Education ADVISORY ■

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New Regulations Proposed by the Department of Education Will Impact Proprietary and Nonproprietary Schools Alike

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The Department of Education has proposed new regulations that could have a significant financial, reputational, and compliance impact on institutions of higher education. While the proposed regulations most directly affect access to federal aid for career training and career services programs, the scope of the new gainful employment, administrative, and financial responsibility regulations extend to all institutions of higher education. The new regulations contain (1) new gainful employment provisions that impact institutions' (both proprietary and nonproprietary) ability to participate in Title IV; (2) heightened administrative capability requirements for both career services and externship requirements; and (3) new triggering conditions for department-imposed financial protections.

These proposed regulations reflect a substantial change in the way Title IV is administered. Higher education administrators and counsel should study them carefully to assess the impact on their institutions. We encourage institutions to consider submitting comments. Comments on the regulations must be submitted by **June 20, 2023** and can be filed online through the federal e-Rulemaking Portal. Institutions should also consider the process, policy, and academic changes that need to be implemented before the regulations go into effect, which will likely be July 1, 2024.

New Gainful Employment Regulations Are More Complex Than Obama-Era Versions

The department has proposed revised regulations to evaluate whether certain academic programs help students obtain gainful employment. The regulations apply to career training programs, which is defined as non-degree programs at all institutions (including certification programs) and degree programs at for-profit institutions. The regulations create a mechanism for measuring whether program graduates can repay their student debt and whether program graduates benefit economically from completing the program relative to high school graduates within the same state.

Similar regulations were first promulgated under the Obama Administration in 2014, but the 2014 regulations were later repealed under the Trump Administration in 2019. Now the Biden Administration has proposed a more stringent version of the 2014 regulations, guided by the Higher Education Act's (HEA) statutory requirement that programs prepare students for gainful employment in a recognized occupation.

The proposed regulations outline a gainful employment framework that would cancel federal aid for any career training program that consistently results in “unaffordable debts” or “low earnings” for graduates. The gainful employment framework relies on two independent metrics: (1) a debt to earnings ratio; and (2) a new earnings premium test.

The debt-to-earnings ratio metric proposes to compare the median earnings of graduates who received federal aid to the median annual payments on loan debt borrowed for the program. Under this metric, a program must show that its debt payments are no more than 8% of annual earnings or 20% of discretionary earnings (i.e., a single individual’s annual earnings minus 150% of the federal poverty guideline) to maintain federal funding. The new earnings premium metric assesses whether a typical career training program graduate who received federal aid earns at least as much as a typical high school graduate in their state’s labor force. Career training programs whose graduates typically earn less than the median high school graduate in their state are considered “low-earning” programs.

A career training program that fails to meet the baseline performance expectations for post-graduation earnings must warn students that the program is at risk of losing access to federal aid. Programs that fail to meet the same metric for two years over a three-year period would lose their eligibility to participate in federal aid programs. The gainful employment framework proposes to establish a new disclosure page on the department’s website that will inform students and families about each career training program’s financial value. To increase transparency, institutions will be required to give students the link to the department’s disclosure website.

Students enrolled in or planning to enroll in a low-earning program will be required to confirm that they have reviewed the disclosure website before federal financial aid is disbursed. Additionally, the low-earning career training program will have to observe a minimum three-day “cooling-off period” from the date the prospective student reviewed the disclosure website before the low-earning career training program can enroll, register, or have the prospective student financially commit to the school.

Though the department acknowledges that the benefits of a career training program should not be limited to only what graduates earn, it asserts that establishing a minimum performance expectation for post-graduation earnings ensures programs do not negatively affect a student’s future economic well-being. But condensing its analysis to only two metrics may be shortsighted and may result in substantive errors. For example, the metrics do not take into consideration jobs that start off at a lower salary but increase pay over time (e.g., residency programs and apprenticeship programs). The metrics also fail to evaluate whether program graduates actively pursue higher-paying employment opportunities in their field of training.

The proposed regulations provide challenges for both proprietary and nonproprietary institutions. The risk to proprietary institutions is obvious—the proposed regulations seemingly specifically target programs at proprietary institutions. There are at least 25 programs at proprietary institutions that are already considered low-earning career training programs. Though it is unclear whether schools that are already considered low-earning career training programs will be exempt from the requirements outlined in the proposed regulations, it is clear that upon implementation, the proposed regulations will likely expand the list of low-earning career training programs and increase the number of schools at risk of losing federal aid.

The department should consider these issues and ensure that mechanisms are put in place to ensure equity across the board. The challenges for nonproprietary institutions are more subtle. While the gainful employment metrics would affect Title IV eligibility of only non-degree programs at nonprofit and public institutions, the gainful employment metrics will still be calculated for *all* programs at those schools.

New Administrative Capability Regulations Require Expanded Financial Aid and Career Counseling Services for Proprietary and Nonproprietary Institutions

The department’s proposed regulations also include revisions and additions to the administrative capability regulations. These regulations set forth requirements for financial aid counseling, career counseling, and other requirements that ensure an institution is “administratively capable” of participating in and administering Title IV programs. The new regulations would expand the list of financial aid and career counseling services that educational institutions must make available to students and that are scrutinized by the department for purposes of determining a program's eligibility to participate in federal programs. The proposed regulations would also impose a new and significant burden on schools to build career programming opportunities for students that may not have previously existed.

The proposed regulations would require that institutions provide adequate financial aid counseling and financial aid communications that include information about the cost of attendance, net price, and sources and amounts of each type of aid available. This proposal is aimed at ensuring completeness of information provided to students and families and avoiding confusion, which the department cites as a concern under the existing regulations.

But the proposed regulations also go one step further—they obligate institutions to advise students to accept the most beneficial type of aid first. This particular requirement may introduce challenges for schools that will now be required not only to provide a student with relevant financial aid information but also to interpret that information for the student and make a recommendation on how to proceed.

The proposed regulations also impact career services programs and related externship opportunities for students. Under the proposed regulations, institutions would be required to "provide adequate career services to eligible students who receive Title IV, HEA program assistance." Such adequacy would be assessed based on:

- The number of students enrolled in GE programs at the school
- The number and distribution of career services staff
- The career services the institution promised to its students
- The presence of partnerships between institutions and recruiters who regularly hire graduates.

The regulations would not impose a required ratio for career services staff but would require a "connection" between the services promised to students and what is actually provided. The regulations do not provide information on the data or objective markers the department intends to use to inform its adequacy determinations for these programs.

And the department has not indicated whether the regulations will take into account the reality that the components of an adequate career services program could vary based on the type of program involved—that is, students in certain GE programs preparing students to enter more nascent industries might require more assistance from career services staff than students in other programs where, perhaps, the channels for applying for and securing employment are well-established.

In addition to career services program requirements, the proposed regulations would also require institutions to provide students with "accessible clinical, or externship opportunities related to and required for completion of the credential or licensure in a recognized occupation, within 45 days of the successful completion of other required coursework."

This proposal could create real challenges for institutions that do not already have established externship programs. Indeed, developing relationships with third-party organizations (such as hospitals, schools, businesses, governmental agencies, and more) to facilitate a successful externship program that adds value to the student experience and prepares students for licensure in a particular field can take significant time. The department should consider a realistic timeline for compliance to give schools the necessary time to build meaningful externship opportunities and to avoid the potential unintended consequence of providing externships that fail to provide meaningful training and real-world experience to students.

The Proposed Financial Responsibility Regulations Allow the Department to Seek Financial Help More Easily

The department's proposed regulations also include changes that would allow the department to obtain earlier financial protection from institutions showing signs of financial struggles. The regulations would require institutions to meet certain conditions to participate in federal financial aid programs, resulting in greater oversight. According to the department, the proposed regulations in this arena are designed to allow the department to respond faster and with greater flexibility when issues that could lead to school closures arise.

The proposed regulations provide an updated list of mandatory and discretionary triggering conditions that would require providing notice to the department. The updated list includes several new mandatory and discretionary conditions and moves some conditions from discretionary to mandatory. Upon a trigger, the department can (1) immediately seek financial protection; or (2) recalculate an institution's financial responsibility score to determine whether its condition has materially weakened. The department may increase financial protection via a letter of credit or by requiring the institution to set aside funds to reimburse students and taxpayers if the institution closes.

The mandatory triggers that require notice to the department are designed to monitor external events that might not be reflected in an institution's composite score but that might indicate that the institution is at risk.

Under the new proposed regulations, a "mandatory trigger" would occur when an institution:

- Is required to pay a debt or other liability that will result in a failing financial responsibility score when added to its current financial responsibility calculation.
- Is subject to lawsuits (state, federal, qui tam) where the potential liability would result in a failing financial responsibility score when added to its current financial responsibility calculation.
- Is at risk of losing access to federal aid due to having a high cohort default rate, failing the 90/10 revenue requirement, or having a significant share of aid in failing gainful employment.
- Is inflating its own financial responsibility score by making a contribution to the institution.
- Discourages department oversight actions by entering into debt covenants that could cause adverse conditions if the department places limitations on its access to federal financial aid.
- Declares financial exigence.
- Enters a receivership.

The "discretionary triggers" would apply when an institution:

- Is subject to adverse accreditor actions, such as show cause or probation.
- Experiences significant fluctuation in the amount of federal aid.
- Closes programs or locations that enroll significant shares of students.
- Is subject to adverse actions by states and other federal agencies.

While the proposed regulations may have a more significant impact on for-profit institutions, all colleges and universities will be impacted by the wide-ranging new regulations. All institutions should consider whether they want to submit a comment by **June 20, 2023** to address the concerns and adverse impacts that the proposed regulations will have on institutions and should prepare for compliance once the regulations take effect. Alston & Bird's Education Team is able to assist with any questions institutions may have on these proposed regulations.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or anyone from our **Education Team**:

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