The Higher Education Opportunity Act of 2008

I. Introduction

Congress passed a number of student financial assistance bills in 2007 and 2008. President Bush signed the College Cost Reduction and Access Act (CCRAA) of 2007 (H.R. 2669) on September 27, 2007.[1] During 2008, Congress also passed The "Ensuring Continued Access to Student Loans Act of 2008", with the goal of injecting liquidity into the FFEL market.[2] Congress also finally passed a comprehensive extension of the Higher Education Act, "The Higher Education Opportunity Act" (HEOA) (H.R. 4137).[3] President Bush signed the legislation on August 14, 2008. The Department of Education is planning to hold negotiating rulemaking sessions in 2009 to develop regulations to implement HEOA. The summary below highlights the most significant changes affecting student loan borrowers.

Unless otherwise noted, the sections cited in the footnotes below refer to the HEOA, P.L. 110-315. Unless otherwise indicated, the effective date for the HEOA provisions is August 14, 2008. Many important provisions will not go into effect until 2009 or 2010 and will be the subject of negotiated rulemaking in 2009.

II. Key Provisions

A. Student Loan Eligibility Requirements

1. Needs Analysis

The HEOA includes some revisions to the needs analysis statute, including a requirement that the value of military housing or a military housing allowance must be excluded from consideration as untaxed income or benefits in the needs analysis formula. Most of the needs analysis provisions are in section 471 of the legislation and will take effect on July 1, 2010.

2. Independent Students

There were also some changes made to the definition of "independent student" for purposes of student aid eligibility. A few new categories were added in 2008. Individuals may now be considered "independent" if they are orphans, in foster care, or wards of the court or were orphans, in foster care, or wards of the court at any time when they were 13 years of age or older; if they are or were immediately prior to attaining the age of majority, emancipated minors or in legal guardianship as determined by a court of competent jurisdiction in the individual's state of legal residence; or if they are verified as

[1] P.L. 110-84.
[2] P.L. 110-227.
[3] P.L. 110-315.

either unaccompanied homeless children or youth or as unaccompanied youth at risk of homelessness and are also self-supporting.[4]

3. ATB Requirements

Under current law, students who are not high school graduates must first take and pass an "ability to benefit" exam in order to receive federal student assistance. The HEOA makes an important change to this requirement, allowing schools to also consider students to have the ability to benefit from the instruction upon the student's satisfactory completion of six credit hours or the equivalent coursework that is applicable toward a degree or certificate offered by the institution of higher education.[5] It is unclear how this will work in practice. For example, a student may enroll for a course and presumably not be eligible for federal aid, but then qualify later if she completes the six credit hours.

4. Drug Conviction Ban

There is also a slight change to the "drug conviction ban", giving borrowers with drug-related convictions an additional way to reinstate eligibility for federal assistance. As under current law, they may regain eligibility if they satisfactorily complete a drug rehabilitation program, including two unannounced drug tests or if their conviction is reversed, set aside, or otherwise rendered nugatory. In addition, they will be able to regain eligibility if they successfully pass two unannounced drug tests conducted by a drug rehabilitation program.[6] These provisions will take effect on July 1, 2010.

5. PLUS Loan Eligibility

There were important changes to PLUS loan eligibility in both the Ensuring Continued Access to Student Loans Act and the Higher Education Opportunity Act. To help facilitate PLUS borrowing, Congress gave lenders additional discretion to find extenuating circumstances for parents or graduate/professional students applying for PLUS loans from January 1, 2007 through December 31, 2009. Lenders may find extenuating circumstances if the applicant is or has been delinquent for 180 days or fewer on mortgage loan payments or medical bill payments during that time period and the borrower does not otherwise have an adverse credit history. [7]

B. Grants

1. Pell Grants

[4] P.L. 110-84, P.L. 110-315 §473, amending 20 U.S.C. §1087vv.
[5] §485.
[6] §485.
[7] P.L. 110-315 §424.

Pell grant levels will increase in 2009/2010 and will continue to go up gradually over time. [8] The HEOA also allows students to receive two Pell grants in a single academic year as long as they are enrolled at least half-time.

2. TEACH Grants

The HEOA addresses some of the problems with TEACH grants. The law provides that a grant recipient who obtained a degree or expertise in a field that was a high need subject area at the time of application for the grant, but is no longer designated as high need at some point, may fulfill the service obligation by continuing to teach in that field.[9] The HEOA also requires the Secretary to issue regulations establishing categories of extenuating circumstances under which a grant recipient who is unable to fulfill all or part of the service obligation may be excused from fulfilling that portion of the obligation.[10] These amendments are scheduled to take effect on July 1, 2010.

C. Loan Limits

Congress increased loan limits in the Ensuring Continued Access to Student Loans legislation. For loans first disbursed on or after July 1, 2008, the unsubsidized Stafford annual limit was increased by $2,000 for undergraduate dependent students.[11] The annual limits for undergraduate independent students increased from $4,000 to $6,000 for students who have not completed the first two years of education and from $5,000 to $7,000 for students in the third year of undergraduate education and beyond. The limits for independent undergraduates also apply to dependent undergraduates whose parents are unable to borrow PLUS loans. However, these borrowers are not eligible for both the new $2,000 increase for dependent undergraduates and the increased amounts for independent undergraduates.[12] Aggregate unsubsidized loan amounts for undergraduate dependent students increased from $23,000 to $31,000, but subsidized loans can still be no more than $23,000 of this aggregate amount. For undergraduate independent students and dependent students whose parents are unable to borrow PLUS loans, the aggregate limit increased from $46,000 to $57,500, but the $23,000 limit on subsidized loans remains.

The HEOA increases Perkins loan limits. The annual limit for undergraduates was increased from $4,000 to $5,500. For graduate or professional students, the annual

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[8] §401.
[9] §412.
[10] Id.
[11] P.L. 110-227 (Ensuring Continued Access to Student Loans Act of 2008). See also U.S. Department of Education, "The Ensuring Continued Access to Student Loans Act of 2008" Dear Colleague Letter GEN-08-08 (June 18, 2008).

[12] U.S. Department of Education, "The Ensuring Continued Access to Student Loans Act of 2008" Dear Colleague Letter GEN-08-08 (June 18, 2008).

limits were increased from $6,000 to $8,000.[13] The aggregate limits were increased from $40,000 for graduate or professional students to $60,000 and from $20,000 to $27,500 for students who have successfully completed two years of education leading to a bachelor's degree. The aggregate limit is increased from $8,000 to $11,000 for all other students.

D. New Federal Loan Disclosure Requirements

The HEOA amends the federal loan disclosure provisions in a number of ways. Lenders are still required to provide disclosures at or prior to disbursement. The new disclosures are required for all loans except for consolidation loans. There are also some new provisions for consolidation loans, discussed below. These disclosure regulations are scheduled to go into effect for loans disbursed on or after July 1, 2009.

Under the new provisions, information about the types of repayment plans available will have to be disclosed at or prior to disbursement as well as prior to repayment. Borrowers will also receive information about forgiveness options. There are some additional requirements for unsubsidized Stafford loans and for PLUS loans. These borrowers will receive new disclosures about options to pay the interest that accrues on the loan while still in school and if the borrower does not pay such interest when and how often interest will be capitalized. For loans made to parent borrowers, disclosures will explain that the parent has the option to defer payment on the loan while the student is enrolled in school on at least a half-time basis, that if the parent does not pay the interest on the loan while the student is enrolled, when and how often interest will be capitalized, and that the parent may be eligible for a deferment on the loan if the parent is enrolled in school on at least a half-time basis. A separate notice summarizing the borrower's rights and responsibilities will also be required at the time the lender notifies the borrower of approval of a loan.[14]

The HEOA creates a number of new pre-repayment disclosure requirements. The key change requires lenders to provide information on loan repayment benefits including specific information about any benefits that are contingent on the repayment behavior of the borrower and any limitations on these benefits. Lenders will also be required to provide descriptions of all the repayments plans that are available to borrowers, a statement that borrowers may change from one plan to another, and information about additional resources, including nonprofit organizations, advocates and counselors of which the lender is aware where borrowers may receive advice and assistance.[15]

The HEOA also includes new required disclosures that lenders must give to borrowers during repayment.[16] Lenders will be required to provide borrowers with a bill or statement that corresponds to each payment installment time period in which a

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[13] §464.
[14] §433(c).
[15] §433(b).
[16] §433(e).

payment is due and that includes in simple and understandable terms, the original principal amount of the borrower's loan, the borrower's current balance, interest rate, total amount the borrower has paid in interest, the aggregate amount the borrower has paid for the loan, a description of each fee the borrower has been charged for the most recently receding installment time period, the date by which the borrower needs to make a payment in order to avoid additional fees, the lender's or loan servicer's addresses and toll-free phone number for payment and billing error purposes, and a reminder that the borrower has the option to change repayment plans, including a list of the names of the repayment plans available.

There are also new disclosures that must be given to borrowers having difficulties making payments and during delinquency. If a borrower notifies a lender that she is having trouble making payments, the lender must provide information about repayment plans, including how the borrower can request a change in repayment plan, how to obtain forbearance, and a description of the options available to avoid defaulting on the loan and any relevant costs or fees.

The disclosure requirements will apply for loans for which the first payment is due on or after July 1, 2009 or if applicable, borrowers who became delinquent on or after July 1, 2009.

In addition, the HEOA requires consolidation lenders to disclose to prospective borrowers at the time they provide applications for consolidation loans whether consolidation would result in a loss of loan benefits, including forgiveness, cancellation and deferment.[17] The lenders must also disclose possible loss of cancellation benefits for Perkins borrowers who consolidate their loans.

E. Private Student Loans

1. General

The HEOA contains a number or provisions affecting private student loans. The most substantial changes are new private loan disclosure requirements. These new provisions are amendments to the Truth in Lending Act (TILA) and the Federal Reserve Board, rather than the Department of Education, will be issuing regulations to implement the law.

There are some important non-disclosure provisions affecting private loans. First, as of August 2008, the $25,000 Truth in Lending limit no longer applies to private educational loans.[18] This means that TILA will apply to all private student loans regardless of the amount of the loans.

[17] §425.
[18] §1011.

"Private educational loans" are defined as loans provided by private educational lenders, defined as financial institutions or federal credit unions that solicit, make or extend private education loans and any other person engaged in the business of soliciting, making or extending private education loans. The loans must not be made, insured or guaranteed under the federal aid programs and must be issued expressly for postsecondary educational expenses to a borrower, regardless of whether the loan is provided through the educational institution or directly to the borrower and must not include an extension of credit under an open end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling.

The HEOA also adds a new section to TILA, 15 U.S.C. §1631, "Preventing Unfair and Deceptive Private Educational Lending Practices and Eliminating Conflicts of Interest." For the most part, this section applies the federal loan improper inducement and preferred lender provisions to private loans as well. There is also a new provision that prohibits "co-branding." Pursuant to this provision, private educational lenders will be prohibited from using the name, emblem, mascot, or logo of the school or other words, pictures, or symbols readily identified with the school, in the marketing of private education loans in any way that implies that the school endorses the loans.[19] There is also a new provision prohibiting private educational lenders from imposing fees or penalties on borrowers for early repayment or prepayment of loans.[20]

Finally, this new section of TILA affirms that the term "creditor" in the Truth in Lending act includes private educational lenders. It is unclear whether this was necessary since private educational lenders should have been covered by TILA prior to this amendment, but perhaps Congress wanted to eliminate any doubt.

The HEOA also creates a three day cancellation right for private student loan borrowers.[21] Borrowers have the right to cancel the loan, without penalty, at any time within three business days of the date on which the loan is consummated. The lender must disclose this right to the borrower. This will be a crucial issue in the new regulations that the FRB is developing. Until then, we will not know whether the rescission right will closely mirror the current TILA rescission for credit secured by property.[22]

2. Private Loan Disclosure Requirements

First, there are some private loan disclosure provisions that are amendments to the Higher Education Act, not Truth in Lending, and will apply to schools that receive federal funding or assistance and provide information regarding private education loans

[19] §1011, adding §140(c).
[20] §1011, adding §140(e).
[21] §1021(e)(7), amending 15 U.S.C. §1638.
[22] For more information about TILA rescission, see National Consumer Law Center, Truth in Lending ch. 6 (6th ed. 2007 and Supp.).

to borrowers.[23] These schools will be required to provide borrowers with the information that the Federal Reserve Board requires to be disclosed under the new Truth in Lending provisions for private loan applications and solicitations. This is fairly extensive information, as described below, and includes information about the potential range of rates of interest applicable to private education loans, whether the interest rate is fixed or variable and other terms of the loans.[24] In addition, schools must inform prospective private loan borrowers that they may qualify for loans or other federal government assistance and that the terms and conditions of loans made, insured, or guaranteed under the federal loan programs may be more favorable than the private education loans. This information must be presented in such as manner as to be distinct from information regarding federal government loans.

With respect to timing, the law states that the disclosures must be provided so that borrowers may take the information into account before selecting a lender or applying for a loan. It is unclear how this requirement will work in practice. The Secretary of Education is required to coordinate with the Federal Reserve Board to determine the minimum information that will be required and to develop a model disclosure form. This must be done no later than 18 months after the date of enactment of the HEOA law (August 14, 2008).

The other new disclosure requirements apply to creditors and are amendments to TILA. The Federal Reserve Board is required to issue regulations to implement these changes. The proposed regulations were issued on March 24, 2009.[25] The regulations must become effective not later than six months after the date of issuance.[26]

There are new disclosure requirements at different stages of the lending process. The first set of disclosures is required in private education loan applications and solicitations. The second set must be given at the time of loan approval and yet another set at the time of consummation. Each category is discussed below.

In any application for a private education loan, or a solicitation for a loan without requiring an application, the lender will be required to disclose clearly and conspicuously the following information:

A) the potential range of rates of interest applicable to the loan;
B) whether the rate is fixed or variable;
C) limitations on interest rate adjustments, both in terms of frequency and amount, or the lack thereof, if applicable;
D) requirements for a co-borrower, including any changes in the applicable interest rates without a co-borrower;
E) potential finance charges, late fees, penalties, and adjustments to principal, based on defaults or late payments of the borrower;

[23] §152.
[24] These TILA provisions can be found in §1021 of the bill and are discussed below.
[25] 74 Fed. Reg. 12464 (March 24, 2009).
[26] §1021, amending the Truth in Lending Act, 15 U.S.C. §1638

F) fees or range of fees applicable to the loan;
G) the term of the loan;
H) whether interest will accrue while the student to whom the loan relates is enrolled in school;
I) payment deferral options;
J) general eligibility criteria for the loan;
K) an example of the total cost of the loan over the life of the loan which shall be calculated using the principal amount and the maximum rate of interest actually offered; and calculated both with and without capitalization of interest, if an option exists for postponing interest payments;
L) that a school may have school-specific education loan benefits and terms not detailed on the disclosure form;
M) that the borrower may qualify for federal student financial assistance in lieu of or in addition to a non-federal loan;
N) the interest rates available with respect to such federal student assistance;
O) that the borrower has the right to accept the terms of the loan and consummate the transaction at any time within 30 calendar days (or such longer period as the lender may provide) following the date on which the application for the loan is approved and the borrower receives the required disclosure documents; and except for changes based on adjustment to the index used for a loan, the lender may not change the rates and terms during the 30 day period;
P) that before a loan may be consummated, the borrower must obtain from the school the self-certification form (discussed below) and complete, sign and return the form to the lender;
Q) that consumers may obtain additional information concerning federal student assistance from their school or the Department of Education web site; and
R) such other information as the Board shall prescribe, by rule, as necessary or appropriate for consumers to make informed borrowing decisions.

Disclosures are also required at the time of loan approval. At this point, the lender must disclose:

A) the applicable interest rate in effect on the date of approval;
B) whether the rate is fixed or variable;
C) limitations on interest rate adjustments, both in terms of frequency and amount, or the lack thereof, if applicable;
D) the initial approved principal amount;
E) applicable finance charges, late fees, penalties, and adjustments to principal, based on borrower defaults or late payments, including limitations on the discharge of a private education loan in bankruptcy;
F) fees or range of fees applicable to the loan;
G) the maximum term under the loan program;
H) an estimate of the total amount for repayment, at both the interest rate in effect on the date of approval and at the maximum possible rate of interest offered by the lender and applicable to the borrower, to the extent that such maximum rat may be determined, or if not, a good faith estimate thereof;

I) any principal and interest payments required while the student for whom the loan is intended is enrolled and unpaid interest that will accrue during such enrollment;
J) payment deferral options;
K) whether monthly payments are graduated;
L) that the borrower has the right to accept the terms of the loan and consummate the transaction at any time within 30 calendar days (same as (O) above);
M) that the borrower may qualify for federal financial assistance (same as (M) above) and that the borrower may obtain additional information concerning federal assistance from the school or the Department of Education web site;
N) the interest rates available with respect to federal financial assistance;
O) the maximum monthly payment, calculated using the maximum rate of interest actually offered by the private lender and applicable to the borrower, to the extent that such rate may be determined, or if not, a good faith estimate thereof, and
P) such other information as the Board shall prescribe.

Lenders are also required to provide disclosures contemporaneously with the consummation of the loan. Most of these disclosures are the same as those required at the time of loan approval. The first disclosure regarding interest rates is the same as (A) above adjusted as necessary for the rate of interest in effect at the date of consummation. Other disclosures are the same as (B) through (K) and (M) through (P) above. At this time, the lender must also provide the disclosure about the three day right to cancel. Lenders are prohibited from disbursing funds until the 3 day period has expired.

These amendments should require changes in the current TILA regulations regarding timing of disclosures. The current Truth in Lending regulations contain special rules for interim student credit extensions.[27] These are defined as credit plans that involve extensions of credit for education purposes where the repayment amount and schedule are not known at the time the credit is advanced. [28] For interim credit extensions under a student credit program, the creditor is not required to disclose the finance charge, payment schedule, the total of payments, or the total sale price.

As described above, borrowers will be required to provide private lenders with a "self-certification form" prior to loan consummation. Lenders are prohibited from consummating loans without first obtaining this form. There is a separate section that will be added to the Higher Education Act describing the form requirements.[29] The Department of Education is charged with developing this form in consultation with the FRB. This will be a standardized form that will be made available to loan applicants by the school, in written or electronic form. The school must make the form available upon request of the applicant. The form must contain only disclosures that:

[27] Reg. Z, 12 C.F.R. §226.17(i).

[28] Commentary to Reg. Z, 12 C.F.R. §226.17(i).

[29] §155.

A) the applicant may qualify for federal student assistance in place of, or in addition to, a private loan;
B) the applicant is encouraged to discuss the availability of federal, state and institutional student assistance with financial aid officials at the school;
C) a private loan may affect the applicant's eligibility for free or low-cost federal, state, or institutional student assistance; and
D) the information that the applicant is required to provide on the form is available from officials at the financial aid office of the school.

The form must include a place for the applicant to provide information on:

A) the applicant's cost of attendance at the school, as determined by the school;
B) the applicant's expected family contribution, as applicable, for students who have completed the free application for federal student aid;
C) the applicant's estimated financial assistance, as determined by the school, as applicable;
D) the difference between the amounts under (A) and (C), as applicable; and
E) the sum of the amounts under (B) and (D), as applicable.

There must also be a place for the applicant to sign the form in writing or electronically.

The HEOA states explicitly that there is no private right of action against a school with respect to this self-certification form. Lenders also have no liability under TILA for failure to comply with this section.

The FRB is required to issue final regulations to implement most of the disclosure provisions no later than 365 days after the date of enactment (August 14, 2008). The regulations will become effective not later than six months after the date of issuance. Not later than two years after the date of enactment, the FRB shall, based on consumer testing, and in consultation with the Secretary of Education, develop and issue model forms that lenders may use. The model forms must be comprehensible, clear and conspicuous, enable borrowers to easily identity material terms of the loan and to compare terms among private loans and be succinct and use an easily readable type font. Private lenders that elect to use the model forms will be deemed to be in compliance with the disclosure provisions.

Most private education lenders are already required under TILA to provide some of this information. The FRB will need to take into effect existing practices and requirements when developing the new regulations. The HEOA specifically provide that the Board should prevent, to the extent possible, duplicative disclosure requirements for lenders that are otherwise required to make disclosures under the TILA, except that in any case in which these new disclosure requirements differ or conflict with any other TILA disclosure requirements, the new amendments will be controlling.

3. Liability Provisions

There are new amendments to the TILA liability sections. These provisions are not effective until the FRB regulations are issued.[30] The current provision in TILA, 15 U.S.C. §1640(a)(3) providing that attorney's fees and costs are available for rescission violations was amended to include the new student loan rescission (3 day cancellation) provision. In addition, the statute of limitations for cases of violations involving private educational loans will run from the date on which the first regular payment of principal is due under the loan rather than from the date of occurrence of the violation. The law also makes clear that private educational lenders will not be liable for any failure to comply with the self-certification form requirements.

F. Counseling Requirements

The HEOA law includes some changes to the exit counseling requirements. Schools will be required to provide information on available repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments and the difference in interest paid and total payment under each plan; and information about forgiveness or cancellation provisions and the effects of using a consolidation loan, general description of tax benefits that may be available, and a notice about the availability of NSLDS.[31]

The law also includes some changes to the entrance counseling requirements. Schools will be required to provide information to the extent practicable about the effect of accepting the loan on the eligibility of the borrower for other forms of student financial assistance, an explanation of the use of the master promissory note, information on how interest accrues and is capitalized, sample monthly repayment amounts, likely consequences of default and contact information if the borrower has questions about the borrower's rights and responsibilities.[32]

G. Improper Inducement and Preferred Lender Lists

There are a number of new provisions, mostly clarifying the regulations previously issued by the Department on these topics.

H. Repayment

1. Rehabilitation

The HEOA law aligns the payments for purposes of rehabilitating loans in Perkins with FFEL and Direct loans so that borrowers will have to make nine consecutive payments in a ten month period.[33] The 2008 Higher Education Act reauthorization law limits FFEL and Direct borrowers to only one rehabilitation per loan.[34]

[30] §1012.
[31] §488(b).
[32] §488(l).
[33] §464.
[34] §426.

2. PLUS Loan Repayment

Congress also made some important changes to the PLUS loan repayment provisions. For loans disbursed on or after July 1, 2008, repayment will still begin 60 days after disbursement. However, borrowers may postpone repayment during any period in which the parent borrower or the graduate or professional student PLUS borrower qualifies for a deferment.[35] Further, parent borrowers, upon request, may defer payment during any period in which the student on whose behalf the loan was borrowed qualifies for a deferment. Upon request, a parent borrower may also defer repayment for six months after the student on whose behalf the loan was borrowed ceases to carry at least one-half the normal full-time academic workload or if the parent is also a student, six months after the day that the parent ceases to carry at least one-half the normal full-time academic workload. Finally, graduate and professional student PLUS borrowers may also defer repayment during the six months after they cease to carry at least one-half the normal full-time academic workload. Interest that accrues during the deferment periods shall if agreed upon by the borrower and the lender, be paid monthly or quarterly or added to the principal amount of the loan not frequently than quarterly.

3. Consolidation

The 2008 HEA reauthorization law allows eligible military service members with FFEL loans to consolidate with Direct Loans to take advantage of the new program in Direct Loans that will prohibit accrual of interest for these borrowers while they are on active duty military service during a war, military operation, or national emergency. [36]

I. Proprietary School-Related Provisions

1. Definitions

The HEOA amends the definition of "proprietary institution" to include schools that offer programs leading to a baccalaureate degree in liberal arts if the school has provided such a program since January 1, 2009 and is accredited by a recognized national accrediting agency or association and has continuously held such accreditation since October 1, 2007 or earlier.[37] This provision is effective July 1, 2010. The definition of proprietary institutions of higher education will also include a school in any state that in lieu of the requirement to admit as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, instead admit as regular students individuals who are beyond the age of compulsory school attendance in the state in which the school is located or who will be dually or concurrently enrolled in the institution and a secondary school. These amendments are scheduled to take effect on July 1, 2010.

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[35] §424.
[36] Id.
[37] §102.

2.90/10 Rule

The HEOA also amends the 90/10 rule in a number of ways that will make it easier for schools to meet the requirement. The 2008 HEA reauthorization law does not eliminate the 90/10 rule. Instead, it waters the law down so that it will be easier for schools to comply.[38]

The rule will now be a program participation agreement requirement rather than an institutional eligibility requirement. The law also specifies what proprietary institutions may count as revenue, giving the schools new ways to comply, while also allowing them to temporarily treat new federal loan funds as part of the 10 percent formula. In addition, schools will now have to violate the rule for two consecutive years before facing penalties.

3. Default Rate and Sanctions

The default rate sanctions program applies to all institutions. However, due to historically higher default rates in the proprietary sector, these schools have been more likely to face sanctions or the threat of sanctions. The HEOA will make it easier for schools to avoid sanctions by increasing the default rate sanctions trigger from 25 to 30 percent for fiscal year 2012 and any succeeding year.[39] The law contains some minor improvements to the cohort default rate calculation. The rate will be calculated for an additional fiscal year.[40] This is effective FY 2009. However, the current method of calculating default rates will continue in effect until three consecutive years of cohort default rates are calculated in accordance with the new rate. The Department will also be required to publish a report at least once each year showing cohort default rates and life of cohort default rates for each type of institution.

J. Distance Education

The HEOA amends the definition of "distance education" to include instruction that uses one or more of the following technologies: the Internet, one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devises, audio conferencing, or video cassettes, DVDs and CD-Roms if they are used in conjunction with the other technologies listed above. These technologies must be used to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, synchronously or asynchronously.[41]

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[38] §493.
[39] §436(a).
[40] §436(e).
[41] P.L. 110-315 §103, amending 20 U.S.C. §1003.

K. Diploma Mills

The HEOA defines "diploma mills" as entities that offer, for a fee, degrees, diplomas, or certificates, that may be used to represent to the general public that the individual possessing such a degree, diploma, or certificate has completed a program of postsecondary education or training; requires such individual to complete little or no education or coursework to obtain such degree, diploma, or certificate; and lacks accreditation by a recognized accrediting agency or association.[42] The law also requires the Department to maintain information and resources on its website to assist students, families, and employers in understanding what a diploma mill is and how to identify and avoid diploma mills. Further, the Department must continue to collaborate with the United States Postal Service, the Federal Trade Commission, the Department of Justice (including the Federal Bureau of Investigation), the Internal Revenue Service, and the Office of Personnel Management to maximize federal efforts to prevent, identify, and prosecute diploma mills and broadly disseminate to the public information about diploma mills, and resources to identify diploma mills. [43]

L. Provisions for Military Service Members

The HEOA includes a new program that prohibits interest accrual while eligible military service members are serving on active duty during a war, military mobilization, or national emergency.[44] This benefit applies only to Direct loan borrowers and only for loans first disbursed on or after October 1, 2008. Borrowers with FFEL loans may consolidate into the Direct Loan program to take advantage of this benefit.

The law also broadens the interest rate protections in the Service member Civil Relief Act. The Act requires that creditors reduce the interest rate to 6% on an obligation incurred by a service member before active duty.[45] This provision currently applies to private student loans. As of August 2008, due to amendments in the HEOA, the interest rate protection will apply to federal student loans as well.

There are also new readmission requirements for military service members in §484C of the bill.

M. Discharges

1. Profession-Related and Public Service

The HEOA creates a number of new job-related cancellation programs, including loan forgiveness for teachers employed by educational service agencies, loan forgiveness

[42] §103.
[43] §109.
[44] §451(d).
[45] 50 App. U.S.C. §527.

for service in areas of national need, and limited loan repayment for civil legal assistance attorneys.

2. The teacher loan forgiveness program will specifically include teachers who are employed by educational services agencies.[46]
3. The current child care provider forgiveness program is replaced by a new program of loan forgiveness for service in areas of national need. Borrowers must be employed full-time in these areas and not in default. Areas of national need include early childhood educators, certain nurses, foreign language specialists, certain librarians, highly qualified teachers serving students who are limited English proficient, low-income communities, and underrepresented populations, child welfare workers, certain speech language pathologists and audiologists, certain school counselors, other public sector employees as described in the statute, certain nutrition professionals, medical specialists, mental health professionals, dentists, STEM employees, physical therapists, superintendents, principals and other administrators, and occupational therapists. Borrowers can apply for forgiveness of not more than $2,000 of the outstanding obligation after the completion of each school, academic or calendar year of employment up to a maximum amount of $10,000. No borrower may receive forgiveness for more than five years of service. Forgiveness will be granted on a first-come, first-served basis and subject to appropriations.[47]
4. Loan Repayment for Civil Legal Assistance Attorneys. Certain legal assistance attorneys will also be separately eligible for loan forgiveness. Parent PLUS loans are not included. Borrowers will be required to enter into written agreement that they will remain employed as civil legal assistance attorneys for a required period of not less than three years, unless involuntarily separated from employment. The Department will assume the obligation to repay the student loan by direct payments on behalf of the borrower to the loan holder, except that the amount assumed shall not exceed $6,000 in any calendar year or an aggregate total of $40,000. These benefits will also be offered on first-come, first-served basis and subject to appropriations. Priority will be given to borrowers who have practiced law for five years or less, and have completed less than three years of the required service.

There are also some changes to the Perkins profession-related cancellations in §465 of the bill.

The 2008 HEA reauthorization law amends the statutory definition of "public service job" to specifically exclude time served as a member of Congress and to define

[46] §429.
[47] §428K.

public health to include nurses, nurse practitioners, nursed in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics.[48]

2. Disability Discharge

The HEOA amends the definition of total and permanent disability in a number of important ways. The new definition is more favorable for borrowers on one hand because it allows discharges to be granted to borrowers not only with conditions that are expected to result in death, but also if the conditions have lasted for a continuous period of not less than 60 months or can be expected to last for this 60 month period. However, the law specifically allows the Department to develop safeguards as necessary to prevent fraud and abuse, including regulations to reinstate the obligation and resume collection for any borrower who receives a new loan or earns income in excess of the poverty line after receiving a discharge. Depending on how the regulations are crafted, it may be easier to get a discharge, but more difficult to retain the benefits over time.

The new definition also states that a borrower who has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected condition and who provides documentation of such determination shall be considered permanently and totally disabled and shall not be required to present additional documentation. This provision is effective upon enactment of the law. The other changes are effective July 1, 2010.[49]

The Department will likely issue a Dear Colleague letter to clarify implementation of the V.A.-related provisions.

N. Credit Reporting

Loan holders will be required to report to credit bureaus information concerning the repayment status of the student loan.[50]

O. Miscellaneous

The HEOA affirms that federal student loan collection must cease when a borrower dies. In those circumstances, the borrower's estate or his/her family's estate is not liable for federal financial assistance debts.[51] This provision may alleviate the need to apply for a death discharge. However, it may still be preferable to do so rather than raising this defense later in a collection action. The law also states that infancy may also not be raised as a defense by Perkins loan borrowers.[52]

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[48] Find this provision, 429-431
[49] P.L. 110-315 §437.
[50] §432.
[51] §486.
[52] §486.