

Nonprofits Impacted by Proposed Legislation Aimed at For-Profit Institutions

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Senator Maggie Hassan (D-NH) and Senate Minority Whip Dick Durbin (D-IL) have introduced legislation intended to “hold predatory institutions, including for-profit schools, accountable when they engage in unfair, deceptive and other fraudulent practices.” While the Preventing Risky Operations from Threatening the Education and Career Trajectories of Students Act of 2019 ([PROTECT Students Act](#)) contains numerous provisions clearly intended to target for-profit institutions, the collateral impact on independent institutions may be significant.

Many of the provisions in the PROTECT Students Act have appeared in bills introduced in previous Congresses, such as [changing the current 90/10 rule to 85/15](#) for for-profit institutions and counting Department of Defense Tuition Assistance and Department of Veterans Affairs Post-9/11 GI Bill in the numerator; creating an interagency for-profit Oversight Coordination Committee including representatives from the Federal Trade Commission, Consumer Financial Protection Bureau, Department of Defense and Department of Veterans Affairs, which would, among other duties, publish a For-Profit College Warning List calling out “especially predatory or risky schools;” and codifying into law the 2014 Gainful Employment and 2016 borrower defense regulations and prohibition on mandatory arbitration clauses. And, in an effort to deter the conversion of for-profit institutions to nonprofit, the bill proposes to require periodic review by the Department of Education of any conversions and requires converted for-profit institutions to continue complying with federal requirements for for-profit colleges for at least 5 years after converting. In addition, institutions have to have approval from the IRS, Department of Education and appropriate accreditors *before* marketing themselves as nonprofit.

However, there are two provisions that could have substantial impact on nonprofit institutions.

The bill would significantly amend the definition of “nonprofit institution of higher education” at section 103 of the Higher Education Act that was a part of the original 1965 legislation. The new language would, for the first time, very specifically dictate the composition of an institution’s board of trustees. The present law follows the basic IRS definition of a Sec. 501(c)(3) organization by describing a nonprofit institution as one where “no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.” In other words, a general operational test.

The proposed legislation adds to the definition a requirement regarding the structure of an institution’s governing body:

“no member of the governing board of the institution (other than any ex officio member serving at the pleasure of the remainder of the governing board and receiving a fixed salary) receives any substantial direct or indirect economic benefit (including a lease, promissory note or other contract) from the institution; and no person with the power to appoint or remove members of the governing board receives any such substantial direct or indirect economic benefit (including a lease, promissory note or other contract) from the institution.”

This goes far beyond current conflict of interest provisions required by both accreditors and good institutional practice, which allow for the disclosure and recusal of trustees with economic interests to make any such interests a disqualification from eligibility of the institution to participate in the federal student loan and grant programs. An obvious example would be the trustee who is a developer, and whose firm enters into a *below market* transaction to develop campus property, a conflict which under current accretor rules, state laws and IRS requirements would require disclosure and the recusal of the trustee from consideration of any matters relating to the project. But under the proposed definition, the trustee would be ineligible to serve and the institution could lose its *eligibility to participate in the Title IV programs*. Doubtless not an outcome intended by the Senate sponsors, but real nonetheless.

Another equally challenging provision proposes to expand the Incentive Compensation ban beyond student recruitment and packaging and awarding financial aid to “other aspects of an institution’s activities and operations including job placement” and student support services, including “reducing student loan defaults” that are provided by third parties. An increasing number of companies and organizations provide valuable services in these arenas, often with more sophisticated technologies and at a lower cost. The breadth of the expansion of the Incentive Comp Rule challenges the continued ability of institutions *of all stripes* to enter into mutually beneficial relationships.

How these proposals fit within Health, Education, Labor and Pensions Committee Chairman Lamar Alexander's strategy to craft a bipartisan bill that can capture the required 60-votes for passage on the Senate floor is unclear. But as Senator Hassan is an active member of the HELP Committee and Senator Durbin a member of the Democratic leadership in the Senate, it is likely that these proposals will be part of the HEA debate taking place this year.

We are a long way from a Higher Education Act of 2019. But it certainly appears that mixed with what are likely to be very positive efforts to encourage innovation, measurable outcomes and flexibility in learning models will be an effort to incorporate restrictive provisions fraught with collateral damage. We will continue to monitor and report on any updates.

Vince Sampson focuses on helping clients predict, navigate and understand the increasingly complex involvement of federal agencies and Congress.

Mike Goldstein has been a pioneer in the development of new and more effective and efficient approaches to education in general and eLearning in particular through the creation of innovative approaches to combining the resources and interests of the various sectors of the education, technology, financial and governmental communities.

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