

## **AMENDED STATEMENTS OF FISCAL EFFECT AND SMALL BUSINESS IMPACT**

The Board of Higher Education seeks to enact revisions to existing regulations: 610 CMR 13.00: Financial Assessment and Risk Monitoring of Institutions of Higher Education. These regulations apply to private, independent institutions of higher education located in the Commonwealth and authorized to grant degrees. The regulation establishes standards to permit the Board of Higher Education (Board), through its executive agency, the Department of Higher Education (the Department), to: identify, through an annual 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 standing or transition to closure; and require contingency closure planning and timely public notification in the event of imminent closure.

The proposed amendments to 610 CMR 13.00 establish new criteria for the furnishment of surety bonds or letters of credit by institutions identified as being at risk of imminent closure (M.G.L. c. 69 § 31B (3)) and establish criteria for the Department to issue fines for institutional non-compliances with legal requirements (M.G.L. c. 69 § 31B(c)). In addition, the proposed amendments codify existing procedures pursuant to which institutions currently certify compliance with the law, including their compliance with the posting of annual financial reports and summaries and training of institutional governing board members (M.G.L. c. 69 § 31B((e)-(g))).

### **Fiscal Effect on the Public and Private Sectors**

M.G.L. c. 30A provides that, before any regulation can become effective, agencies of the Commonwealth must file an estimate of its fiscal effect on both the public and private sectors for the first and second years and a projection for the first five years; or state that there is no fiscal effect (if that is the case). According to the Secretary of the Commonwealth's Office, this requirement is not the cost/benefit analysis that accompanies federal regulations, but rather the agency's best judgment of the "out of pocket" expenses that will be incurred in complying with the regulation.

#### **Public Sector**

The Board does not anticipate that there will be any fiscal effect on the public sector.

#### **Private Sector**

The Board anticipates that there will be no fiscal effect for the overwhelming majority of independent private higher education institutions. While all private institutions located in the Commonwealth are subject to the initial regulatory screening process, the regulations do not require any expenditures by or resources from the institutions as that process is conducted either by Department staff based off of publicly available information, or the New England Commission on Higher Education (NECHE), which accredits the majority of private higher education institutions in Massachusetts, pursuant to a Memorandum of Understanding, based off

of publicly available information and information that such institutions are already required to submit to NECHE. The Board anticipates that there will be a fiscal effect on private institutions that are identified as being at Risk of Imminent Closure, as these institutions will then need to expend internal resources to furnish a surety bond or letter of credit. In addition, private institutions that fail to comply with the requirements of 610 CMR 13.00 and otherwise fail to cooperate with the Department in the screening, inquiry, monitoring, and/or contingency planning and notification processes, including failure to obtain the required bond with surety or letter of credit, may be subject to a fine not to exceed \$1,000 per day for non-compliance in an amount determined by the Commissioner in the Commissioner's sole discretion.

It is impossible for the Board to estimate what the expenses would be to those institutions that are deemed at Risk of Imminent Closure, as expenses would depend upon the resources each such institution has available and would dedicate to its interactions with the Department. Expenses would further depend on the extent of the work that each such institution has already done to mitigate any potential closure risk. The Board does not anticipate that any institution would need to hire staff to handle the Department's inquiries and to develop or refine the plans and documentation the Department would request. However, it is possible that an institution could voluntarily elect to hire outside consultants or counsel to assist it with this process.

The Department announced in the July 22, 2022 issue of the Massachusetts Register that it would hold a public comment period from July 22, 2022 to August 12, 2022 and hold a public hearing on August 12, 2022 relative to the proposed amended regulations 610 CMR 13.00. No testimony was provided at the public hearing; and of the two written comments received, one expressed general support and appreciation for the Board's proposed amended regulations. The other comment requested clarification regarding the Department's approach in determining whether to assess possible sanctions pursuant to 610 CMR 13.10 where an institution has demonstrated good-faith efforts to comply with 610 CMR 13.07 (trustee completion of training requirements) and 610 CMR 13.08 (posting of audited financial statements).

Since it is not the intention of the Board or Department to, pursuant to 610 CMR 13.10, sanction an institution capable of demonstrating good-faith efforts to comply with 610 CMR 13.00 et seq., no changes to the proposed amended regulations are necessary at this time. The Department can specify its intention to take into account an institution's good-faith efforts to comply in its implementation procedures. The Board strongly believes that the fiscal effects associated with these revised regulations are justified and outweighed by the benefits and protections that will be put in place for the public, along with the benefits that would accrue to private institutions as a result of having financial issues identified early, so as to allow institutions to dedicate time to developing plans to address those issues.

### **Small Business Impact**

In addition, M.G.L. c. 30A provides that before any regulation becomes effective, agencies of the Commonwealth must file with the Secretary of the Commonwealth a statement considering the impact of said regulation on small businesses. Such statement of consideration shall include, but not be limited to, an estimate of the number of small businesses subject to the

proposed regulation; projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed regulation; the appropriateness of performance standards versus design standards; an identification of relevant regulations of the promulgating agency, or any other state agency, which may duplicate or conflict with the proposed regulation; and an analysis of whether the proposed regulation is likely to deter or encourage the formation of new businesses in the Commonwealth.

#### An estimate of the number of small businesses subject to the proposed regulation

There are approximately 82 private independent institutions of higher education in Massachusetts that are subject to these regulations. The Board believes that no more than 23 of these institutions fall under the definition of “small business” as established by the U.S. Small Business Administration in 13 CFR § 121.201. All 23 “small business” institutions would be subject to the screening process established by these regulations.

#### Projected reporting, recordkeeping, and other administrative costs

On average, the Board anticipates that no more than 10 to 15 institutions would be screened-in each year. The Board has no way of predicting whether any of the screened-in institutions would also be considered to be small businesses. The following statements regarding reporting, recordkeeping, and other administrative costs apply irrespective of whether an institution qualifies as a small business.

The annual reporting process requests institutions to update key leadership contacts, provide the public URL where it has posted its annual financial reports and summaries, submit documentation of the training it has provided to governing board members, and certify that it will notify the Board of any financial conditions required by law. Institutions have already been subject to his requirement for two full years, and as such, no new annual reporting requirements are being created through the proposed regulatory amendments.

These regulatory amendments should not impose any additional recordkeeping costs. Institutions should already be implementing recordkeeping concerning their financial circumstances and training of governing board members, and the Board (and to the extent delegated, NECHE) intends to rely on existing recordkeeping practices for the annual reporting process. The Board anticipates that the overwhelming majority of documents requested by the Department in furtherance of requiring a surety bond or letter of credit, and/or in furtherance of an institution’s annual reporting requirement, would be records kept by the institution in the ordinary course of business.

The Board does not anticipate that institutions will incur any additional administrative costs as a result of these regulations. If an institution is deemed at Risk of Imminent Closure, however, it will need to furnish a surety bond or letter of credit to guarantee the availability of funds for the preservation of student records and refund of student deposits. Additionally, if an institution does not comply with the proposed regulations, it may be subject to a fine determined by the Commissioner, up to \$1,000 per day. Internal resources may need to be redeployed to

respond to some of the Department's inquiries and to obtain the surety bond or letters of credit, or for the resolution of any assessed fines for non-compliance. An institution may choose to retain outside consultants or counsel to assist it with the Department's inquiry, but such expertise is not and should not be required.

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Since it is not the intention of the Board or Department to, pursuant to 610 CMR 13.10, sanction an institution capable of demonstrating good-faith efforts to comply with 610 CMR 13.00 et seq., no changes to the proposed amended regulations are necessary at this time. The Department can specify its intention to take into account an institution's good-faith efforts to comply in its implementation procedures.

#### Appropriateness of performance standards versus design standards

Performance standards are not appropriate for these regulations, which are being proposed in order to establish standards and processes to permit the Board to identify, through a screening 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; allow for contingency closure planning and timely public notification in the event of closure; guarantee the availability of funds for the preservation of student records and refund of student deposits in the event of closure; and ensure full institutional compliance through potential fines for non-compliance. Design standards are necessary so that the regulated parties and the public understand the processes that are in place and to provide for some predictability and uniformity.

#### Identification of duplicate or conflicting regulations

The Board has not identified any duplicate or conflicting regulations promulgated by any state agency.

#### Analysis of whether the proposed regulation is likely to deter or encourage the formation of new businesses in the Commonwealth

These regulations are unlikely to have any impact on whether private higher education institutions want to establish a physical presence in Massachusetts. When individuals or entities seek to establish a new institution or branch campus in Massachusetts, it is usually because they wish to offer some in-person educational programming/services to Massachusetts residents and 100% online education is not sufficient for their programmatic needs. If the Board's oversight of

a proposed new institution's fiscal stability is enough to deter an entity from establishing a physical campus in the Commonwealth, it follows that the institution may have a precarious financial situation and therefore would not be an institution which Massachusetts residents should attend.