

NATIONAL ASSOCIATION OF SCHOOLS OF ART AND DESIGN

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MEMORANDUM

TO: NASAD Members and Constituents

FROM: Karen P. Moynahan, Executive Director

RE: Recent Federal Activities of Note and Importance

The following is an update outlining recent federal conversations and policy initiatives. NASAD provides this information for your review, recommends careful consideration including the potential impact each may have on institutions and their students, and highly recommends that it be shared with offices within your institution.

Notice of Proposed Rulemaking: Request for Comment

Nonemployee Status

The National Labor Relations Board (NLRB) released on September 23, 2019, a [proposed rule](#) (see Federal Register/Vol. 84, No. 184/Monday, September 23, 2019/Proposed Rules, p. 49693) establishing that students who perform any service for compensation, such as teaching or research in connection with their studies at a private college or university, are not “employees,” according to the meaning of Section 2(3) of the [National Labor Relations Act](#). Under the rule, students who perform services related to their studies will be held as “primarily students with a primarily educational, not economic, relationship with their university, and therefore not statutory employees.”

At this time, the NLRB is [requesting comment](#) on the proposed regulations. As part of this Notice of Proposed Rulemaking, the NLRB is also seeking comment on whether the rule should also apply to students providing services to their institution in a capacity unrelated to their course of study. Individuals wishing to comment may do so by mail, or through the [Federal eRulemaking Portal](#). Original comments, and comments on the suggestions offered by others, are due no later than November 22 and 29, 2019, respectively. For further information, please refer to the NLRB’s announcement in the [Federal Register](#).

Notices of Proposed Rulemaking: Comment Closed

Accreditation and Innovation

Distance Learning

State Authorization

On June 12, 2019, the United States Department of Education released a [Notice of Proposed Rulemaking](#) pertaining to regulations governing the recognition of accrediting agencies, certain student assistance general provisions, and institutional eligibility as they pertain to the [Higher Education Act of 1965](#) (HEA). These proposed changes are applicable to institutions that participate in Title IV federal financial aid programs. The text presented represents the outcome of feedback received during a series of [public hearings](#) held in the fall of 2018 and the work of several negotiated rulemaking committees which convened in the early months of 2019. The proposed revisions are extensive, encompassing issues such as affordability, access, transparency, accreditation and oversight, innovation, and burdensome federal regulations within higher education. If approved and published prior to the end of November 2019, these changes are expected to go into effect on July 1, 2020.

The Notice of Proposed Rulemaking includes an [executive summary](#), [summary of major provisions](#), [costs and benefits](#), [background information](#), [description of the Department of Education’s negotiated rulemaking process](#), and a [summary of proposed changes](#) (see Federal Register/Vol. 84, No. 113/Wednesday, June 12, 2019/Proposed Rules).

The “Endowment” Tax

On July 3, 2019, the Internal Revenue Service (IRS) issued [proposed regulations](#) (see Federal Register/Vol. 84, No. 128/Wednesday, July 3, 2019/Proposed Rules) under Internal Revenue Code section 4968, which passed as part of the [2017 Tax Cuts and Jobs Act](#). Section 4968 imposes a 1.4% excise tax on the investment income of private colleges and universities which had 1) at least 500 tuition-paying students during the preceding taxable year, more than half of whom are located in the United States, and 2) assets at the end of the preceding taxable year with an aggregate fair market value of at least \$500,000 per student.

Of particular note is that while the tax is commonly referred to as an “endowment excise tax,” the statute does not use the word “endowment.” More encompassing, the tax applies to net investment income from all sources, not just income from endowment funds. From the IRS’ [own projections](#), the proposed rule would affect about 1% of all four-year colleges and universities, which amounts to less than 30 out of over 2,400 institutions whose information is included in the [National Center for Education Statistics’ Integrated Post-Secondary Education System](#) data for 2016.

The IRS sought feedback on the notice of proposed rulemaking through a comment period which closed on October 1, 2019. The [comments](#) are now available to the public for review before the IRS considers and responds to all substantive feedback.

Title IX

In November of 2018, the Secretary of Education proposed to amend regulations pertaining to [Title IX of the Education Amendments of 1972](#). The proposed regulations serve several functions including clarifying and modifying Title IX regulatory requirements, the effect of constitutional protections, the designation of a Title IX coordinator, the dissemination of a nondiscrimination policy, and (among others) the adoption of grievance procedures.

The 2018 announcement on the Federal Register includes an [executive summary](#), [summary of major provisions](#), [cost and benefit analysis](#), [background](#), and detailed list of [significant proposed regulations](#) (see Federal Register/Vol. 83, No. 230/Thursday, November 29, 2018/Proposed Rules).

The Department of Education sought feedback on the notice of proposed rulemaking through a comment period which closed on January 28, 2019. The number of [comments](#) received by the January 28 deadline was substantial; all are now available to the public for review. It will take some time for the Department to review and consider the substantive comments.

Newly Released Final Rules

Gainful Employment

In July 2019, the Department of Education announced that it had rescinded and replaced the 2014 gainful employment (GE) regulations. These changes pertain to and therefore affect certain institutions that participate in Title IV federal financial aid programs including 1) proprietary schools, and 2) public and private non-profit institutions that offer postsecondary non-degree-granting programs (see [Federal Register/Vol. 84, No. 126/Monday, July 1, 2019/Rules and Regulations](#)).

Although the 2014 GE Rule remains in effect until July 1, 2020, the Department is offering to institutions the ability to implement these regulations immediately. Institutions that elect [early implementation](#) are not required to comply with the requirements of the prior Rule (2014), including as an example, submission of data to the National Student Loan Data System for the 2018-2019 award year.

For your assistance, the National Office staff has updated the [federal advisory](#) pertaining to this issue and recommends that institutions to which these rules apply become familiar with the newly released 2019 GE Rule.

Borrower Defense to Repayment

On September 23, 2019, the Department of Education released in the [Federal Register](#) new Institutional Accountability regulations that revise federal standards and processes for adjudicating borrower defenses to repayment claims. Borrower defense to repayment (BDR) allows student borrowers the ability to seek loan forgiveness if an institution of higher education has misled the student or engaged in unlawful misconduct. The new BDR Rule impacts all federal student loans, and therefore all students and institutions who/that are engaged, or could be engaged, in the claims process.

As a brief history, [initial regulations](#) were put in place in 1995 and specified that a borrower may assert as a defense to repayment “any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.” The 1995 Rule, however, did not put forth a process to assert such a claim. In the [Federal Register released](#)

on [November 1, 2016](#), the Department expanded the rules regarding how borrower defense claims could be originated and how they would be adjudicated.

In November 2017, in order to amend or rescind the 2016 regulations, the Department began a negotiated rulemaking process and published a subsequent [notice of proposed rulemaking](#) on July 31, 2018. After a comment period, a negotiated rulemaking committee was assembled but failed to reach consensus, thus the Department developed regulatory language.

The present 2019 Rule further revises the process for assertion and resolution of BDR claims. The Rule contains but is not limited to a federal standard for facilitating the collection and review of evidence, new evidence standards, a new limitations period of three years, and a definition of “misrepresentation.” Of note is that loans disbursed prior to July 1, 2017, will be subject to pre-2016 regulations; loans disbursed between July 1, 2017 and July 1, 2020, will be subject to the 2016 final regulations; and loans disbursed on or after July 1, 2020, will be subject to the new 2019 Rule.

The final rule and respective regulations found in the Federal Register include an [executive summary](#), [summary of major provisions](#), and an [analysis of comments and changes](#) (see Federal Register/Vol. 84, No. 184/Monday, September 23, 2019/Rules and Regulations).

Overtime Pay

The U.S. Department of Labor announced on September 27, 2019, a [final rule](#) (see Federal Register/Vol. 84, No. 188/Friday, September 27, 2019/Rules and Regulations) to update and revise the regulations issued under the [Fair Labor Standards Act](#) that implement the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees.

The final rule may enable approximately 1.3 million newly eligible American workers for overtime pay by raising the standard salary level from \$455 to \$684/week; raising the total annual compensation requirements for highly compensated employees; allowing employers to use nondiscretionary, annual bonuses and incentive payments to satisfy up to 10% of the standard salary level; and revising special salary levels for workers in U.S. territories and the motion picture industry. While the Department of Labor [previously noted](#) that professors, instructors, and adjunct professors would be exempt from salary requirements, institutions are encouraged to study the regulations in relation to support staff and administrators.

The final rule is effective January 1, 2020, and located in the [Federal Register](#), along with [contact information](#) for the Department of Labor and Wage and Hour Division district offices.

Other Federal Activities

Department of Justice

On September 28, 2019, in response to concerns apparently held by the Department of Justice

(DOJ) regarding potential antitrust violations, delegates at the Annual Conference of the National Association for College Admission Counseling (NACAC) voted to remove three provisions from its [Code of Ethics and Professional Practices](#). The [removed provisions](#) addressed exclusive incentives for early decision, recruitment of undergraduate students who have already committed elsewhere, and recruitment of transfer students.

It is anticipated that the DOJ will issue a consent decree—an agreement that would compel NACAC, under court order, to delete the three provisions from its *Code*. It is important to note that the legal review is not resolved and remains pending with the Antitrust Division of the DOJ. Therefore, much awaits ahead including the possibility that the concerns of the DOJ and the actions of NACAC will result in a protracted national conversation, the outcome of which is unknown at this time.

NASAD has been monitoring this issue since 2017 and will continue to do so. Information of a salient nature will be provided when available. At this time, all aspects of the current *NASAD Handbook* remain in force.

Federal Advisories

As a reminder, a [full compendium](#) of federal advisories may be found on the Publications page of the NASAD website. This compendium includes information pertaining to [Misrepresentation](#), [Repeated Courses](#), [Federal Definition of the Credit Hour](#), [State Authorization](#), and [Gainful Employment](#).

NASAD will continue to remain abreast of federal initiatives and provide updates as they become available and as appropriate. It is strongly recommended that institutions remain abreast of unfolding activities, and vigilant in their efforts to develop clear and cogent understandings of federal policies and initiatives. NASAD appreciates your accomplishments. Thank you for your continuing efforts.

Kind regards.

KPM:kdj