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Biden-Harris Administration Releases Final Rules Intended to Promote Financial Responsibility for Colleges and Consumer Protection for Students

October 31, 2023

On October 24, 2023, the Biden-Harris Administration ("Administration"), as part of its ongoing efforts to strengthen oversight and accountability with regard to colleges and universities, released the final regulations relating to the enhancement of financial responsibility measures for institutions of higher education ("institutions") and consumer protections for student borrowers and taxpayers. The U.S. Department of Education ("Department") finalized the rules in response to public comments received following the publication of the draft rules in May 2023. The final regulations were published in the Federal Register on October 31, 2023, and will go into effect on July 1, 2024. To view the final regulations, click here.

According to the Department's press release, the final regulations will affect four main areas: (1) financial responsibility, (2) administrative capability (3) certification procedures, and (4) ability to benefit (establishes clearer processes for access to Federal aid for students who do not have a high school diploma or its recognized equivalent). The majority of the changes reflected in the final rules involve the financial responsibility and accountability measures. The Department also released a Fact Sheet, which summarizes the key provisions of the final rule.

Per the press release, U.S. Secretary of Education Miguel Cardona stated that the final regulations seek to fix a "broken system, which failed to protect students and families, and [address] abuses in higher education that have cost taxpayers billions of dollars in recent years." U.S. Secretary of Education Cardona further stated that by "raising the bar for [institutional] accountability," students will have a "greater shot at the American dream."

Moreover, students who are enrolled at an institution that closes are less likely to complete their academic program. The final rules on financial responsibility and accountability are intended to disincentivize institutions from engaging in "risky behavior" and allow the Department to quickly respond when institutions show warning signs of closure. For example, § 668.171(c) outlines a list of "mandatory triggering events," most of which constitute an automatic failure of financial responsibility criteria. For mandatory triggers that result in a recalculated composite score of less than 1.0 and those that constitute automatic failures of financial responsibility criteria, the institution must provide financial protection. The amount of the financial protection is ten percent (10%) of the total Title IV, HEA funding in the prior fiscal year. Where there is more than one mandatory or discretionary triggering event, the Department may require separate financial protection for each

triggering event. However, for mandatory triggering events that constitute an automatic failure of financial responsibility criteria, the Department may consider whether the financial protection can be released following the submission of two full fiscal years of audited financial statements.

Examples of mandatory triggering events offered in the final rule include, but are not limited to:

- Having a failing financial responsibility composite score due to a debt, liability, or lawsuit brought against the institution by a Federal or state actor.
- A *Qui Tam* lawsuit, in which the federal government has intervened, if the action has been pending for 120 days after the intervention.
- The state, the Department, Federal agency, or another oversight body requires the institution submit a teach-out plan or agreement due to financial concerns.
- The institution's two most recent official cohort default rates are 30% or greater, which puts the institution at risk of losing access to federal aid.
- The institution declares a state of financial exigency or enters into a receivership.

§ 668.171(d) of the regulations provide a list of "discretionary triggering events" which will cause the Department, on a case-by-case basis, to evaluate whether the institution is financially responsible. If the Department determines the discretionary triggering event has a significant adverse effect on the institution's financial condition, then the institution must provide financial protection.

Examples of discretionary triggering events offered in the final rule include, but are not limited to:

- The institution is placed on probation or in a status that poses an equivalent or greater risk to the institution's accreditation, authorization, or eligibility.
- An institution closes programs or locations that enroll more than 25% of its students who receive title IV, HEA program funds.
- A creditor listed In the institution's financial statements takes steps to withdraw, limit, or suspend a loan or financing agreement with the institution.

This alert provides an brief overview of the Department's final regulations. Nothing herein creates an attorney-client relationship between the sender and recipient. Cullen and Dykman LLP will continue to monitor developments and provide updates when available. If you have any questions on how the final regulations may impact your institution, please feel free to contact Dina Vespia (**dvespia@cullenllp.com**), Deirdre Mitacek (**dmitacek@cullenllp.com**) or any member of our **Higher Education Practice Group**.

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