

# CAPPS Annual Conference

## La Jolla, San Diego, CA

### U.S. Department of Education Update: New Compliance Challenges Posed by Negotiated Rulemaking Proposals, Changes to Guidelines, and Enforcement Initiatives

Thursday, October 6, 2022, 11:00 am - 12:00 pm

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# Introduction

- ▶ Period of Dynamic Change in Washington
  - ▶ Administration Sustaining its Crack-Down on Proprietary Sector-
    - ▶ Multiple New Agency Initiatives – ED, CFPB, FTC
    - ▶ Loan Discharges and Forgiveness Target Career Colleges
    - ▶ New Recertification and Financial Responsibility Policies
    - ▶ Negotiated Rulemaking – New Rules and More Scrutiny
  - ▶ Congress Moving Towards Transition
    - ▶ Pending Mid-Term Elections Stymie Legislative Initiatives
    - ▶ Anticipated Transition of House, and Possibly Senate, from D to R
  - ▶ This Panel Presentation -
    - ▶ Overview of Key Pending Issues, and How to Be Prepared

# Introduction

## Mid-Term Elections – Prognosis on Potential Transition of House, and Possibly Senate, from D to R--

Current House	221	212	2
<u>Consensus Forecast*</u>	204	218	
		Plus: Thirteen Tossup Races- 218 Needed for Majority	
Current Senate:	50	50	
<u>Consensus Forecast*</u>	49	49	
		Plus: Two Tossup Races: GA (Warnock v. Walker) and NV (Masto v. Laxalt)	

\*Source: 270towin.com

**Caveat: Full month left Momentum Shift Towards Ds  
Polls Notoriously Unreliable! And the Economy is Key!**

# Borrower Defense to Repayment (BDR)

## ▶ What is it?

## ▶ How it works

- ▶ Defenses
- ▶ Application
- ▶ Fact-Finding
- ▶ Adjudication
- ▶ Group Process?
- ▶ Recovery/Recoupment Action

*Who advocates for the school?*

# Borrower Defense to Repayment (BDR)

## ► Application excerpt (studentaid.gov):

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### EMPLOYMENT PROSPECTS

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Did your school misrepresent employment outcomes that would be available to you or the employment outcomes of prior graduates? Please select all that apply:

- My school did not fulfill its promise that I would find future employment.
- My school misrepresented its job placement rates.
- My school misrepresented the demand for graduates in my field.
- My school misrepresented its partnerships with employers.
- My school misrepresented my eligibility for a certification or a licensure in my field of study.
- My school exaggerated the earnings of prior graduates or my likely earnings after graduation.
- My school misrepresented that it was accredited when it was not.
- My school misrepresented that my program had the accreditation necessary to qualify graduates for licensure or certification when it did not.
- My school failed to tell me that my programs did not have the accreditation necessary to qualify graduates for certification or licensure.
- Other, please identify:

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Per item selected, above:

Please describe how the school communicated with the school. Please describe in detail what the school told you, or failed to tell you, and why you believe it was a misrepresentation.

# Borrower Defense to Repayment (BDR)

## ► Where are we now?

- \$1.5 Billion for 79,000 students of Westwood College (Aug. 30)
  - All students who attended from 2002 through 2015
- \$3.9 Billion for 208,000 students of ITT Technical Institute (Aug. 16)
  - All students who attended from 2005 through 2016
- \$5.8 Billion for 560,000 students of Corinthian Colleges (June 1)
  - All students who attended from 1995 through 2015
- Formal demand to DeVry University for payment
- Sweet v. Cardona
- Blanket Loan Forgiveness (Aug. 24)
- NPRM, July 13. (scheduled publication, Nov. 1)

# 90/10 NPRM - Neg Reg Consensus

- ▶ Consensus Language Was A Marked Improvement Over Department's Prior 90/10 Proposal
- ▶ But NPRM w/ Consensus Deal Stills Toughens the 90/10 Rule:
  - ▶ VA and Other Non-Title IV Federal Funds Now Count Against Schools In Accordance With Recent Statutory Changes
  - ▶ New Guidelines On When Non-Federal Revenues Will Count:
    - ▶ Cannot count revenue from programs that include coursework also offered as part of a Title IV program;
    - ▶ Courses must be taught by the school's instructors;
    - ▶ Courses must be provided at the main campus or an approved additional location, a state or accreditor-approved location, or an employer facility;

# 90/10 NPRM - Neg Reg Consensus

- ▶ Courses that prepare students to take an examination for an industry-recognized credential or certification will likely soon be excluded unless other criteria are met
- ▶ Where institution only provides facilities for test prep, acts as a proctor, or oversees a course of self-study, course revenues do not count
- ▶ Longtime Inclusion of State Grant Funds as Non-Federal Placed at Risk by Rules on Co-Mingling of Federal and State Funds
  - ▶ Uncertainty on Whether and How Federal Component is Quantifiable
  - ▶ Adverse New Language Nullifying All State Grant Funds Where Federal Component Cannot Be Determined
- ▶ Toughened Sanctions Where 90/10 Not Met:
  - ▶ Potential Liabilities For Periods When Institution Was Unaware
- ▶ Toughened Disbursement Rules



# New Proposed Recertification and PPA Rules

## ▶ New PPA Signature Requirements:

- ▶ March 2022 DCL: Effective immediately, the Department “may in certain cases require signatures” from controlling ownership entities on PPA at recertification
- ▶ Circumstances where signature requirement is likely include changes in ownership, composite scores below 1.5, schools on provisional certification or HCM2, significant BDR or audit/program review findings, or fraud judgments
- ▶ Neg Reg proposal: would impose PPA signature requirement across-the-board for all controlling ownership entities

# New Proposed Recertification and PPA Rules

## ▶ New Proposed PPA Rules:

- ▶ Restrictions on non-profit institutions that converted from for-profit
- ▶ Elimination of automatic recertification for delayed PPAs
- ▶ Calls for new PPA conditions restricting transcript withholding and written arrangements, requiring review of marketing materials, caps on student enrollment
- ▶ Tightened restrictions on measures aimed at limiting student reliance on Direct Loans and other Title IV funding

# Changes in Ownership or Control

- ▶ Latest Dept. guidance, Sept. 15:
  - ▶ Pre-Acquisition Review remains optional
  - ▶ Dept. only offers CPAR, discontinues APAR
- ▶ Covid-19 National Emergency Waivers
- ▶ NPRM, July 28:
  - ▶ Revised definitions
  - ▶ 90-day pre-closing notice to Dept. (w/ documentation)
  - ▶ Reporting requirements: 5% change in ownership (direct or indirect)
- ▶ Dept. concerned with conversions to non-profit

# Administrative Capability

- ▶ No Neg. Reg. consensus.
  - ▶ Earliest effective date: July 1, 2024
- ▶ New requirements in proposed rules:
  - ▶ “adequate career services”
  - ▶ clinical/externship opportunities
  - ▶ “Extra” GE rules
  - ▶ No “misrepresentations” or “aggressive recruiting”
  - ▶ Other agency actions
  - ▶ Validity of high school diplomas

## Stanley A. Freeman



Stanley A. Freeman is a partner in the Washington, D.C. office of the international law firm Eversheds Sutherland. Stan counsels postsecondary educational institutions from all sectors of higher education regarding strategic issues pertaining to participation in the federal student financial assistance programs, accreditation, licensure, and related regulatory concerns. He was selected by his peers for inclusion in the 2009 - 2020 editions of *The Best Lawyers in America* in the specialty of Education Law.

Stanley has been actively involved in representing educational institutions for more than 20 years. In his practice, he counsels individual educational institutions, corporate investors in higher education, associations of schools and colleges, and allied educational companies on administrative, transactional, regulatory and litigation matters. He has represented numerous schools before the U.S. Department of Education and before other federal agencies, state educational oversight agencies, and accreditors on compliance matters, financial responsibility concerns, legislative issues, and investigative matters. He has also litigated cases in the state and federal courts. He spends much of his time advising clients concerning regulatory and compliance matters arising under the Higher Education Act of 1965, including program reviews, audits, substantive changes, changes in ownership and control, and other oversight matters.

Stanley has authored numerous articles on federal student financial aid issues for higher education publications and frequently speaks to gatherings of college officials and student aid administrators.

Stanley graduated with distinction from the Honors College of the University of Michigan in 1978 and earned his law degree from the Georgetown University Law Center in 1982. He is admitted to practice law in the District of Columbia, Maryland and Virginia. Stanley is a lifelong resident of the Washington area, and he and his wife Cecilia have five children.

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## *Benjamin E. Reed*



**Ben Reed is a senior litigation associate in the Atlanta office of Eversheds Sutherland, with a focus on higher education. In his litigation practice, Ben advises clients in all aspects of complex commercial disputes, including class actions, contract disputes, business torts, and issues related to regulatory compliance.**

**In his higher education practice, Ben advises postsecondary educational institutions on compliance matters arising out of federal and state accrediting agency oversight and regulation, including with respect to institutional participation in the Title IV federal student aid program. Ben also advises education clients in regard to their corporate compliance programs and on regulatory and transactional issues arising from mergers, acquisitions, sales, and investments in educational institutions.**

**Ben holds a B.A. in Psychology from Emory University and a J.D. from Duke University School of Law. He is admitted to practice in Georgia and has appeared in trial courts nationwide.**

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## *Michael S. Abril*



Michael S. Abril “Mike” is the Chief Legal Officer (“CLO”) of Ember Education, the shared services division of San Joaquin College, Inc. (“SJVCi”), where Mike also serves as Corporate Secretary. SJVCi owns and operates two regionally accredited career colleges: San Joaquin Valley College and Carrington College. Mike’s duties as CLO include overseeing the Ember Education Legal Department, administering SJVCi’s charitable foundation (We Achieve Education Foundation, Inc.), and serving on Ember Education’s governmental affairs team. Mike also serves on the litigation committee of Career Education Colleges and Universities (“CECU”). During Mike’s tenure at SJVCi, Mike has supervised both accreditation and human resource functions. Mike served on the CAPPs Board of Directors from 2016 to 2021. Mike has participated on various panels at CAPPs and CECU conferences and annual meetings.

Prior to joining SJVCi in December 2012, Mike worked in private law practice, including seven years practicing law in Los Angeles for national law firms. As a private attorney, Mr. Abril focused on business and real estate matters.

Mike did his undergraduate work at the University of California, Davis where he received his B.A. (Economics and Political Science) in 1982. He received his MBA and J.D. degrees from the University of Southern California in 1986.

Mike works and resides in Bakersfield, CA, is married to Alice, and has three children—daughters Paige and Taber and son Blair. During his time away from the office, Mike follows his favorite sports teams (USC Trojans, Los Angeles Angels, and the Dallas Cowboys), attends live concerts and plays, travels around the United States, and tries to stay on top of his health and fitness. Mike admits he has a weakness for Apple products.

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*Ember Education is a division of San Joaquin Valley College, Inc.*

## ***Robert M. Hendrickson***



Robert Hendrickson is the VP of Compliance and Regulatory Affairs at Ember Education. He is responsible for leading, developing and maintaining rigorous systems to ensure compliance with all regulatory standards for Carrington College and San Joaquin Valley College.

Robert has 15 years of regulatory compliance experience, beginning as an Accreditation Coordinator with a national accrediting agency. He then moved into a campus leadership role for a proprietary college, before migrating back into Organizational Compliance roles of progressively expanded responsibility. His areas of focus include institutional and programmatic accreditation, state licensing for residential and online programs, federal student aid compliance, veterans' affairs, and international student programs.

Robert holds a Master of Science degree in International History from the London School of Economics and Political Science, and a bachelor's degree in History from James Madison University. He lives in Tempe, Arizona with his wife Christine, son Bobby, and dog Mabel.

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