



441 G St. N.W.
Washington, DC 20548

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February 8, 2024

The Honorable Bernard Sanders
Chairman
The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Virginia Foxx
Chairwoman
The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Education: Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB)*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Education (ED) titled “Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB)” (RINs: 1840-AD51, 1840-AD65, 1840-AD67, and 1840-AD80). We received the rule on January 24, 2024. It was published in the *Federal Register* as final regulations on October 31, 2023. 88 Fed. Reg. 74568. The effective date is July 1, 2024.

According to ED, this final rule amends the regulations implementing title IV of the Higher Education Act of 1965, as amended (HEA), related to financial responsibility, administrative capability, certification procedures, and ability to benefit (ATB). *See generally* Pub. L. No. 89-329, title IV, 79 Stat. 1219, 1232 (Nov. 8, 1965). ED stated that it amended the financial responsibility regulations to increase its ability to identify high-risk events at institutions of higher education and require financial protection as needed. ED also stated that it amended and added administrative capability provisions to enhance the capacity for institutions to demonstrate their ability to continue to participate in the financial assistance programs authorized under title IV of the HEA (title IV, HEA programs). ED stated further that it amended the certification procedures to create a more rigorous process for certifying institutional eligibility to participate in the title IV, HEA programs. Finally, ED stated that it amended the ATB regulations related to student eligibility for non-high school graduates.

Enclosed is our assessment of ED’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to

the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and 'J'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Hilary Malawer
Deputy General Counsel
Department of Education

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF EDUCATION
TITLED
“FINANCIAL RESPONSIBILITY, ADMINISTRATIVE CAPABILITY,
CERTIFICATION PROCEDURES, ABILITY TO BENEFIT (ATB)”
(RINS: 1840-AD51, 1840-AD65, 1840-AD67 & 1840-AD80)

(i) Cost-benefit analysis

The Department of Education (ED) prepared an analysis of the costs and benefits in addition to an accounting statement for this final rule. ED’s analysis of the costs and benefits of the final rule is qualitative. ED stated that the final rule provides significant benefits for ED and students and some lesser benefits for institutions of higher education. ED also stated that the final rule will create costs for institutions and some smaller costs for ED and students. According to ED’s accounting statement, the final rule will result in an annualized benefit, in 2023 dollars, of \$120,000 at 3 and 7 percent discount rates. ED also estimates the rule would impose an annualized cost, in 2023 dollars, of \$4.36 million at a 3 percent discount rate and \$4.37 million at a 7 percent discount rate.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

ED prepared a Final Regulatory Flexibility Analysis. The analysis includes 1) a description of reasons that action by the agency is being considered; 2) a succinct statement of the objectives of, and legal basis for, the regulations; 3) a description of and, where feasible, an estimate of the number of small entities to which the regulations will apply; 4) a description of the projected reporting, recordkeeping, and other compliance requirements of the regulations, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record; 5) identification, to the extent practicable, of all relevant federal regulations that may duplicate, overlap or conflict with the regulations; and 6) alternatives considered.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

In its submission to us, ED indicated that the Act is not applicable to this final rule.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant

exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

ED did not discuss the Act in its initial submission to us. But in a subsequent email, ED clarified that it determined the final rule will not increase direct spending under the Act. Email from Program Specialist (Regulations), ED, to Senior Staff Attorney GAO, *RE: U.S. Department of Education - CRA Submission for OPE's Financial Responsibility notice* (Feb. 8, 2024).

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On May 19, 2023, ED published a notice of proposed rulemaking. 88 Fed. Reg. 32300. ED stated that 7,583 parties submitted comments. ED also stated that it discussed substantive issues under the sections of the proposed regulations to which they pertain.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

ED determined that this final rule contains information collection requirements (ICRs) under the Act. ED stated that it has or will at the required time submit a copy of its ICRs to OMB for its review. The ICRs under the final rule include Student Assistance General Provisions (OMB Control Number 1845-0022); Approved State Process (OMB Control Number 1845-0176); and Eligible Career Pathways Program (OMB Control Number 1845-0175). The total burden hours for the ICRs are 2,634,480. ED also estimated the cost imposed by each regulatory provision of the final rule with ICRs.

Statutory authorization for the rule

ED promulgated this final rule pursuant to section 404 of title 5 and sections 1001–1003, 1070g, 1082, 1085, 1088, 1091, 1092, 1094, 1099a-3, 1099c, 1099c-1, 1141, 1221e-3, and 1231a of title 20, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

ED determined that this final rule is not anticipated to have an annual effect on the economy of more than \$200 million; however, the issues in the final rule are significant because they raise legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Order. Therefore, according to ED, the final rule is subject to review by OMB.

Executive Order No. 13132 (Federalism)

ED determined that this final rule does not have federalism implications.