure, requiring distance education providers to comply with state laws regarding closure, and preventing institutions from withholding transcripts for credits paid for with federal student loan funds.

Career training programs initiated after July 1, 2024 will be limited to no more than 100% of the length mandated by the state for certification or licensure. Likewise, new degree programs will be required to meet any state-required programmatic accreditation and licensure requirements. When a student attests he or she intends to move, institutions will be required to show that they meet the receiving state's requirements and clarify which programs lead to provisional licensure or licensure through reciprocity agreements.

The department will no longer automatically renew certifications after 12 months, and provisionally certified institutions with significant consumer protection issues as judged by the department will be required to recertify every three years until those issues are rectified. Further, higher-level direct and indirect owners will be required to sign the PPA and obligate themselves as a condition of certification.

Notably, the final regulations do not include the proposed rules' provision that would have targeted misrepresentation and recruitment at postsecondary institutions and required institutions to comply with specific state consumer protection laws. This change reflects the department's view that generally applicable laws prohibiting unfair and deceptive acts or practices cover the same conduct. The final regulations also exclude the proposed regulations' provisions that would have required institutions to return federal student aid money in certain circumstances.

Students' "ability to benefit" protections will be bolstered

ATB pathways already exist for students who do not have a high school diploma (or its recognized equivalent) to be eligible for Title IV federal student aid under certain circumstances. To ensure that state processes for accessing financial aid are adequate, institutions participating in state ATB processes will be subject to reporting rules and heightened documentation requirements to demonstrate compliance.

The regulations also define an eligible career pathway program (ECPP) ATB students will be required to enroll in to secure federal funds. The department will verify at least one ECPP at each postsecondary institution intending to use ATB.

What's Next

The Biden-Harris Administration's moves to regulate the higher education sector come as a continued wave of the Administration's efforts to raise the regulatory bar on institutions of higher education. The new regulations, aimed at strengthening accountability for higher education institutions, evidence clear and unambiguous federal oversight and enforcement priorities.

Failure to comply with the voluminous new regulations—including many new and heightened requirements for certifications, disclosures, and reporting—could unwittingly land a well-intentioned institution in the department's crosshairs. Even under perfect circumstances, institutions will largely bear the costs of these regulations and the expenses of compliance. Proper preparation will help prevent pitfalls and curb unnecessary costs.

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