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Department of Education to Hold Higher Ed Leaders Personally Liable for Title IV Compliance Failures

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ANNE D. CARTWRIGHT
KANSAS CITY:
816.983.8000
ANNE.CARTWRIGHT@
HUSCHBLACKWELL.COM

ABBY FELTER
KANSAS CITY:
816.983.8000
ABBY.FELTER@
HUSCHBLACKWELL.COM

HAYLEY E. HANSON
KANSAS CITY:
816.983.8377
HAYLEY.HANSON@
HUSCHBLACKWELL.COM

JULIE MICELI
OMAHA:
402.964.5000
JULIE.MICELI@

On Thursday, the Department of Education announced that, in certain circumstances, it will require leaders of institutions to assume personal liability as a condition of Title IV Federal Student Aid participation.

The Department said it may require individuals at schools demonstrating financial risk to assume personal responsibility by signing a school's Title IV program participation agreement. The Department listed significant audit findings or failure to meet financial responsibility requirements as financial risk indicators. Before requiring individuals at these schools to assume personal liability, the Department would consider the following "non-exhaustive" factors:

Civil or criminal lawsuits, settlements, or disciplinary or legal actions by the Department or other state or federal agencies involving Federal Student Aid or claims of dishonesty, fraud, misrepresentation, consumer harm, or financial malfeasance.

Significant compliance issues, such as findings stemming from program reviews or audits, unpaid liabilities from either of those processes, or findings of a lack of administrative capability.

An executive compensation or a bonus structure that could significantly affect the financial health of the institution.

The Department stated it would begin making determinations on this issue on a "case-by-case" basis, with a focus on institutions or groups of affiliated institutions that pose "the largest financial risk to the United States." Based on

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the guidance, these would include institutions that annually receive tens or even hundreds of millions of dollars of Title IV funds and institutions with the most serious and significant sets of concerns related to their compliance with federal financial aid rules.

It also acknowledged that it may, in some instances, accept other financial protections to minimize the risk of financial losses. The Department has a variety of options for securing financial assurances.

Statutory Basis

This guidance is based on the Department's interpretation of 20 U.S.C. § 1099c(e) which allows it to seek guarantees from owners. The statute states:

1. Notwithstanding any other provision of law, the Secretary may, to the extent necessary to protect the financial interest of the United States, require—

   (A) financial guarantees from an institution participating, or seeking to participate, in a program under this subchapter, or from one or more individuals who the Secretary determines, in accordance with paragraph (2), exercise substantial control over such institution, or both, in an amount determined by the Secretary to be sufficient to satisfy the institution's potential liability to the Federal Government, student assistance recipients, and other program participants for funds under this subchapter; and

   (B) the assumption of personal liability, by one or more individuals who exercise substantial control over such institution, as determined by the Secretary in accordance with paragraph (2), for financial losses to the Federal Government, student assistance recipients, and other program participants for funds under this subchapter, and civil and criminal monetary penalties authorized under this subchapter.

The statute expressly notes several situations where the Department may not require individuals to agree to be personally liable. Under 20 U.S.C. § 1099c(e)(4), the Department may not require an individual to provide personal financial guarantees when the institution:

has not been subjected to a limitation, suspension, or termination action by the Secretary or a guaranty agency within the preceding five years;

has not had, during its two most recent audits of the institutions conduct of programs under this subchapter, an audit finding that resulted in the institution being required to repay an amount greater than five percent of the funds the institution received from programs under this subchapter for any year;

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meets and has met, for the preceding five years, the financial responsibility standards, and

has not been cited during the preceding five years for failure to submit audits required under this subchapter in a timely fashion.

What this means to you

We do not anticipate the Department seeking individual financial guarantees from individuals at all institutions. Rather, the Department will likely request individual guarantees to those institutions that have demonstrated financial risk, receive a high volume of Title IV funds, and have had compliance issues in the last five years.

Institutions in this position are likely already considering steps they can take to alleviate these factors. Having documented, robust plans for improvement may provide assurances to the Department that could deter demand for personal liability assurances.

Contact us

For assistance with matters linked to Title IV Federal Student Aid or other student funding compliance, please contact Anne Cartwright, Abby Felter, Hayley Hanson, Julie Miceli, Lisa Parker, or your Husch Blackwell attorney.

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