Higher Education Opportunity ^For Confusion Act Regulations:

What May we Expect?

Boston July 2009

Yolanda R. Gallegos

GALLEGOS LEGAL GROUP

HEOA: Overview

- Signed into law on August 14, 2008
- Five years late
- 10 years in the works
- Unprecedented 14 extensions of the statutory deadline to reauthorize.

HEOA: Highlights

- More expansive view of Revenue for 90/10
- Expands Period of Time for Measuring Cohort Default Rates
- Year-Round Pell
- Copyright Infringement Policing
- Revisions to Exit and Entrance Counseling Requirements
- Adds Several Disclosure Requirements

HEOA:
Affected Institutional Documents

- Catalogs
- Student Handbooks
- Brochures
- Corporate/Campus Websites
- Specific Notification Forms
- Internal Policies & Procedures
- Mailings to Prospective Students & Family Members

HEOA:
Current Interpretations

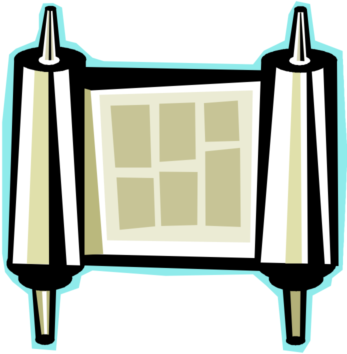
- **Dear Colleague**
- **Drafts of Regulations Issued in Neg Reg**
- **Proposed Regulations**

90/10 CALCULATION: What's New

Effective 8/14/08

90-10:
Legislative History

- 1992: 85/15 rule included in HEA definition of "proprietary institution of higher education."



- 1998: Changed to 90/10 rule.
- 2008: "Revenue" calculation changed & moved to different section of HEA

90/10: Old Calculation Methodology

<u>Title IV funds for tuition, fees, & charges</u>

All revenue from:

- Tuition, fees, & charges for Title IV students
- Revenue from activities necessary for training students in Title IV programs

90/10:
New Calculation Methodology

Title IV funds for tuition, fees, & charges (minus <u>unsub loans in excess of pre-ECASLA limits)</u>

All revenue from:

- **Tuition, fees, & charges for Title IV students;**
- **Revenue from activities necessary for training students in Title IV programs & non-Title IV program;**
- **Non-Title IV program revenue; and**
- **Unsub loan amount in excess of pre-ECASLA limits (with conditions)**

***New items in red.**

90-10: Non-Title IV Program Counted as Revenue

- Paid for by student or on behalf of student by third-party;

  AND

- State agency-approved or licensed;
- Accredited by ED-recognized accrediting agency; (or)
- Provides industry-recognized credential or certification **or prepares students to take certification examination**
- **Provides State licensing training; <u>or</u>**
- **Provides training needed for students to meet requirements for training for licensed practitioners , including CEU**

***Red =draft regulations only**

90-10:
Revenue from Training Activities of Non-Title IV Programs

- Funds from Revenue-Generating Activities Necessary for Training for NON-Title IV Programs to be Counted Institutional Revenue if Activities are:
  - Conducted on campus or at a facility under the control of the school;
  - Performed under the supervision of a faculty member; AND
  - Required to be performed by all students in a specific educational program at the school.

90-10: Loan Amounts in Excess of Pre-ECASLA Limits

Schools May Count Unsub Loan Revenue in Excess of Pre-ECASLA Limits as Non-Title IV Revenue for Loans "Made" On or After July 1, 2008 and Before July 1, 2011.

90/10:
Pre-ECASLA Regulatory Limitation

Draft regulation permits schools to count as non-Title IV revenue only the excess Unsub amount that "pays for tuition, fees, or institutional charges remaining on the student's account after title IV, HEA program funds are applied."

90-10: Institutional Scholarships Rebut Presumption

- Academic or Need-Based
- In the Form of Monetary Aid or Tuition Discounts
- Counted in the FY in Which it was Disbursed
- Derived from a Restricted Account; AND
- Designated from an Outside Source OR from Income Earned on Those Funds

90-10: Institutional Loans Accrual Method-Temporary

- To be able to account for as revenue, loans must be:
  - **Bona fide as evidenced by standalone repayment agreements that are** enforceable prom notes;
  - Issued at intervals related to enrollment periods;
  - Subject to regular loan repayments and collections **by the institution; AND**
  - **Separate from the enrollment contract.**

July 1, 2008 to July 1, 2012

Red =draft regulations only

90/10:
Institutional Loans
Alternate to NPV

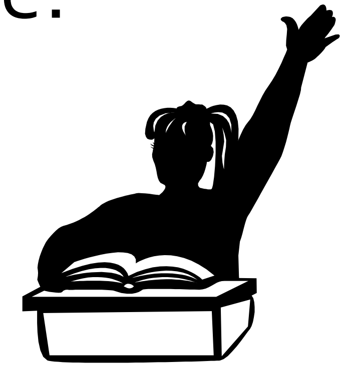
Alternative to Net Present Value Formula:

- 50 % of the total amount of loans that the institution made during the relevant fiscal year.
- Two-year prohibition on selling loans.

90/10:
Institutional Loans
May they be Purchased?

Question:

May loans purchased by institutions from other lenders be counted by purchasing institution as non-Title IV revenue?



90-10:
Moved to PPA Section of HEA

90-10 provision moved from definition of "proprietary institution of higher education" to PPA section of HEA.

90-10: Sanctions

- Termination from Title IV programs if institution fails to meet 90/10 for <u>two</u> consecutive fiscal years;

- Provisional certification if institution fails to meet 90/10 in any <u>one</u> fiscal year.

- ED publishes list of schools which do not meet 90/10 in any <u>one</u> fiscal year;

Changes to Cohort Default Rate Calculation Methodology

Effective for 3-year period
ending FY 2011

Cohort Default Rate: Legislative History

- Sanctions related to high default rates first instituted in late 1980's;
- Instituted based on premise that high default = low quality education;
- Studies show that high default rates more correlated with low income, first-generation college; and students with dependents.

Cohort Default Rates: Same or Similar Provisions

- Over 40% in one year = loss of FFEL & Direct;
- 3 consecutive years at or over threshold =, loss of FFEL, Direct, & Pell;
- Loss of eligibility of FY in which school notified and for next 2 FYs;
- Loss of eligibility not in effect while request for adjustment or appeal pending;
- Panoply of appeals still available.

Cohort Default Rates: Threshold Rates Changed

OLD LAW

- Statutory threshold set at 25% for FYs after 1993

HEOA

- Statutory threshold increased to 30% for FY 2012 and thereafter

Cohort Default Rate: Expansion of Time Period Included in CDR

OLD LAW

- Counted loans that defaulted before end of fiscal year following FY in which students entered repayment (2-yr period).

HEOA

- Counts loans that default before end of second FY following FY in which students entered repayment (3-yr period).

Cohort Default Rate: Impact of Adding Year to CDR Period

Institution Type	Projected 4-Year Rate	Projected 3-Year Rate	Current 2-Year Rate
Public	9.5%	7.2%	4.7%
Private (non-profit)	6.5	4.7	3.0
Proprietary	23.3	16.7	8.6
Less than 2-year	26.6	18.5	8.9
2-to 3-year	27.2	19.5	9.9
4-year or more	19.2	13.7	7.3

Cohort Default Rate: When will impact of new methodology be felt?

When CDR for FY 2009, 2010, and 2011 available.

Cohort Default Rate: Transition Chart

FY Student Entered Repayment	No. of Yrs. Considered In CDR	Yr. CDR Released	Threshold Percentage
2007	2	2009	25
2008	2	2010	25
2009	2	2011	25
2009	3	2012	25
2010	2	2012	25
2010	3	2013	25
2011	2	2013	25
2011	**3**	**2014**	**30**
2012	3	2015	30
2013	3	2016	30

Cohort Default Rate: Expanded Mitigating Circumstances Appeals

- Old law: Only available when CDR exceeds threshold rate for each of 3 most recent FYs
- HEOA: Available when CDR exceeds threshold rate for 3 most recent FYs or 2 of 3 most recent FYs

Successful 2-year appeal prevents ED from placing institution on provisional certification solely based on CDR.

Cohort Default Rate: Triggers for provisional certification (Draft Regulations)

- Failure to meet administrative capability requirement due to:
  - One 2-year CDR at 25% or more; or
  - Two 3-year CDRs at 30% or more.

- ED may not place such schools on provisional if :
  - Pending or successful request for adjustment of two 3-year 30+ CDRs;
  - Pending or successful mitigating circumstances appeal of two 3-year 30+ CDRs;
  - Erroneous data appeal of provisional certification;
  - 30 or less borrowers; or
  - CDR calculated as average rate.

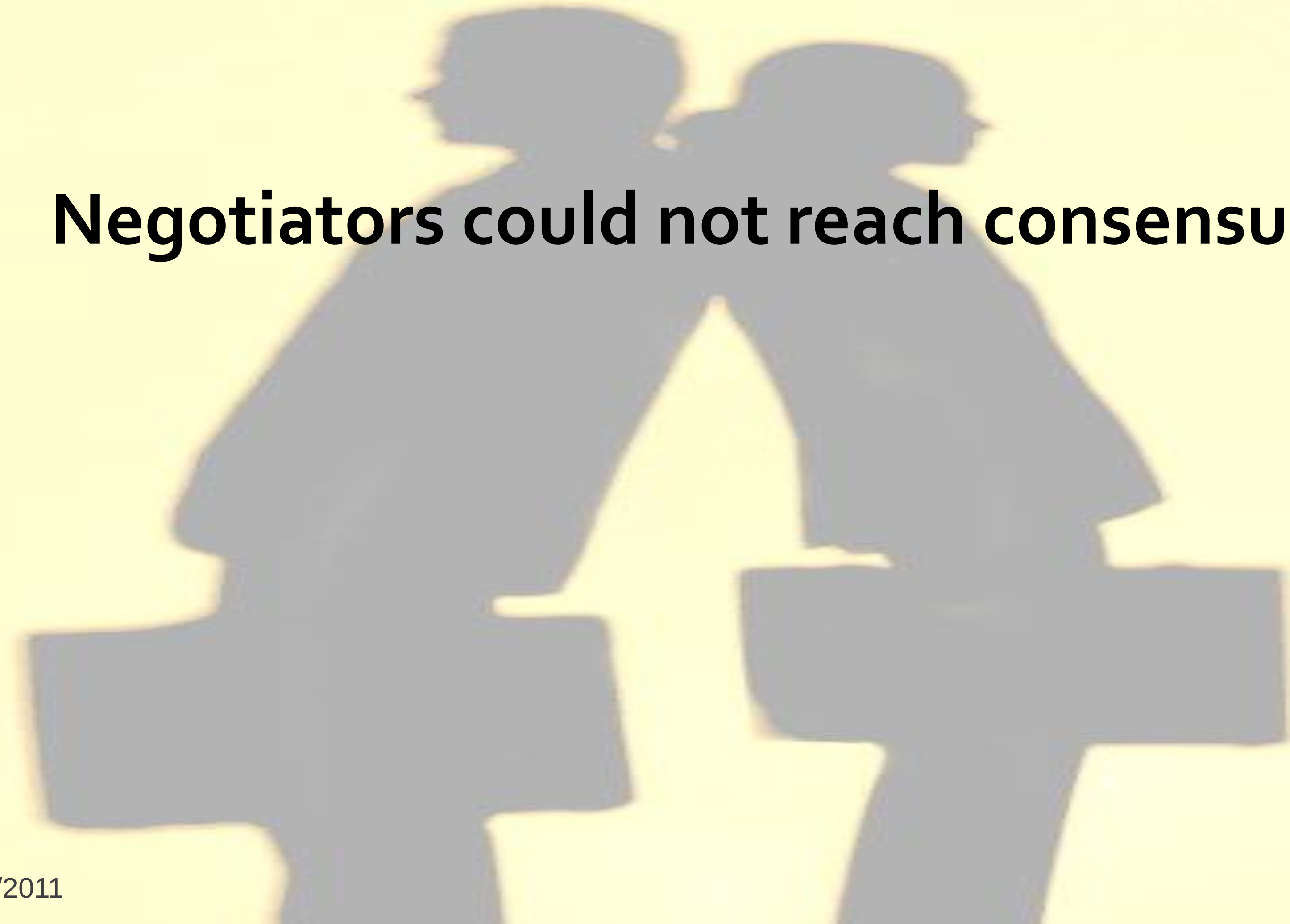
Cohort Default Rate: How CDRs Will be Issued (Draft Regulations)

For each year in 2009, 2010 & 2011:

- One draft and official with 2-yr methodology
- One draft and one official with 3-yr methodology

Year-Round Pell:
As Good as it Sounds?

YEAR-ROUND PELL:
Neg Reg



Negotiators could not reach consensus.

YEAR-ROUND PELL: The Statute

- A student is entitled to a second Pell Grant to permit the student to "**accelerate the student's progress"** toward a degree or certificate if student is enrolled:
  - at least a half-time basis;
  - for a period of more than one academic year, or more than two semesters or an equivalent period of time;
  - during a single award year; and
  - in a degree or certificate program

YEAR-ROUND PELL: The Question

What does “to accelerate the student’s progress” mean?

YEAR-ROUND PELL: Debate on Acceleration

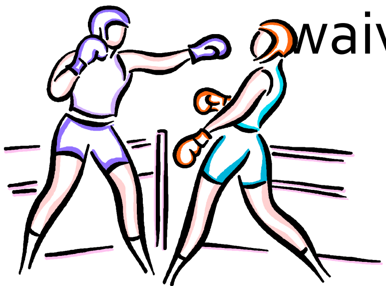
NON-FED NEGOTIATORS

Even part-time students should be able to get second Pell where courses cross over to second academic year within one award year.

US DEP'T OF EDUCATION

Student must complete one full academic year's worth of credits of first academic year before becoming eligible to for second Pell.

Special circumstances waiver.



Year-Round Pell: Special Circumstances Waiver To Academic Year Completion Requirement

- FAA must determine that student unable to complete academic year **"due to circumstances beyond student's control,"** such as:
  - Withdrawal from classes due to illness; or
  - Necessary classes not offered during award year.
- Does not include:
  - Withdrawal to avoid grade or instructor; or
  - Failing to register for offered classes.

YEAR-ROUND PELL:
Example of Scenarios
With $5000 Scheduled Award

US DEP'T OF EDUCATION

Sept. 2009 Term	Jan.2010 Term	May 2010
6 credits	12 credits	12 credits
$1250	$2500	$1250

NON-FED NEGOTIATORS

Sept. 2009 Term	Jan. 2010 Term	May 2010 Term
6 credits	12 credits	12 credits
$1250	$2500	$1250 + **$1250 for second Pell**

YEAR-ROUND PELL: What to Do?

- Good faith interpretation of the law acceptable while the issue remains unsettled
- Use proposed regulations as informal guidance
- Rely on final regulations even before they become effective

YEAR-ROUND PELL:

Calculation of a Pell for Payment
Period that Occurs in Two Award Years

YEAR-ROUND PELL: Proposed Manner of Calculating Pell for Payment Period in Two Award Years

- Consider entire payment period to occur within one year;
- Place payment period with more than 6 months in one award year in that award year (subject to student request);
- **Upon student request,** assign payment period to AY in which student is reasonably expected to receive greater payment "over the two award years" subject to Pell payment data submission requirements.
- Pay the student from the funds for the award year designated.

Effective August 14, 2008

TITLE IV CODE OF CONDUCT

Code of Conduct: Introduction

- Requires Code of Conduct that prohibits conflicts of interest re Title IV loans;
- Must post prominently on website
- Many of provisions already existed in the regulations, applicable only to lenders; these are applicable to schools.
- Contained in PPA section of HEOA.

Code of Conduct: Who is Covered Under HEOA?

- **Institutions participating in Title IV loan programs**;
- **Officers**: director or trustee of institution or institution-affiliated organization, if such individual is treated as an employee;
- **Employees**;
- **Agents**: defines as officers and employees;
- If institution has PLA, **Institution-Affiliated Organizations** that recommend, promote, or endorse loans for students at the institution, such as alumni organizations and athletic organizations. Does <u>not</u> include the lender itself.

Code of Conduct:
HEOA Gift Ban

- Ban on receiving or soliciting "gifts" from lenders, guarantors, and servicers.

- Applies to school employees, agents, and officers:
  - who work in the FA office OR
  - have responsibilities with respect to education loans

- **"Responsibilities with respect to education loans" includes those who do not work at front end of the FA process including employees working on default management with lenders.**

Red=from draft regulatory preamble

Code of Conduct: SLATE Gift Ban

- Also Bans Gifts **<u>To</u>:**
  - Contractors, Directors, and Trustees of Institution Receiving Gifts **Regardless of Whether they Work in FA Office or Have Education Loan Responsibilities** and
- Also Bans Gifts **<u>From</u>:**
  - Industry, Trade, or Professional Association or Other Entity that Receives Money from Lender or GA.

Code of Conduct: HEOA Definition of “Gift”

“Any gratuity, favor, discount, entertainment, hospitality, loan or other item having a monetary value of more than a de minimus amount . . . [including] a gift of services, transportation, lodging, or meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.”

20 U.S.C. § 1094(e)(2)(B)

Code of Conduct: SLATE Definition of "Gift"

- Provides more examples of "gifts":
  - Inducements;
  - Stocks;
  - Things of value;
  - Money;
  - Service;
  - Honoraria;
  - Registration fees;
  - Travel expenses;
  - Forbearance or promise;
  - Gifts provided in kind, by purchase or a ticket, payment in advance, ore reimbursement after expenses have been incurred;
  - Computer hardware below market price;
  - Printing costs or services;
  - Any other item having monetary value of more than ten dollars

Code of Conduct: Exceptions to Gift Ban

- Default aversion or prevention, or financial literacy materials and training (e.g., brochure, workshop, training);
- Food & refreshments integral to training session that:
  - Designed to improve service and
  - Contributes to professional development of officer/employee/agent;
- **Favorable terms/conditions/benefits to student-employee if comparable to those provided to all students;**
- **Entrance & exit counseling if:**
  - **Institution staff in control of counseling either in person or electronically;**
  - **No promotion of specific lender;**
- **Philanthropic contributions if unrelated to education loans and not made in exchange for any advantage related to such loans;**
- **State education grants, scholarships, or financial aid funds.**

Red= Items not permitted by SLATE

Code of Conduct: Advisory Boards

SLATE

- Bans receiving any remuneration for serving on advisory board of lender, GA, or entity that receives money from lender or GA --BUT--
- Allows participation in advisory board that is unrelated to educational loans

HEOA

- Prohibits employees with FA or educational loan responsibilities from receiving "anything of value" –BUT--
- Allows such employees to be reimbursed for "reasonable expenses."
- Implicitly permits non-FA employees, officers or agents or those with no educational loan responsibilities to serve <u>with pay.</u>

Code of Conduct: Board of Directors

SLATE

- Permits service on a board of directors of a publicly traded or privately held company only if:
  - No direct interest in or benefit from the functions of the financial aid office.

HEOA

- Permits performing paid or unpaid on board of directors of lender, GA, or servicer if:
  - Not employed in FA and
  - No responsibilities with respect to education loans.
- Permits even those with education loan responsibilities to perform paid or unpaid on board of directors of lender, GA, or servicer if:
  - Written conflict of interest requiring recusal from decisions regarding education loans at institution.

Code of Conduct: Contracting Arrangements

SLATE

- Does not specifically address contracting arrangements.

HEOA

- Bans officers or employees with education loan responsibilities from accepting financial benefit from lender or affiliates for consulting or services relating to education loans.

Code of Conduct: Revenue Sharing

SLATE

- Bans arrangement where institution accepts a percentage of the principal of every loan from a lender.
- Covers private and Title IV loans

HEOA

- Bans arrangement where schools receives "fees" or "other **material** benefits
- IN EXCHANGE FOR
- Institution "recommending the lender or the loan product."

Code of Conduct: Financial Aid Staffing

SLATE

- Blanket ban on Lending Institutions staffing FA offices.

HEOA

- Bans institution's request or acceptance of any assistance from lender with call center or FA office staffing.
- Permits lenders providing:
  - Professional development training for FAA;
  - Educational materials for borrowers with disclosures;
  - Short-term, non-recurring staffing services for FA functions during emergencies.

Code of Conduct: Opportunity Pool Loans

SLATE

- Prohibits agreements whereby Lending Institutions provide high-risk loans
  - IN EXCHANGE FOR
  - School providing concessions or promises WHICH
  - May prejudice other borrowers or prospective borrowers.
- Also requires notice to borrowers of Title IV financing options before Lending Institution may provide private loan to borrower at institution that has "educational loan arrangement" with a Lending Institution.

HEOA

- HEOA bans both private education loans and opportunity pool loans when there are certain quid pro quos regardless of prejudice to students.

Code of Conduct: Prohibition on Steering

SLATE

- Does not address steering.

HEOA

- Prohibits assigning 1st-time borrower to particular lender; and
- Refusing to certify or delaying loan certification based on borrower's selection of lender or guaranty agency.

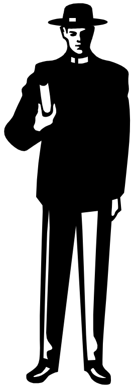
Effective August 14, 2008

PREFERRED LENDER ARRANGEMENTS

Preferred Lender Arrangements: Why So Regulated?

"Unholy Alliance" Between Lenders And Institutions:

- Revenue sharing;
- Failure to disclose PLL criteria ;
- FAA and FA offices with their own financial interests in lenders on PLL;
- Denial of borrowers' lender choice ;
- Listing affiliated lenders on PLL;
- Opportunity pool agreements resulting in prejudice to other borrowers.



Preferred Lending Arrangements: Introduction

- Some requirements of existing ED regulations codified
- HEOA includes additional requirements
- SLATE more onerous in some respects
- A PPA requirement.

Preferred Lender Arrangements: Definition

SLATE

- List of recommended or suggested lending institutions that institution makes available to borrowers, prospective borrowers, or others.
- Does not exclude any kind of education loan.

HEOA

- Arrangement or agreement between lender and an institution or institution-affiliated organization under which:
  - Lender issues loans to students or the families; and
  - Institution or organization <u>recommends, promotes or endorses</u> the education loan products of the lender.
- Excludes Direct and Auction Pilot Program Loans

Preferred Lender Arrangement: Institutional Loans Exception

SLATE

- Does not address issue.

HEOA

- Institutional loan does not constitute a PLA, so long as loan is:
  - funded by the institution's <u>own</u> funds;
  - funded by donor-directed contributions;
  - made under Title VII or Title VIII of Public Service Health Act; OR
  - made under an institutional repayment plan

Preferred Lender Arrangement: Express Agreement Required?

SLATE

- Does not address issue.

HEOA

- ED Draft Preamble indicates:
  - If institution recommends, promotes, or endorses the lender and
  - Lender provides loans to institution's students,
  - There will be a PLA.
  - Even where no express or formal agreement between lender and institution.

Preferred Lender Arrangements: "Neutral, Comprehensive" List Alternative

- Neutral, comprehensive list of lenders within set period of time;
- With statement that borrower is free to choose lender not on list.
- List that fails to include <u>all</u> lenders will be considered PLL.

Most requirements effective August 14, 2008

New Disclosure Requirements

Disclosures: List

- Copyright Infringement Policy
- Entrance & Exit Counseling
- Plans to improve academic programs
- Terms and conditions of FFEL, Direct & Perkins loans
- Student Diversity Information
- Placement Information
- Graduate and Professional Education
- Fire Safety
- Vaccination Policy
- Disaggregated graduation/completion and athletically-related disclosures
- Campus security and campus crime report information
- Drug Violation Penalties

Disclosures:
Plan to Improve Academic Programs (Draft Regulations)

- Must make plan “readily available” to enrolled and perspective students.
- School decides **what** is a “plan.”
- School decides **when** a “plan” becomes a “plan.”

Disclosures: Copyright Infringement Policies & Procedures

- **Draft copyright infringement plans**
  - With “a variety of technology-based deterrents”
  - “To the extent possible,” offer alternatives to illegal downloading or illegal peer to peer exchanges.
- **Disclose policies and sanctions related to copyright infringement with:**
  - Annual notice to students of civil and criminal penalties;
  - Summary of penalties for copyright law violation;
  - Description of policies re P2P file sharing including disciplinary actions

Disclosures: Copyright Infringement (Draft Regulations)

- ED will require use of one or more technological deterrents suggesting:
  - Bandwidth shaping;
  - Traffic monitoring to identify largest bandwidth users;
  - Accepting and responding to Digital Millennium Copyright Act notices;
  - Use of variety of products designed to reduce or block illegal file sharing.
- Must demonstrate effectiveness of plan by use of measurable criteria;
- **Must periodically review legal alternatives for downloading copyrighted material and provide results of review;**
- Information re institutional policies and sanctions must be made available upon request to prospective and enrolled students (rather than one-to-one) (if posted on website, there must be link to exact electronic address)

Disclosures: Transfer of Credit Policy

- Institutions must "publicly disclose" its transfer of credit policies.
  - Must include established criteria for acceptance of credit;
  - Must include list of institutions with which institution has articulation agreements.
  - **Proposed regulation** would define "publicly disclose" as to require that disclosure be made in a readable and comprehensible manner.

Effective August 14, 2008

Different disclosures effective on different dates

PRIVATE LOAN PROVISIONS

Private Loans: TILA Self-Certification Form

- Requires institutions to agree in PPA to provide upon request of applicant for private loan:
  - TILA self-certification form and
  - Information required to complete the form "to the extent the institution possesses such information."

Private Loans: Self-Certification Form Contents

- Form not yet available but in it ED must include:
  - Applicant may qualify for Title IV , state, or other institutional financial aid, instead of, or in addition to a private loan;
  - Applicant encouraged to discuss availability of such other assistance;
  - Private loan may affect applicant's eligibility for other free or low-cost aid;
  - Information applicant is required to provide on form is available from school's FA office;
  - COA;
  - Expected EFC;
  - EFA;
  - Difference between COA and EFA;
  - Sum of EFC and (COA-EFA);
  - Place for applicant's written or electronic signature.

Private Loans: Self-Certification Form: (Draft Regulations)

- Adds requirement that institution **discuss** with applicant, at his request, availability of Federal, State, and institutional aid;
- Form must be provided even when institution is the private lender;
- Allows institutions to post self-certification form on website for download or provide directly through FA or other designated office;
- Clarifies that once form is provided and discussion completed (if requested), no obligation to track status of private loans;
- No requirement for institution to update information provided for form;
- Institution required to provide form only to applicants who are "enrolled or admitted" at institution.

Private Loans: Disclosures for Institutions that Provide Information Regarding a Private Education Loan

- Truth in Lending disclosures;
- Possibility of qualifying for Title IV aid;
- Terms and conditions of Title IV loans may be more favorable than private loans;
- Presented in manner distinct from information about Title IV loans;
- Must be provided regardless of whether institution has PLA.

Effective August 14, 2008

Private Loans: Private Lender Obligation to Provide TILA Disclosures

- Most likely will apply only to lenders that also meet TILA definition of "creditor."
- Requires disclosures at various stages of loan process;
- FRB must create model disclosure form by August 14, 2010 that private education lender may opt to use.
- Borrower has right to cancel loan at any time within 3 business days of loan consummation.
- Loan may not be disbursed until expiration of this 3-day period.

Yolanda R. Gallegos

GALLEGOS LEGAL GROUP

315 Eighth Street, SW
Albuquerque, NM 87102
(505) 242-8900
(505) 247-8300 (fax)
gallegoslegalgroup.com