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U.S. Department of Education Issues Proposed Regulations From Latest Title IV Program Integrity Rulemaking

Drinker Biddle

Article By Cindy Irani
Jonathan D. Tarnow
Drinker Biddle & Reath LLPClient Alert

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On May 18, 2015, the Department of Education (the "Department") published a Notice of Proposed Rulemaking ("NPRM") reflecting its proposed regulations on three of six topics that were part of its spring 2014 negotiated rulemaking on Title IV program integrity.[1] The majority of the NPRM details the Department's proposed amendments to its cash management regulations, most notably new restrictions and requirements governing relationships between postsecondary institutions and financial account providers. The NPRM also includes changes to how previously passed coursework may be treated for Title IV eligibility purposes, and it removes provisions requiring certain programs that are generally subject to clock-to-credit hour conversion rules to be considered clock hour programs for Title IV purposes.

The deadline for comments to the NPRM, which is summarized below, is July 2, 2015.

Title IV Cash Management

As discussed during the negotiated rulemaking and reiterated in the NPRM, the Department has become increasingly concerned about what it calls a "proliferation of marketing of campus debit and prepaid cards to students in exchange for monetary benefits to schools, often in the form of significant remuneration or the low- or no-cost administration of financial aid disbursement services." In particular, the Department cites findings by USPIRG, Consumers Union, the GAO and the Department's Inspector General that: financial account providers have reportedly prioritized disbursements of Title IV credit balances to their own accounts rather than aid recipients' preexisting bank accounts; providers and institutions have implied to students that signing up for such a debit card from a financial account provider is a prerequisite to receive Title IV funds; institutions have shared private student information unrelated to the financial aid process with financial account providers before student consent was received to open an account; and providers have charged students "onerous, confusing, or unavoidable" fees to access their Title IV funds through such accounts and debit cards.

In response to its concerns, the Department is proposing a number of new regulations on arrangements between postsecondary institutions and financial account providers. Under the proposed rules, it would classify such arrangements into two tiers. Tier one ("T1") arrangements would be those where a third-party servicer performs one or more of the functions associated with processing direct payments of Title IV funds on behalf of the school and also offers one or more financial accounts to students and parents. Tier 2 ("T2") arrangements would be those whereby a school contracts with a financial institution (or entity that offers financial accounts through a financial institution) under which financial accounts are offered and marketed directly to students or their parents. Among other things, the Department seeks comments regarding whether its regulations should require a minimum number of credit balance recipients at an institution before an institution would be subject to certain obligations applicable to T2 arrangements.

For both T1 and T2 arrangements, the regulations would require institutions to establish a process that provides each student with a choice on how to access his/her Title IV funds, and would specifically:

- Prohibit institutions from requiring students or parents to open an account into which their credit balances

must be deposited.
- Require institutions to provide a list of account options that a student may choose from to receive credit balance funds. In such a list, each option must be presented in a neutral manner and the student's preexisting bank account must be listed as the first, most prominent, and default option. The Department seeks comment regarding whether the option to receive a check should continue to be affirmatively offered to students.
- Ensure electronic payments made to a student's preexisting bank account are as timely as, and no more onerous than, payments deposited to a T1 or T2 account.

The proposed regulations would further require an institution to obtain consent from a student or parent to open an account under a T1 or T2 arrangement before the institution shares personal information about a student or parent with the financial service provider, and before the institution or account provider sends an access device (i.e., debit card) to the student or parent or links the student's ID card with an account. The Department seeks feedback on whether the personal information that an institution may provide before a student or parent consents to open a financial account, as proposed under the new regulations, is sufficient to meet the needs of a servicer or financial institution.

The NPRM also proposes mitigating fees incurred by financial aid recipients by requiring reasonable access to surcharge-free ATMs. For accounts offered under a T1 arrangement, the Department proposes prohibiting point-of-sale fees and overdraft fees, as well as providing students and parents with 30 days after a Title IV disbursement to access funds without incurring any fees. However, the Department seeks feedback about whether 30 days is an appropriate timeframe.

The Department also proposes requiring that contracts governing T1 and T2 arrangements and cost information related to those contracts be provided to the Department and published on the institution's website. Institutions would be required to submit to the Department the URL of the webpage where such information is posted and the Department would make the URLs publicly available.

The proposed regulations would require that an institution evaluate its T1/T2 arrangement contracts in light of the "best financial interests" of the students. That is, the institution must: 1) document that it periodically conducts reasonable due diligence to ascertain whether fees imposed under the arrangement do not, on the whole, exceed prevailing market rates (the Department seeks comment about whether this requirement is excessive); 2) ensure that all contracts for the marketing or offering of accounts to students and parents provide that the institution may terminate the arrangement based on complaints received or upon a determination that the fees imposed are excessive; and 3) take affirmative steps to ensure that the requirements of the cash management regulations are met. Such institutions must also ensure that the accounts offered pursuant to T1 or T2 arrangements comply with the applicable Treasury Department requirements governing Federal payments.

In addition to the regulations pertaining directly to T1/T2 arrangements, the Department proposes the following changes with respect to its cash management regulations:

- Explicitly reserving the right of the Department to establish a method for paying credit balances directly to aid recipients. The Department explained that it is not establishing a credit or debit card for direct payment of Title IV funds at this time, but will explore whether such a card would be beneficial to students and parents;
- Prohibiting an institution under reimbursement or heightened cash monitoring payment methods from holding credit balance funds on behalf of a student;
- Establishing and modifying definitions of key terms;
- Removing outdated references to programs that are no longer authorized;
- Requiring institutions to exercise the level of care and diligence required of a fiduciary in maintaining and investing Title IV funds;
- Removing references to the "just-in-time payment method" and renaming the "cash monitoring payment method" as the "heightened cash monitoring payment method";
- Requiring institutions on reimbursement or heightened cash monitoring status to credit a student's ledger account for the amount of Title IV funds the student is eligible to receive and pay any credit balance due to the student before seeking reimbursement from the Department;
- Requiring institutions to maintain Title IV funds in an insured depository account consistent with OMB guidance;
- Providing that an institution generally must disburse during a payment period the amount of Title IV funds the student is eligible to receive for that payment period;
- Providing that an institution may credit a student's ledger account to pay for allowable charges associated with a payment period. The Department specifically invites feedback about whether proposed methods for prorating institutional charges under these proposed regulations are appropriate; and
- Providing that an institution may include the cost of books and supplies as part of tuition and fees. The

Department requests comment regarding how an institution should make this disclosure and frequency of such disclosures.

Retaking Coursework

The Department's current regulatory definition of "full-time student" allows repeated coursework to count towards a student's enrollment status in a term-based program but does not allow an institution to include either more than one repetition of a previously passed course or any repetition of previously passed coursework due to a student's failure of other coursework. The NPRM states that, since the current regulation took effect July 1, 2011, the Department has heard from a number of institutions with academic programs that require students to repeat the coursework for an entire term if they fail just one course in that term. In those circumstances, the institutions also have noted that students in these programs are only eligible for unsubsidized loans and that denying Title IV aid to these students while they were repeating all coursework in the term would result in students relying on less desirable private education loans or withdrawing from these programs.

The Department proposes in the NPRM to allow an institution to count all of the coursework for an undergraduate, graduate or professional student who is enrolled in a program using an integrated curriculum that requires a student who failed one course to retake both the failed course and all previously passed coursework to academically progress in the program. The current prohibition against counting more than one repetition of a previously passed course, however, would remain.

Clock-to-Credit Hour Conversions

As part of its earlier Program Integrity rules that took effect July 1, 2011, the Department mandated that certain programs otherwise subject to a clock-to-credit hour conversion must be considered clock hour programs for Title IV purposes. Specifically, under those currently effective regulations, such a program must generally be treated as a clock hour program for Title IV purposes, subject to certain exceptions, if: (1) the institution is required to measure student progress in clock hours to receive State or Federal approval or licensure to offer the program, or for graduates to apply for licensure or the authorization to practice the occupation that the student is intending to pursue; (2) the credit hours in the program do not comply with the Department's definition of a "credit hour;" or (3) the institution does not offer all the underlying clock hours that are the basis for the credit hours and generally requires attendance in the clock hours that are the basis for the credit hours awarded.

Stating that it does not "wish or intend to interfere with State requirements relating to program delivery or the number of credit or clock hours a State recognizes or requires for its purposes," the Department now proposes to eliminate the language that it promulgated just a few years ago. The NPRM states that the Department now believes the clock-to-credit conversion formula alone is sufficient to ensure that clock hours are appropriately converted to credit hours without regard to any State requirement or role in approving or licensing a program.

The full NPRM is available here. Comments on the proposed regulatory changes must be submitted to the Department no later than July 2, 2015. Please do not hesitate to contact us if you would like further information or assistance with respect to this matter.

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[1] The Department has previously issued proposed and final regulations on Federal Direct PLUS Loan eligibility, which was also part of the spring 2014 negotiated rulemaking. As of this date, it has not released any proposed regulations on the remaining two topics from that negotiated rulemaking, which are State authorization for distance education and State authorization of foreign locations.