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# Complying with New Federal Regulatory Requirements

MAACS Annual Conference

Lancaster, PA | July 26, 2023

# Presenter

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# MAYNARDNEXSEN

## Education

Maynard Nexsen's Higher Education Group is deeply experienced in all manner of regulatory issues that are important to

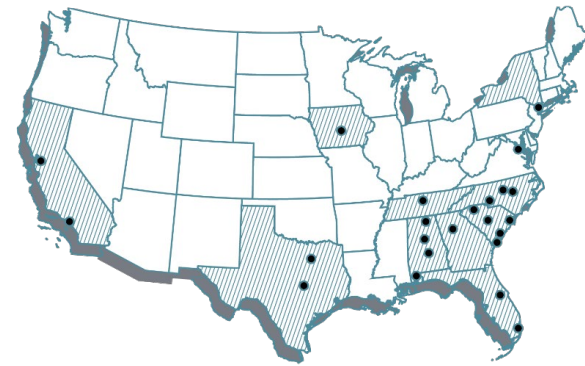
- Institutions of higher education
- Educational investors
- Third-party servicers
- Accrediting agencies

Attorneys in the group have worked in

- The U.S. Department of Education
- Nationally recognized accrediting agencies
- Specialized law firms focused on higher education

They also have served as in-house and outside counsel to colleges and universities, investor groups, and accrediting agencies

23 OFFICES FROM COAST TO COAST



The Firm's other practice groups have a long history of working with institutions of higher education in matters such as

- Banking and Finance
- Cybersecurity
- Real Estate
- Employment and HR
- Intellectual Property
- Immigration
- Litigation
- Transactions

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- If you desire legal advice for a particular situation, you should consult an attorney.

# Recent Regulatory Updates

- Borrower Defense to Repayment
- Arbitration and Class-Action Waivers
- 90/10
- Personal Liability
- Ownership Changes
- GLBA Safeguards Rule and Required Cybersecurity Updates
- FTC Updates to Advertising and Endorsement Guides

# Regulatory Updates on the Horizon

- Gainful Employment
- Third-Party Servicer Guidance
- Title IX
- Secret Shoppers
- Proposed FTC Rule on Use of Customer Reviews and Testimonials

# Borrower Defense to Repayment

- A Borrower Defense to Repayment is “an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided and that caused the borrower detriment warranting relief.”

# Borrower Defense to Repayment

- New regulations effective July 1, 2023
- Five acts or omissions that will support a BDR claim:
  - Substantial misrepresentation that misled the borrower about attending the school or taking out a covered loan
  - Substantial omission of fact regarding the borrower's decision to attend the school or take out a covered loan
  - Breach of contract by school that fails to perform its obligations to the student borrower
  - Aggressive and deceptive recruitment by school
  - State or federal judgment regarding school acts or omissions, or adverse actions by ED to deny or revoke a PPA



# Borrower Defense to Repayment

- Substantial misrepresentation and substantial omission are defined at 34 CFR §§ 668.71-668.74
- Misrepresentation covers a broad range of false, erroneous, or misleading statements by an institution or its representatives regarding the nature of the educational program, financial charges, and the employability of graduates, including the omission of information that makes statements on these matters false, erroneous, or misleading
- A substantial misrepresentation is any misrepresentation on which a person relies or could be expected to rely to that person's detriment

# Borrower Defense to Repayment

- New Section 668, Subpart R (34 CFR §§ 668.500-668.509) defines aggressive and deceptive recruitment to include (but not limited to):
  - pressuring the applicant to make immediate enrollment or borrowing decisions;
  - taking advantage of the applicant's unfamiliarity with postsecondary education or borrowing;
  - discouraging the applicant from consulting family or friends about enrollment or borrowing decisions;
  - obtaining the applicant's contact information through improper means, such as falsely advertising employment opportunities;
  - using threatening or abusive language or behavior toward the applicant; or
  - repeatedly contacting the applicant for enrollment after the applicant has requested no further contact

# Borrower Defense to Repayment

- Regulation re-establishes group claim process:
  - Can be initiated by Secretary based on information available to the Department
  - Can be established by Secretary in response to request from a “third-party requestor”:
    - State requester, such as State AG or oversight agency; or
    - A nonprofit legal aid organization

# Borrower Defense to Repayment

- Individual claimants must file materially complete application that describes detriment suffered by borrower
- For group claims, the Department presumes that school's actions caused harm to the borrowers
- Group claimants do not have to show reliance or detriment, and they may not even know that claims have been filed on their behalf

# Borrower Defense to Repayment

- If a single borrower's claim is denied, the borrower can request reconsideration by the Secretary
- If a group claim is denied, the group members are advised of their rights to file individual claims
- There is no opportunity for a school to appeal an approved BDR claim

# Borrower Defense to Repayment

- If the Secretary does not make a decision on a claim within 3 years, the loans are discharged and no liability is assessed to the school
- Secretary can seek recovery from schools or their affiliates for loans disbursed after July 1, 2023
- Secretary has limited rights to seek recovery for discharged loans disbursed prior to July 1, 2023

# What Schools Should Be Doing Now

- Review all marketing and advertising materials for truth and accuracy
- Revise materials that include exaggerations and statements that could be misunderstood or that cannot be supported by objective evidence
- Update advertising materials to comply with new and proposed FTC guidelines regarding customer reviews, testimonials and endorsements

# What Schools Should Be Doing Now

- Build a secure file in which evidence supporting factual statements is accessible and retained indefinitely
  - There is no statute of limitations on BDR claims
  - Evidence should be secure and retrievable, no matter staff turnover or technology updates
- Review scripts, policies, and procedures used by recruiters and admission representatives
- Document that recruiters and admission representatives are trained and aware of institutional policies prohibiting aggressive recruiting practices



# Arbitration and Class Action Waivers

- New BDR regulations re-introduce ban on use of mandatory pre-dispute arbitration agreements and class action waivers regarding any aspect of a BDR claim as of July 1, 2023
- If the school's current enrollment agreement, catalog, or other agreement with students contains a mandatory arbitration agreement or class action waiver, the school must either (a) amend the agreement or (b) advise students in writing that these provisions are not enforceable after July 1, 2023
- 34 CFR §§ 685.300(e)(3) and 685.300(f)(3) provide specific language that schools must use **verbatim** to make the required notices to students

# Arbitration and Class Action Waivers

- Schools also have new reporting obligations as of July 1, 2023:
  - Must notify ED of any lawsuit in connection with a BDR claim filed against the school by a student or other party
  - Must provide ED with copies of complaint, any counterclaim, dispositive motions, rulings thereon, and judgments within 30 days of filing or receipt
- ED will publish these records in a public database

# What Schools Should Be Doing Now

- Review Dear Colleague Letter GEN-23-10 (7/3/23)
- Review catalogs and enrollment agreements to identify all arbitration and class-action waiver language
- Provide students with required notices regarding enforcement of these provisions
  - If not provided by July 1, then comply by July 1 and provide notice no later than at exit counseling or in initial response to a complaint or demand for arbitration, whichever is earlier
- Develop policies and procedures to ensure timely notice to ED of all legal actions related to a BDR claim

# 90/10

- For fiscal years beginning after January 1, 2023, all federal education assistance funds count on 90% side
- ED published list of federal funds in the *Federal Register* on December 21, 2022, and will update the list from time to time as necessary
- Schools must obtain a certification from local and state agencies regarding the share of federal funds included in any payments
- Schools must attempt to ascertain the federal share of any funding sent directly to students if they make payments to schools
- Schools must use good-faith efforts to make these determinations or exclude the funds entirely from the 90/10 calculation

# 90/10

- ED also revised the types and sources of revenues that can count as non-federal revenue on the 10% side
  - Can continue to count revenues from activities necessary for students' education and training (e.g., clinic revenue)
  - Activities must be:
    - Conducted on campus or in a facility controlled by school
    - Performed under supervision of school faculty
    - Required for all students in the program
    - Related directly to services performed by students

# 90/10

- ED also revised the types and sources of revenues that can count as non-federal revenue on the 10% side (cont.):
  - Revenue from ineligible programs still counts
    - Cannot include any courses included in eligible programs
    - Must be offered by the school and taught by its faculty
    - Must be taught at the school, another location approved by the state or accreditor, or at an employer facility – not online
  - Sale of accounts receivable or institutional loans is excluded

# What Schools Should Be Doing Now

- Ensure that accounting systems are properly capturing and categorizing all federal funds
- Check with local and state funding sources to determine federal share, if any
- Develop procedures for determining what funds, if any, are provided directly to students
- Obtain state or accreditor approval for any off-campus locations where ineligible programs are delivered
- Revise ineligible programs to eliminate any courses included in eligible programs

# Ownership Changes and Updates

- Threshold for triggering a change of ownership increased to acquisition or loss of 50% or more of voting interests in ownership entity, up from 25%
- Threshold for reportable changes in ownership percentages lowered to 5% from 25%
- Schools must report any acquisition of at least 5% but less than 25% of the entity ownership interests that do not otherwise trigger a change of ownership on a quarterly basis
- Must report any acquisition of 25% or more within 10 days



# Ownership Changes and Updates

- A school planning a change of ownership must provide written notice to both ED and its students at least 90 days prior to the anticipated transaction date
  - Notice to ED must include current state and accreditor approvals and evidence of notice to students
- If the school is planning for a change of ownership, all incremental changes not previously reported must be reported before the new 90-day notice
- Optional Abbreviated Pre-Acquisition Review (APAR) application remains available

# Ownership Changes and Updates

- APAR is for limited purpose of determining whether prospective buyer has 2 years of acceptable audited financial statements
  - If only 1 year, ED will require New Owner LOC of at least 10%
  - If no acceptable audit statements, New Owner LOC will be at least 25%
  - APAR should be submitted at least 60 days in advance of transaction
- ED can impose new conditions as part of review and approval
- New restrictions on conversions to non-profit status

# What Schools Should Be Doing Now

- Develop policies and procedures for tracking and reporting ownership percentage changes to ED at least quarterly
- If contemplating a change of ownership, build 90-day notice requirements and time for APAR, if requested, into the transaction timeline

# Personal Liability

- **March 23, 2022**, Electronic Announcement on signatures to PPAs:
  - PPA currently signed on behalf of school by CEO or other authorized person
  - ED may require PPA signatures from other corporate or legal entities that can affect a school's financial responsibility
  - There is a rebuttable presumption that these entities include:
    - Sole owner or member with 100% of voting rights
    - Owners with less than 100% interest who exercise substantial control (i.e., voting interest of at least 50%, either alone or by agreement with others)
    - Entities that provide the financial statements for the school

# Personal Liability

- March 23, 2022, Electronic Announcement on entity signatures to PPA (cont.):
  - ED may require entity signatures for many reasons:
    - Composite score below 1.5
    - Provisional certification or HCM2
    - Change of ownership
    - Significant number of approved or pending BDR claims
    - Significant program review or audit findings
    - Legal judgment finding fraud or misrepresentation
  - New policy effective for PPAs signed on or after July 1, 2022

# Personal Liability

- **March 1, 2023**, Electronic Announcement:
  - ED may require individuals in some cases to sign PPAs to assume personal liability for financial losses to ED
  - Targets persons who exercise substantial control
    - Substantial ownership interest in school, either alone or through proxy, trust, or similar agreement with others
    - Directors and executive officers

# Personal Liability

- March 1, 2023, Electronic Announcement (cont.):
  - ED by statute cannot impose personal liability if the school:
    - Has not been subject to LS&T action in last 5 years;
    - Has not had audit finding in last two compliance audits requiring repayment of more than 5% of school's Title IV funds;
    - Meets and has met for previous 5 years ED's financial responsibility requirements; and
    - Has not been cited in last 5 years for failing to file required audits timely

# Personal Liability

- March 1, 2023, Electronic Announcement (cont.):
  - ED can require personal liability for many reasons, such as:
    - School receives significant amount of Title IV funding
    - Significant number of approved BDR claims
    - Lawsuits, settlements or legal actions involving student aid or claims or dishonesty, fraud, misrepresentation, etc.
    - Financial responsibility problems such as composite score below 1.0 or going concern disclosure by auditor
    - Failing to meet 90/10



# Personal Liability

- March 1, 2023, Electronic Announcement (cont.):
  - ED can require personal liability for many reasons (cont.):
    - Substantial increase or decrease in Title IV funding
    - High withdrawal or low retention rates
    - Executive compensation or bonus plan that threatens finances
    - Significant administrative capability findings
    - Significant or systemic audit or program review findings
    - State or accreditor actions, including show-cause or suspension order
    - Any other relevant factors to protect U.S. financial interest

# What Schools Should Be Doing Now

- Take actions to establish the four conditions that prevent ED from imposing personal liability
- Ensure that potential signatories are on notice and establish contingency plans
- Review possibility of D&O insurance coverage with broker
- Explore potential financial protection alternatives, such as letters of credit

# GLBA Safeguards Rule and Required Cybersecurity Updates

- Federal Trade Commission amended the Safeguards Rule in Fall 2021
- Safeguards Rule addresses data protection and cybersecurity requirements for financial institutions
- Schools that participate in Title IV are covered financial institutions pursuant to Gramm-Leach-Bliley Act
- Compliance with GLBA is required per PPA
- Revised rule became effective June 9, 2023

# GLBA Safeguards Rule and Required Cybersecurity Updates

- Revised Safeguards Rule imposes several new requirements on schools:
  - Prepare written risk assessment addressing risk evaluation and mitigation and the status of the school's information systems and data protection
  - Designate a qualified employee to oversee information security program
  - Design and implement plans to limit access to consumer data, including encryption and multi-factor authentication
  - Develop incident response plan
  - Conduct periodic assessment of service providers

# GLBA Safeguards Rule and Required Cybersecurity Updates

- ED announced that it will begin enforcement of new Safeguards Rule requirements as of June 9, 2023
- Compliance with GLBA and Safeguards Rule will be assessed in annual compliance audits:
  - Is there a designated responsible employee?
  - Has the school performed a risk assessment addressing staff training, security of information systems, and detection and response plan for system failures?
  - Has school documented a safeguard for each risk?

# What Schools Should Be Doing Now

- Designate a responsible person to oversee cybersecurity function
- Conduct risk assessment
- Document safeguards for each identified risk
- Develop written policies and procedures for responding to a breach or other incident
- Train staff

# Additional Resources

- <https://www.maynardnexsen.com/capabilities-education#Client-Alerts>
- <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-07-03/implementation-and-policy-guidance-pre-dispute-arbitration-agreement-provisions>
- <https://www.federalregister.gov/documents/2022/12/21/2022-27732/list-of-federal-education-assistance-for-proprietary-institutions-of-higher-education-to-include-as> (federal funds for 90/10)
- <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements>
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Thank  
You

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