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## Higher Education Act Reauthorization Moves Forward Into 2018 Following House Committee Action

As Congress reconvenes this month, there is significant movement toward a 2018 reauthorization of the Higher Education Act of 1965 (HEA), the nation's primary law with respect to postsecondary education and which authorizes the federal student financial aid programs. On December 13, 2017, the House of Representatives' Committee on Education and the Workforce, chaired by Rep. Virginia Foxx (R-NC), approved H.R. 4508, titled the Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (the "PROSPER Act" or "House bill"). As of this writing, no date has been set for a floor debate or full House vote on the PROSPER Act, nor has a companion HEA reauthorization bill been introduced in the Senate. Senator Lamar Alexander (R-TN), chair of the Senate Committee on Health, Education, Labor and Pensions, has indicated that marking up an HEA reauthorization bill will be that committee's "first order of business" this year. Below is a high-level overview of the House bill's important elements, some of which would represent substantial shifts in postsecondary education policy and regulation.

### Single Definition of Institution of Higher Education

The House bill would adopt a single definition of "institution of higher education," eliminating for most purposes the distinctions between public and private nonprofit institutions and proprietary institutions. Notwithstanding this change, proprietary and postsecondary vocational institutions would still be required to have operated for at least two years before being eligible for Title IV programs. Additionally, proprietary institutions would remain ineligible for Title III and Title V assistance programs for minority-serving institutions.

### Regulatory Relief and Rollbacks

The PROSPER Act includes a number of provisions limiting and repealing certain regulatory activities of the U.S. Department of Education (the "Department"). Specifically, it would prohibit the Department from defining any term in the HEA, through regulation or otherwise, in a way that is inconsistent with the scope of the HEA, or from imposing any requirement

on an institution or state that exceeds the scope of the requirements explicitly set forth in the HEA. The House bill would also repeal the Department's regulatory definition of credit hour, all gainful employment regulations, and all state authorization regulations that established minimum standards of state authorization (beyond what is set forth in the HEA) that an institution must demonstrate to maintain Title IV eligibility. The legislation would also prohibit the Department from promulgating new regulations concerning a credit hour definition, gainful employment or state authorization. The bill also eliminates the "90/10" revenue rule for proprietary institutions.

The House bill would also repeal the borrower defense regulations promulgated by the Department on November 1, 2016. This would legislatively restore the effective borrower defense regulations to those promulgated by the Department in 1994, until such time as the Department issues new regulations from the current negotiated rulemaking. The bill would also require borrowers seeking federal student loan relief via borrower defense claims to file individually within three years of any asserted misrepresentation or breach of contract, and to have the claim adjudicated by an administrative law judge or equivalent arbiter.

The PROSPER Act further provides that the Department shall not develop, administer or otherwise create a ratings system for institutions of higher education. However, it would require the Department to develop a "College Dashboard Website" which shall include program-level graduation and loan debt information, eventually sunseting the existing "College Navigator" website.

### Institutional and Program Eligibility

The House bill would expand the means by which institutions may demonstrate to the Department that they are financially responsible for purposes of Title IV program participation. Beyond the traditional composite score calculation, institutions could demonstrate financial responsibility by the fact of being assessed an investment-grade entity by bond rating agencies, or demonstrate certain asset

ratios, or otherwise demonstrate that they have sufficient resources to protect against a precipitous closure. Institutions could challenge or appeal the Department's determination of their composite score.

The bill would also sunset the existing institutional cohort default rate (CDR) as an institutional eligibility metric. Instead, the bill would require calculation and reporting of a loan repayment rate (LRR) at the individual program level, with programs losing Title IV eligibility if they fail to meet the LRR benchmark for three consecutive years. The bill would define the LRR as the percentage of borrowers entering repayment in a given fiscal year (assuming at least 30 borrowers in the cohort) who are also in a positive repayment status at the end of the subsequent fiscal year. It further defines such positive repayment status to include loans in repayment, less than 90 days delinquent, paid in full (if not consolidated), or in deferment or analogous forbearance status. Programs determined to have a LRR under 45 percent for three consecutive years would lose Title IV eligibility, and programs with a LRR below 45 percent for any fiscal year would be required to submit a repayment improvement plan to the Department. The bill would also require the Department to advise institutions of each program's draft LRR and to publish all programmatic LRRs upon finalization.

## Competency-Based and Distance Education

The PROSPER Act would add a term that has not previously been defined in the HEA, "Competency-Based Education (CBE)," to encompass programs that measure academic progress through a student's mastery of subject materials rather than strictly by credit or clock hour. CBE programs would need to be able to differentiate between knowledge that a student acquired prior to enrollment and knowledge gained because of the program itself. Qualifying CBE programs would be eligible for Title IV federal student aid, including Pell grants, if they are at least 10 weeks long and encompass 300 clock hours, eight semester hours, or 12 quarter hours. CBE programs that charge a "flat subscription fee" would also be Title IV-eligible, as would programs provided by non-Title IV-eligible entities that partner with Title IV-eligible institutions, as long as the eligible institution's accreditor determines that the arrangement meets applicable accreditation standards.

The House bill would also remove the current definition of distance education, and would amend the definition of correspondence education to emphasize that the latter involves "limited" interaction between an institution and its students with "not regular" academic instruction by faculty. As a consequence, under the House bill, programs that are not correspondence courses and that satisfy the current definition of "distance education" programs would be treated identically to traditional brick-and-mortar programs.

## Accreditation and NACIQI

Under the PROSPER Act, the Department would no longer prescribe the specific standards that an accreditor is required to implement, but would largely defer to the discretion of each accrediting agency to determine which standards it will apply to the accrediting review of institutions, provided that all Department-recognized accrediting bodies have standards that focus on "student learning and educational outcomes in relation to the institution's mission" (including, for instance, a school's religious mission, which the bill would require accreditors to account for when applying their standards). Accreditors would also be permitted to review institutions differentially; that is, they could review an institution in a manner that accounts for its particular historical performance and record of compliance, including with respect to a substantive change. In short, accreditors would not need to apply all standards mechanically to differently situated institutions. Accreditors would also be required to demonstrate that they can implement standards that account for CBE programs and schools. On an annual basis, accreditors would also be required to identify institutions that are at risk of failing to meet their standards and key metrics. Additionally, at least one public member on an accrediting commission would be required to represent the business community.

The House bill would reauthorize the National Advisory Committee on Institutional Quality and Integrity (NACIQI), the entity within the Department that reviews and recommends accreditors for Department recognition (and thus to be Title IV gatekeepers). In addition, the Secretary of Education would be empowered to remove any NACIQI member who was appointed by her predecessor and to name a new member in replacement.

## FAFSA Simplification, Ability-to-Benefit and Streamlining of Title IV Programs

The House bill seeks to improve and simplify the Free Application for Federal Student Aid (FAFSA). It would codify the use of prior-prior-year income data, and would also direct the Department to design and consumer-test a new FAFSA that can be accessed and completed on mobile devices. The bill would also restore student eligibility for Title IV assistance based on "ability to benefit," if a student completes at least six credit hours of college coursework and that initial coursework shortens the student's eventual time to complete a Title IV-eligible program.

The PROSPER Act would reauthorize Pell grants through FY 2024, and also provide for "bonus" Pell amounts to students who take more than a full-time course load. Other grant programs, however, would be discontinued under the bill, including academic competitiveness grants, Federal Supplemental Educational Opportunity Grants, Leveraging Educational Assistance Partnership grants, TEACH

grants and others. The Federal Work Study (FWS) program would also be substantially changed, as the bill would eliminate both graduate and professional students' FWS eligibility as well as the cap on private-sector employment hours. (Such hours would still need to be relevant to a student's program.) Where FWS previously incorporated both "base guarantee" and "fair share" components, the House bill would move to an entirely "fair share" formula, phasing out the change over the course of five years.

The House bill would gradually replace the existing federal Direct Loan program with a new "ONE Loan" program beginning July 1, 2019, with the Direct Loan program to be entirely phased out no later than October 1, 2024. The Perkins loan program would be wound down. Among the features of the proposed "ONE Loan" program is that loan funds would be disbursed to students "like a paycheck" – that is, in weekly, biweekly or monthly installments over the loan period.

## Returns of Title IV Funds for Withdrawn Students

The House bill would amend the current requirements for institutions to return Title IV program funds upon a student's withdrawal. For students withdrawing before 25 percent of the pertinent payment or enrollment period has elapsed, the institution would be required to return all Title IV funds received. For students withdrawing after at least 25 percent, but less than 50 percent, of the relevant payment or enrollment period, the institution would be required to return 75 percent of the corresponding Title IV funds. For students withdrawing after completing at least 50 percent, but less than 75 percent, of the pertinent period, the institution would be required to return 50 percent of the corresponding Title IV funds. For students withdrawing after completing at least 75 percent, but less than 99 percent, of the relevant period, the institution would be required to return 25 percent of the applicable funds. Additionally, the bill would permit institutions to require withdrawn students to reimburse them up to 10 percent of the "unearned" Title IV funds that they are required to return to the Department.

## Loan Limits and Counseling

The PROSPER Act would eliminate loan origination fees for all student borrowers. It would set annual loan limits for dependent undergraduate students, up to a dependent aggregate loan limit of approximately \$39,000. Independent undergraduate students, or dependent students whose parents are unable to borrow, could borrow up to approximately \$60,250. Graduate and professional students' borrowing would be capped at approximately \$150,000 in the aggregate. In addition, for the first time, institutions would be permitted to set lower borrowing limits for certain groups of students. Specifically, institutions could limit borrowing based on program year, credential level, enrollment status (full or part time), or labor

statistical data regarding the average earnings in the occupations generally pursued by program graduates. In addition, institutions would be required to counsel students receiving federal loans or grants at least annually regarding the terms and conditions of their loans (or grants), including providing disclosures as to how students can budget for typical educational expenses and estimate their average income, as well as other consumer financial information.

## Repayment Plans

The PROSPER Act would streamline the current multitude of Title IV loan repayment plans into only two options: (1) the 10-year standard repayment plan, and (2) a new income-based repayment (IBR) plan. Under the IBR plan, borrowers would be required to pay 15 percent of their income and at least \$25 per month, with payments capped at the total amount (including interest and principal) that they would have paid under the standard 10-year repayment plan. The legislation would eliminate current loan forgiveness programs, including the Public Service Loan Forgiveness program. The proposed repeal of loan forgiveness programs does not itself affect the separate availability of loan discharges in defined circumstances (*i.e.*, closed schools, borrower defenses to repayment, false certifications).

## Program Review Reports and Final Program Review Determinations

The PROSPER Act would require the Department, when conducting a program review of an institution's administration of the Title IV programs, to provide an institution with an initial program review report no later than 90 days after concluding an initial site visit. The bill would further require the Department to issue a final program review determination within two years after initiating the review.

## Campus Sexual Harassment and Assault

Institutions would be required under the PROSPER Act to conduct confidential climate surveys at least every three years. The bill would also require the Department to develop campus climate surveys for institutional use, but would permit institutions to use alternatives to the Department-developed survey. Institutions would be required to retain, whether as an employee or third-party contractor, at least one sexual assault counselor whose training specifically addresses the support needs of sexual assault survivors. That counselor would not be considered a responsible employee for Title IX reporting purposes, nor would the counselor be required to report incidents of sexual assault in connection with Clery Act reporting components. All institutions would be required to develop a one-page form providing information and

guidance to victims of sexual assault. As with climate surveys, the bill would require the Department to develop a model form but would not permit the Department to mandate its use to the exclusion of potential alternatives. Further, institutions would be encouraged but not required to enter memoranda of understanding with local law enforcement agencies in order to collaboratively address issues of sexual assault. The Department would be obligated to survey institutional best practices in this regard and to share any identified best practices on its website. Also, institutions would be permitted to delay or suspend their own internal investigations or disciplinary hearings regarding sexual assault in order to allow criminal investigations to proceed.

The House bill would require institutional disciplinary hearings regarding sexual harassment and assault to be “prompt, impartial and fair to both the accuser and the accused.” At a minimum, institutions would also be directed to provide all parties with written notice of the relevant allegations at least two weeks prior to any hearing; to provide the accused with a “meaningful opportunity” to contest the allegation; to ensure that all parties have access to material evidence at least one week prior to any hearing; and to ensure that adjudicating officials do not have conflicting administrative duties and are trained at least annually in sexual assault adjudication, for which the Secretary would provide training modules. The bill would allow institutions to determine the appropriate standard of evidence for their institutional disciplinary hearings regarding sexual harassment and assault (which could be higher than the preponderance-of-evidence standard imposed under a 2011 Dear Colleague Letter that the Department withdrew in September 2017).

## Other Issues

The House bill includes various additional provisions related to postsecondary institutions and students. Among these provisions are requirements for institutions to implement drug and alcohol prevention programs, with a specific focus on opioid addiction. It would also require that institutions disseminate standards of conduct and reminders of student sanctions, as well as information on drug and alcohol counseling and treatment programs available to students. Institutions would also be required under the House bill to prepare annual reports on the childcare resources that are available to parents in school, as well as documentation of the appropriate licensure of such resources and the extent to which they are in fact serving enrolled students. The legislation also includes a proposed “sense of Congress” resolution, expressing that free speech zones and other restrictive speech codes at institutions may be at odds with the First Amendment, and providing that no institution receiving Title IV funds shall restrict speech through such policies. Under the bill, institutions would be required to annually disclose any speech-limiting campus policies to all current and prospective students.

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This alert is intended to provide a brief summary of the PROSPER Act as approved by the House Committee on Education and the Workforce, and should not be construed or relied upon as legal advice. We will continue to monitor this bill and related legislation. If you have questions regarding the matters described above, or any other matters, please do not hesitate to contact us.

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