

ED's latest proposed rulemaking: Pursuing its own agenda

September 6, 2018

The U.S. Department of Education's (ED) higher education policymaking agenda so far in 2018 has to a large degree seemed to focus on rolling back initiatives of the Obama administration, including several rulemaking efforts focused on protecting student borrowers and increasing oversight of for-profit institutions. ED recently [announced](#) a plan to rescind the much debated gainful employment rule in favor of disclosure requirements to be applicable to all institutions. Expanded borrower defense to repayment rules, which had been re-written in the wake of the collapse of several large for-profit institutions, are now [proposed](#) to be significantly scaled back. And rules regarding state authorization of distance education were [delayed again](#), except notably the requirements related to foreign locations.

While these sweeping changes are each subject to the publication of final rules or ongoing legal challenges and therefore require continued attention, ED now appears ready to "turn the page" and pursue its own ambitious rulemaking agenda. On July 31, ED [announced](#) its intention to establish a negotiated rulemaking committee with a focus on fostering innovation in higher education through de-regulation. ED plans to suggest revisions to numerous regulations, including several challenging and controversial topics, including

- criteria used by ED for the recognition of accrediting agencies with a focus on institutional mission and educational quality (including developing new standards for measuring and reporting job placement rates) as well as the process for recognition and review of accrediting agencies;
- rules on direct assessment programs and competency-based education, with a focus on identifying barriers to the implementation of such programs;
- the definitions of "regular and substantive interaction" for purposes of distance education and of the "credit hour";
- the "written arrangements rules" governing the outsourcing of educational programs to another educational institution or organization (which were previously the subject of ED's Educational Quality through Innovative Partnerships (EQUIP) pilot program);
- state authorization requirements for distance education programs, including disclosures to enrolled and prospective students; and
- other barriers to innovation and competition in postsecondary education or to student completion, graduation, or employment, including the eligibility of faith-based entities to participate in Title IV programs.

ED is [accepting written comments](#) on the topics suggested by ED and suggestions for additional topics that should be considered by the negotiated rulemaking committee until September 14, 2018.

The negotiated rulemaking process also will include three public hearings in September, which will be followed by the nomination and selection of participants to the negotiated rulemaking committee. ED anticipates it will convene the committee in January and is proposing two subcommittees to facilitate the work of the committee — one focused on direct assessment programs/competency-based programs and another on the eligibility criteria for faith-based entities. Based on this initial timeline, final rules potentially could be developed and released by fall 2019, to take effect July 1, 2020.

In the absence of any significant progress in Congress on the reauthorization of the Higher Education Act, this rulemaking likely will take center stage in 2019 as far as the Title IV programs are concerned. Like the Obama administration's comprehensive 2010 "program integrity" rulemaking package, ED's new regulatory agenda promises to impact in significant ways virtually all higher education institutions, as well as many higher education investors and ed tech companies.

We are available to respond to questions.

Contacts



Greg Ferenbach
Counsel, Washington, D.C.
T +1 202 637 6457
greg.ferenbach@hoganlovells.com



Michelle Tellock
Senior Associate, Washington, D.C.
T +1 202 637 6561
michelle.tellock@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2018. All rights reserved.