

ISSUE BRIEF

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Cutting Red Tape: Four Higher Education Regulations that Should Be Eliminated

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Higher education regulations promulgated by the Department of Education (DOE), largely issued or expanded during the Obama Administration, have had a disproportionate impact on for-profit institutions and have generally stifled post-secondary innovation. The DOE must begin a notice-and-comment process similar to the process it used to adopt these rules in order to ultimately repeal four particularly onerous regulations. Alternatively, Congress could abolish these regulations through legislation or bar the use of funds for enforcing the regulations. Doing so would enable a variety of institutions to thrive and improve unencumbered by these specific types of red tape.

1. Gainful Employment

Title I of the Higher Education Act (HEA) stipulates that a university must provide a program of study that culminates in a degree or prepares students for “gainful employment” in a given field. Although this language has existed as a part of the HEA since its inception in 1965, the Obama Administration DOE was particularly aggressive in promulgating rules on gainful employment.

In March 2014, the DOE issued gainful employment regulations pertaining to the cohort default

rate of career and for-profit colleges. The finalized regulations, which went into effect in July 2015, stipulate that for-profit institutions and vocational programs are considered to meet the gainful employment guidelines of the HEA if

the estimated annual loan payment of a typical graduate does not exceed 20 percent of his or her discretionary income or 8 percent of his or her total earnings. Programs that exceed these levels would be at risk of losing their ability to participate in taxpayer-funded federal student aid programs.¹

This policy has three problems in particular.

1. Regulations should be sector neutral in their application. The federal government should play no role in picking winners and losers in higher education by encouraging students to attend one type of institution over another.
2. Students at for-profit institutions typically look very different than those pursuing traditional bachelor’s degrees. Such students often come from lower income families, work full time while attending school, or enter higher education later in life.²

For example, during the 2007–2008 academic year, 30 percent of students attending two-year for-profit colleges were between the ages of 24 and 29, compared to just 13.5 percent of students attending four-year nonprofits. More than 18 percent of students at two-year for-profits were 30 to

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39 years old—more than double the percentage (7.8 percent) of students attending four-year non-profit colleges.³ Equating earnings data for graduates of for-profit institutions to those at four-year nonprofit institutions is simply not an apples-to-apples comparison.

3. The Gainful Employment regulation applies broad measures to the higher education sector that penalizes low-performing and high-performing schools alike. To highlight this point, the James G. Martin Center, a higher education policy think tank, studied the School of Visual Arts. They found that despite low default rates, the school would be penalized under gainful employment because visual arts workers earn relatively low wages. According to higher education expert Mark Schneider, “virtually all programs at fine arts colleges in the country would fail the Rule. However, only for-profit programs like those at the School of Visual Arts would be penalized and ultimately shut down as a result. The non-profit schools get a free pass.”⁴ The gainful employment regulation does not foster transparency to students or accountability for taxpayer dollars, but rather constricts the higher education market and limits choices for students.

2. Borrower Defense to Repayment

Shortly before the close of its second term, the Obama Administration issued a new higher education rule called Borrower Defense to Repayment. Meant to protect students who took on student

loans under false premises, the rule broadens the terms under which students can have their debts discharged. Although many state laws already had similar provisions in place, this federal rule sets a risky precedent. Under the Borrower Defense rule, a student can claim that his institution did not provide the education he was promised and claim the university defrauded him. For example, borrowers who take out student loans after July 1, 2017, may be able to have their debts discharged if they can prove a school misled them in the advertising—either verbal or written—or otherwise misrepresented the academic product (such as by claiming all faculty are certified when they are not).⁵ Additionally, the regulation does nothing to distinguish between inadvertent and intentional fraud.

The Borrower Defense to Repayment regulation is bad policy in general. It places an additional undue burden on the for-profit sector. Institutions of higher education are required to put up a letter of credit to be placed in the hands of the federal government to “protect taxpayers—where it finds institutions to be financially unstable or engaged in misconduct.”⁶ However, this burdensome financial obligation disproportionately affects new, innovative institutions that do not have large endowments. As Andrew Kreighbaum identified in a piece for Inside Higher Ed,

The regulations would burden career education institutions with financial requirements not imposed on other colleges and universities, including others with lower graduation rates and higher default rates on student loans.⁷

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1. News release, “Obama Administration Announces Final Rules to Protect Students from Poor-Performing Career College Programs,” U.S. Department of Education, October 30, 2014, <https://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs> (accessed June 9, 2017).
 2. Josh Freeman, “The Typical College Student Is Not a ‘Typical’ College Student (And Other Fun College Demographics Data),” *Forbes*, September 20, 2013, <https://www.forbes.com/sites/joshfreedman/2013/09/20/the-typical-college-student-is-not-a-typical-college-student-and-other-fun-college-demographics-data/#40aa31187c5a> (accessed June 9, 2017).
 3. U.S. Department of Education, “Students Attending For-Profit Postsecondary Institutions: Demographics, Enrollment Characteristics, and 6-Year Outcomes,” Institute of Education Sciences, National Center for Education Statistics, 2012-173, December 2011, <https://nces.ed.gov/pubs2012/2012173.pdf> (accessed June 9, 2017).
 4. Marc Jerome, “Gainful Employment: An Unfair Rule With Bad Consequences,” The James G. Martin Center for Academic Renewal, November 6, 2015, <https://www.jamesgmartin.center/2015/11/gainful-employment-an-unfair-rule-with-bad-consequences/> (accessed June 9, 2017).
 5. Betsy Mayotte, “Defrauded Student Loan Borrowers to Receive Relief With New Regulations,” *U.S. News*, November 2, 2016, <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2016-11-02/defrauded-student-loan-borrowers-to-receive-relief-with-new-regulations> (accessed June 9, 2017).
 6. Andrew Kreighbaum, “Borrower Defense Rules Finalized,” Inside Higher Ed, October 28, 2016, <https://www.insidehighered.com/news/2016/10/28/education-dept-releases-final-version-defense-repayment-loan-rules> (accessed June 9, 2017).
 7. Ibid.
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The DOE has estimated that the costs of this rule could range anywhere from \$2 billion to \$43 billion over the next 10 years.⁸ This costly and broad policy simply creates another avenue where taxpayers will pick up the tab for students who do not pay back their loans.

3. State Authorization

Perhaps the greatest disruption to higher education's brick-and-mortar hegemony has been the proliferation of online learning. More and more students are turning to online education to pursue degrees that may have been otherwise geographically or financially out of reach. However, in July 2016 the Obama Administration issued a rule that required each school to be authorized in each state where they have students receiving their services if they wish to be eligible for federal financial aid. According to the DOE,

To ensure that institutions offering distance education are legally authorized and monitored by states, as required by the Higher Education Act, the proposed regulations clarify state authorization requirements for institutions to participate in the Department's federal student aid programs.⁹

Federal law requiring institutions of higher education to go through the burdensome authorization process for every state in which students receive their services limits the ability for online education to proliferate and reach students. As with for-profit institutions, the federal government should not use regulatory fiat to constrain the growth of non-traditional modes of higher education. Students should be free to pursue the education options that best suit their needs. The state authorization regulation

places more red tape in the way of online learning options and furthers federal micromanagement of higher education.

4. Composite Score

The DOE uses a measure called the "composite score" to determine the financial health of a private for-profit or nonprofit institution, ostensibly to protect students and taxpayers against institutions that may close down abruptly.¹⁰ However, the federal government's blunt means of determining the solvency of an institution does not always paint the most accurate picture of financial health.

A school's composite score is determined by the three ratios:

1. A primary reserve ratio, which measures a school's viability and liquidity;
2. An equity ratio, which measures a school's capital resources; and
3. A net income ratio, which measures profitability.¹¹

The DOE has been heavily criticized for the composite score. Hal Hartely of the Council of Independent Colleges stated that "there isn't even consistency within the department about how to calculate these scores."¹² These inconsistent, burdensome, and expensive regulations from Washington often worsen the financial health of schools whose funds could be better spent on academics and core education missions.

Reducing Regulatory Overreach in Higher Education

The Obama Administration's mark on higher education was defined by an overreach of federal

8. Valerie Richardson, "Student Loan Bailout Proposed for Victims of University 'Fraud,'" *The Washington Times*, July 20, 2016, <http://www.washingtontimes.com/news/2016/jul/20/obama-rule-easier-bail-student-loans-draws-ire/> (accessed June 9, 2017).

9. News release, "Education Department Proposes Rule on State Authorization of Postsecondary Distance Education, Foreign Locations," U.S. Department of Education, July 22, 2016, <https://www.ed.gov/news/press-releases/education-department-proposes-rule-state-authorization-postsecondary-distance-education-foreign-locations> (accessed June 9, 2017).

10. U.S. Department of Education, "Financial Responsibility Composite Scores," Federal Student Aid, <https://studentaid.ed.gov/sa/about/data-center/school/composite-scores> (accessed June 9, 2017).

11. *Federal Student Aid Handbook*, "School Eligibility and Operations," Volume 2 (2009–2010), pp. 2–136, <https://ifap.ed.gov/fsahandbook/attachments/1415FSAHbkVol2Master.pdf> (accessed June 9, 2017).

12. Ry Rivard, "Scores of Problems," *Inside Higher Ed*, March 10, 2014, <https://www.insidehighered.com/news/2014/03/10/can-us-government-tell-colleges-poor-financial-shape-those-are-not> (accessed June 9, 2017).

intervention that tied the hands of colleges and universities and put up barriers to innovation. In a time when Americans owe \$1.3 trillion in student loan debt, federal policy should not limit innovation and alternatives that provide access at lower costs. However, burdensome regulations, particularly those that target for-profit institutions, limit the ability for new higher education models to emerge at a competitive price. The DOE must engage in the same notice-and-comment process that it used to adopt these rules and ultimately repeal these four regulations. Alternatively, Congress could abolish these regulations through legislation or bar the use of funds for enforcing the regulations. Doing so would help ensure that the growth of a variety of higher education institutions could continue.

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