

BOARD OF HIGHER EDUCATION

REQUEST FOR BOARD ACTION

NO.: BHE 22-63

BOARD DATE: June 21, 2022

AUTHORIZATION FOR COMMISSIONER TO SOLICIT PUBLIC COMMENT ON PROPOSED REGULATORY AMENDMENTS TO 610 CMR 13.00: FINANCIAL REVIEW AND RISK MONITORING OF INSTITUTIONS OF HIGHER EDUCATION

MOVED: The Board of Higher Education hereby authorizes the Commissioner to proceed in accordance with the Administrative Procedure Act, M.G.L. c. 30A, § 3, and solicit public comment on the proposed amendments to regulation 610 CMR 13.00: Financial Review and Risk Monitoring of Institutions of Higher Education, subject to the completion of the Executive Office of Administrative and Finance internal review process.

VOTED: Motion approved and advanced to the full BHE by the Executive Committee on 6/13/2022; and adopted by the BHE on 6/21/2022.

Authority: M.G.L. c. 69, §§ 16, 30A, and 31A; 610 CMR 13;
M.G.L. c. 30A, § 3; 950 CMR 20.00

Contact: Constantia T. Papanikolaou, Chief Legal Counsel

Massachusetts Board of Higher Education

Proposed Regulatory Amendments to 610 CMR 13.00: Financial Review and Risk Monitoring of Private Higher Education Institutions

Background

At its January 10, 2020 meeting, the Board of Higher Education (Board) voted (BHE 20-02) to promulgate new consumer protection regulations related to the annual financial screening and assessment of private, independent higher education institutions located in the Commonwealth and authorized to grant degrees. The regulations, (610 CMR 13) establish standards and processes to permit the Board, acting through its staff at the Department of Higher Education, to: identify, through a screening and assessment process, institutions experiencing significant financial distress, placing them at risk of imminent closure; monitor said institutions while they either improve their financial condition or transition to closure; and allow for contingency closure planning and timely, public notification in the event of closure. During its subsequent February 4, 2020 meeting, the Board further received, reviewed and voted (BHE 20-09) to authorize the Commissioner to move forward with implementation procedures which set forth the processes to be used by the Department in implementing the regulations [FARM Procedures for MA Private Independent Higher Education Institutions \(2020\)](#).

As set forth below, proposed amendments to 610 CMR 13.00 are needed to establish criteria that will allow the Department to implement and enforce certain statutory provisions which authorize the Department to require institutions identified as at risk of imminent closure to furnish surety bonds or letters of credit (allowed under M.G.L. c. 69 § 31B(b)(3)), and to issue fines for institutional non-compliance with legal requirements (allowed under M.G.L. c. 69 § 31B(c)). In addition, the proposed amendments seek to codify existing procedures, including procedures pursuant to which institutions: currently certify their financial condition, as well as their ability and intention to remain open with an attestation document; certify their financial condition with the posting of annual financial reports and summaries; and certify the completion of fiduciary training of their institutional governing board members. See M.G.L. c. 69 § 31B(b)(3), and (e)-(g).

By way of background, the Board's original 610 CMR 13.00 regulations were first published for public comment in the Massachusetts Register on July 12, 2019. After the Department finalized the proposed regulations in response to comments received during the public comment period, the legislature enacted a new law which was being drafted in tandem with the Department's regulatory work. The new law codified minimum statutory requirements reflected in the Department's draft regulations for the contemplated financial screening, assessment, and risk monitoring process, but also included additional provisions, such as the requirement that certain institutions post a bond with surety or letter of credit, and a grant of authority to the Department to levy fines. [Chapter 113 of the Acts of 2019](#). The new law was signed on November 14, 2019 and codified at M.G.L. c. 69, § 31B.

Before proceeding with promulgation of the regulations in January 2020, the Department and the Board reviewed and made minor revisions to the pending regulations to accurately reflect non-substantive language in the new law not otherwise captured in the draft regulations. Mindful of the closure of the public comment period and the need to implement the regulations in time for the FY2020 screening cycle, substantive changes to the regulations were deferred with the intention of revisiting regulation revisions after the completion of at least one screening cycle. The Board of Higher Education approved the regulations for promulgation on January 10, 2020, and the regulations went into effect when they were published in the Massachusetts Register on February 21, 2020, in time for the FY2020 screening cycle.

Since then, the Department has effectively implemented the 2020 regulations through two screening cycles thus far. Through this new screening, monitoring and contingency closure planning process, the BHE and the DHE have been able to more accurately identify and timely respond to imminent risks of institutional closure than previously possible under the prior regulatory structure, while also identifying areas for regulatory clarification or enhancement.

As referenced above, the proposed amendments seek to establish the criteria for implementing the following two unique, substantive sections of the new law: an institution's obligation to furnish a bond with surety or a letter of credit sufficient to meet the costs of refunding deposits made by students in anticipation of enrolling or continuing their enrollment at the institution and for the cost of protecting and maintaining student records (M.G.L. c. 69 § 31B(b)(3)); and the Department's ability to levy fines on institutions for legal non-compliances, including the institutions' attendant appeal rights (M.G.L. c. 69 § 31B(c)).

In addition, for the purpose of increasing clarity, the proposed amendments also seek to codify into regulation the following existing practices and procedures implemented by the Department:

- the Department's reporting procedures pursuant to which institutions confirm compliance with the statutory requirement that each member of an institution's governing board receiving training in higher education financial metrics, legal and fiduciary responsibilities, and applicable standards for accreditation at least once every 4 years (M.G.L. c. 69 § 31B(e));
- the Department's reporting procedures pursuant to which each institution posts on its website a copy of its annual financial report or audited financial statement and a summary of the report in terms understandable by the general public (M.G.L. c. 69 § 31B(f));
- an attestation procedure, through which institutions identified as at risk of imminent closure certify, as part of their risk mitigation plans to the Department, the completeness and accuracy of the materials submitted to the Department for the Commissioner's review, along with their ability and intention to continue operations and substantially fulfill its obligations to enrolled and admitted students, as identified in their risk mitigation plans.

Finally, the proposed amendments also include technical edits and improvements to clarify language and help institutions understand processes and definitional terms, such as the definition of student records required to be maintained through a contingency closure plan.

The proposed amendments are attached, with new language identified in red-line edits. (See Attachment A, 610 CMR 13.00).

As set forth in the Timeline below, after approval by the Board, the regulations will be submitted to the Secretary of the Commonwealth's Office by June 24, 2022, in time for publication in the next available Massachusetts Register (July 8, 2022). The Department will hold at least one public hearing, as required, and will offer a four-week public comment period.

Upon the conclusion of the public comment period, the Department will make any necessary changes to the proposed regulatory amendments and will bring the final regulations to the Board for approval and promulgation. At that time, the Department may also present the Board with any associated policies or procedures that may be necessary for implementation. Approving the proposed amendments during the Board's anticipated summer/ early fall Annual Meeting is recommended, to assure that the regulatory amendments are effective for implementation during the Department's FY2023 screening and assessment cycle, and in time for determinations that will be made in the Fall of 2022. (*See Timeline, below*).

Staff Recommendation

Subject to the completion of the Executive Office of Administrative and Finance internal review process, staff recommend that the Board approve the attached 610 CMR 13.00 amendments to be submitted to the Secretary of the Commonwealth's Office for publication in the Massachusetts Register, which will initiate the presentment of the proposed, amended regulations to the public for comment in accordance with the attached Timeline.

Comment Period and Regulatory Compliance Timeline

DATE	TASK/OCCURENCE
June 24, 2022	<ul style="list-style-type: none"> • Draft regulations, small business impact/fiscal effect statements, and notice of public hearing will be brought to the Secretary of the Commonwealth’s Office for publication in next edition of the Massachusetts Register (July 8, 2019) • Letters will be sent to DHCD/MMA per E.O. 145
July 06, 2022	<ul style="list-style-type: none"> • Notices of public hearing will be sent to the Boston Globe for publication (publication in the Globe is likely to occur 2-3 days after submission)
July 08, 2022	<ul style="list-style-type: none"> • Publication of draft regulations and notices of public hearing in the Massachusetts Register
July 08, 2022 – August 05, 2022	<ul style="list-style-type: none"> • Public comment period • At least one public hearing will be held. Public hearing must be at least 21 days after Newspaper advertisement (July 29, 2022).
Week of August 15, 2022	<ul style="list-style-type: none"> • Final regulations will be ready for distribution to BHE for review and for approval either during the BHE’s summer/ early fall Annual Retreat, or during the BHE’s next regularly scheduled meeting in October.
August/ September 2022	<ul style="list-style-type: none"> • BHE meeting- final regulations presented for approval either during a BHE anticipated summer meeting (August/ September), or at the BHE’s first regular meeting of the academic year, typically October. • Submit final small business impact statement to Secretary of the Commonwealth’s Office. • Thereafter, the regulations will be submitted to the Secretary of the Commonwealth for publication in the next edition of the Massachusetts Register. Note- the Secretary accepts and publishes regulations every 2 weeks (e.g., submitting with the Secretary final regulations by September 2, will result in promulgation date of September 16).