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Higher Education

## **Department of Education's Financial Responsibility Standards and Reporting Requirements Apply to both Public and Private Institutions**

On November 1, 2016, the U.S. Department of Education published final regulations addressing a federal student loan borrower's ability to avoid repayment of the loan based upon acts or omissions of the educational institution. In part, the final regulations sought to ensure the financial viability of institutions that receive Title IV funding and imposed a requirement on the institution to report to the Department the occurrence of certain litigation events. Originally intended to be effective July 1, 2017, these regulations were placed in abeyance by Executive Order of President Trump in January 2017. A court order ended the delay and the regulations were effective on October 16, 2018.

The education industry has previously viewed the reporting obligation to apply solely to private institutions. However, on June 3, 2019, the Department released a Question & Answer (Q&A) document clarifying the agency's position that the final regulation's reporting obligation also applies to public institutions. Public institutions should make note of this requirement as the regulation's requirement is broader than it initially appears.

### **What is Reportable?**

Generally, the regulations seek to determine the ability of an institution to meet its financial obligations. One item factored into the analysis is the institution's potential liability. The reporting requirements allow the Department to vet this. Extending this reporting requirement to public institutions is somewhat odd because the regulations also concede that a public institution is already considered to be financially responsible.

Items that institutions must report include:

1. Lawsuits in which the institution is required to pay any debt or incur any liability arising from a final judgment in a judicial proceeding or from an administrative proceeding or determination, or from a settlement;
2. Suits in which the institution is being sued by a state or federal authority for financial relief on claims related to the making of the Direct Loan for enrollment at the school or the provision of educational services; provided, however, that the suit has been pending for 120 days and was initially filed on or after July 1, 2017;
3. “Other actions” brought on or after July 1, 2017, unrelated to a lawsuit described in 2, above
4. Receipt of an accrediting agency’s notice that the institution must submit a teach-out plan;
5. Withdrawal of an owner’s equity;
6. Failure to derive at least 10% of revenue from non-Title IV sources;
7. Citations by a state or authorizing agency for a violation of its requirements;
8. Accrediting agency issuance of a show cause order or placement on probation; and
9. Violations of a loan agreement that result in a default or delinquency event, or another event occurs that could result in other sanctions, penalties, or fees (or creditor’s waiver thereof).

### **Distinguishing Reportable Litigation**

One of the most unclear parts of the regulations addresses the reporting of litigation. The regulations appear to split actions into three parts, identified as 1-3, above. However, the preamble does little to clarify the difference between the groups.

It appears, from the Q&A and the text in the preamble (“Informal Guidance”), that the Department intends for reporting in groups 1 and 2 to account for situations where the action involves a borrower defense; however, we caution readers that group 1 is stated more broadly than the Informal Guidance’s limitations suggest.

It further appears from the Informal Guidance, that the catch-all identified in group 3 involves governmental actions unrelated to borrower defenses and private party actions. The distinction is important because the triggering events for a report differ depending upon the applicable group.

For group 1 and 2, a report must be made within 10 days of the following events:

- The date the compliant is served upon the institution;
- The date the suit has been pending for 120 days (established to eliminate reporting for actions which may be dismissed in the interim); and
- The date upon which payment is required or a liability is incurred from the lawsuit or action.

For group 3, a report must be made within 10 days of the following events:

- The date the compliant is served upon the institution;
- The date the court sets out the scheduling order for the action delegating any of the following dates: summary disposition motion deadlines, pretrial conference date, and trial date; and
- The earliest of the following to occur:
  - The court ruling on a motion for summary judgment, summary disposition, or notifying the parties of the court's intent to reserve judgment on the motion;
  - The passing of the summary judgment or summary disposition deadline if one was set and the institution has opted not to file such a motion; or
  - If no deadline was set for summary judgment or summary disposition (and none was filed by the institution), the earlier of the date of the pretrial conference or trial date (provided the case is still pending upon such date).

It is this group 3 for which we believe institutions will need to be the most concerned because the category is so broad. Further, because the groups, as stated in the regulations, appear to overlap, further guidance from the Department would be welcome. Until then, institutions which have an obligation to report should be consulting with counsel to ensure the institution is making a timely and appropriate filing.

### **What Are The Reporting Requirements?**

#### *New Events*

Each of the above-referenced events has specific timeframes in which disclosure must be made, but most are within ten (10) days of the date the institution learns of the event. To that end, institutions should put in place redundancies (i.e., multiple responsible individuals) to monitor and report events.

#### *Old Events*

Based on the regulations and the Q&A, it is unclear whether public institutions have to report old events. However, out of an abundance of caution, public institutions should consider whether to report: (1) applicable events occurring from July 1, 2017 to March 14, 2019, which were still active as of March 14, 2019; and (2) events occurring after March 15, 2019. Such consideration and reporting are currently delinquent and, if deemed appropriate, should be done as soon as possible. We recommend the involvement of legal counsel in this regard.

### **How Should An Institution Report To The Department?**

Unfortunately, there is currently no template identifying how institutions are supposed to comply with the reporting requirement. The Department has identified e-mail as the preferred method of communication. The Q&A suggests institutions indicate if any of the information submitted is confidential and/or proprietary.

The Q&A suggests institutions submit a number of different items depending on the type of event they are reporting. In general, the Department suggests providing the institution name, OPEID, triggering event type, triggering event date, status of triggering event, and point of contact for any follow-up. For any

debts, liabilities, and losses reported, the Department suggests submitting copies of relevant documentation, which may include judicial filings and orders. As a practical matter, institutions may wish to provide limited information initially and respond to follow-up requests that may come.

### **Other Information**

Notably, on July 31, 2018, the Department published a proposed rule in the Federal Register. The new rule would rescind the 2016 regulations described here, change the financial responsibility standard, and modify what constitutes a triggering and reportable event. Over 30,000 comments were received. However, as of the date of this alert, the final rule has not been published.

If you have any questions about this process, please contact your Michael Best attorney.

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