



## MEMORANDUM

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**TO** American Council on Education

**FROM** Stephanie Gold  
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**DATE** April 1, 2015

**SUBJECT** Campus Accountability and Safety Act (114<sup>th</sup> Congress)

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On February 26, 2015, Senator Claire McCaskill and a bipartisan group of cosponsors introduced the “Campus Accountability and Safety Act” (“CASA” or “Bill”),<sup>1</sup> a modified version of similar legislation that was introduced in 2014 but never came to a vote in Congress. CASA represents an effort to augment existing law on institutional response to campus sexual assault.

This memorandum addresses CASA provisions relating to such matters as confidential advisors; climate surveys; Clery Act reporting obligations; agreements with law enforcement agencies; definitions; and terminology. The memorandum does not focus on differences between the bill introduced in 2014 and this one. Nor does it provide a provision-by-provision analysis of the CASA. Instead, it identifies several aspects of CASA that aim to address important issues but may fall short in terms of efficacy or clarity, or both. The memorandum also includes some issues that were present in the 2014 bill and remain unchanged.

### Confidential advisors

- CASA would require higher education institutions that receive funds under the Higher Education Act to appoint an “adequate number” of “confidential advisors at the institution” to whom “non-employee victims” of sexual harassment, domestic violence, dating violence, sexual assault, or stalking can report, including anonymously. The U.S. Department of Education (“ED”) would define “adequate number” based on institutional size.
  - The undefined term “non-employee victims” raises questions as to meaning and scope. Possibly the intention is to make confidential advisors available only to matriculated students. However, the term could be read to mean that an institution would have confidential-advisor obligations to any member of the general public, except for an institution’s own employees. Ambiguity in this area may confuse victims in terms of whether confidential counseling resources are available to them from an institution.

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<sup>1</sup> On March 4, 2015, Rep. Carolyn Maloney introduced a companion bill in the House of Representatives.

Ambiguity may also limit an institution's ability to plan for appropriate resources in relation to demand.

- Institutional size may not be the only factor that should be considered to determine an "adequate number" of confidential advisors. The extent to which confidential advisors are needed may vary depending on the nature of the institution and the institution's history with the occurrence of sexual assault. For example, the requirement seems to apply equally to residential institutions, online institutions, and non-residential institutions, yet demand for confidential advisors at online or non-residential institutions may be less than at residential institutions.
- CASA would use the term "confidential" with respect to such advisors.
  - The "confidential" terminology may suggest that communications with the advisor will be kept confidential in all circumstances, which could lead victims to have a false or misleading sense of security in this regard. Numerous circumstances could cause a victim's reasonable expectation of confidentiality to prove incorrect, including state law, context, the nature of conversations between the victim and the advisor, and the extent to which they are, and remain, confidential. While various types of privileges exist under states' laws to encourage and enable counseling and advice (for example, medical, psychological, pastoral, and legal), they are rarely absolute, in practice. For example, depending upon the actual circumstances and the applicable state law, an institution, or the person who provided counseling and advice, may be compelled by law to disclose communications with the victim in response to a public records request or a discovery request in civil litigation, or as "education records" under the Family Educational Rights and Privacy Act ("FERPA"). Indeed, a student other than the victim, such as an alleged perpetrator, may have a right to access portions of the records that relate to him or her.
  - In addition, CASA itself would require that confidential advisors collect and report statistics in accordance with the requirements of the Clery Act.<sup>2</sup>
- CASA would define the confidential advisor's role to include advocacy functions (e.g., to assist a victim in contacting campus police or local law enforcement; to "liaise with" appropriate staff to arrange "reasonable accommodations") as well as possibly investigative functions. Specifically, in addition to providing information and support to a victim, confidential advisors would be trained in "victim-centered, trauma-informed interview techniques."<sup>3</sup>
  - These activities may cause any truly confidential (i.e., protected from disclosure, per applicable state law) communication to lose such confidentiality and thus may jeopardize a person's reasonable expectation that communications will be non-disclosable.

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<sup>2</sup> The requirement that confidential advisors collect and report statistics for Clery Act purposes did not appear in the version of the legislation that was introduced in 2014 (hereinafter "2014 Bill").

<sup>3</sup> The 2014 Bill required that confidential advisors assist in conducting a "forensic" interview. The current Bill removes that requirement from the advisor's responsibilities.

- CASA uses the term “reasonable accommodations,” a term that is well-known and used regularly in the disability law context. In this regard it has the potential to be misleading and ambiguous in context.
  - CASA is ambiguous as to whether the confidential advisor may instruct appropriate staff at the institution as to what are reasonable accommodations. In other words, it is unclear who ultimately decides what the appropriate accommodation is—the confidential advisor or other institutional staff.
  - In general, the roles of victim advocate and crime/disciplinary investigator are distinct. The victim’s advocate should act in the victim’s interest; the investigator should seek to obtain a thorough, objective understanding of the facts. CASA is ambiguous about whether confidential advisors must be trained in use of “victim-centered, trauma-informed interview techniques” for investigative or non-investigative purposes. If for investigative purposes, the roles CASA would assign confidential advisors seem to conflict, and CASA does not address how to reconcile them. Confusion as to role may lead to unmet expectations and legal challenges.
- CASA would require an institution to designate as a confidential advisor an individual who has protection under State law to provide privileged communication. An institution would be permitted to partner with a third-party victim services organization, such as a community-based rape crisis center or sexual assault service provider, to offer students access to advisors whose communications state law protects as privileged.
    - The class of individuals to whom privilege laws apply (e.g., clergy, psychologists, counselors to or advocates for victims of specified crimes) varies from state to state, which may not support in all cases the application of privileges and therefore may result in a different set of confidential advisors being designated on some campuses as compared to others. As a legal matter, it is unclear whether an individual’s privileged communications would remain privileged if the individual performs the responsibilities designated to confidential advisors in CASA.

#### Climate surveys

- CASA would require ED, in consultation with the Attorney General, to “develop, design, and administer” every two years<sup>4</sup> a standardized, online survey of students “regarding their experiences with sexual violence and harassment,” and would require ED to “develop [the] survey tool using best practices from peer-reviewed research measuring sexual violence and harassment.” The survey would be administered at institutions that participate in the federal student financial aid programs authorized under Title IV of the Higher Education Act, and, upon approval from ED, such institutions could administer the survey with assistance from a third party. ED would publish the results in a report that would permit comparisons across schools and campuses.

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<sup>4</sup> The survey would have been administered every year under the 2014 Bill.

- CASA specifies that the survey instrument “shall be fair and unbiased, scientifically valid and reliable, and meet the highest standards of survey research.”<sup>5</sup> Bill does not indicate whether institutions can expect to participate in developing surveys that will be administered to their students, or whether they or the public generally, will have an opportunity to comment on the proposed survey instrument or whether the instrument will be tested for validity and reliability prior to implementation. In another context, for the National Assessment of Educational Progress, Congress created a National Assessment Governing Board of stakeholders and testing and measurement experts to assure that congressionally mandated research comported with Congress’ goals.
- A valid and reliable survey instrument requires that its purpose be known, for the questions must be designed to serve that purpose. CASA does not identify the purpose of the survey.
- CASA would require each institution to “ensure that an adequate, random, and representative sample size of students (as determined by [ED]) enrolled at the institution complete the survey.”
  - An institutional guarantee that a survey response is “adequate, random, and representative” may be impossible. Institutions have a limited authority when it comes to compelling students to participate in surveys. The CASA requirement may result in noncompliance over matters outside institutional control. Even if institutions were able to compel participation or provide incentives to students to participate, such compulsion or incentives may taint the survey’s validity and reliability.
  - CASA does not indicate how ED will determine what sample size is sufficiently “representative.” “Representative” may relate to a range of characteristics, such as gender, age, enrollment status, credential level (e.g., undergraduate, graduate), class (e.g., freshman, sophomore, junior, senior), and residence status (e.g., on-campus, off-campus). Further, steps an institution would need to take to obtain a representative sample size may compromise confidentiality.
  - Institutions may be required to obtain Institutional Review Board approval, on the ground that the survey constitutes human subjects research. Not all institutions have the same level of experience with the IRB review process.
- CASA prescribes, non-exhaustively, some topics the survey must cover, and provides that other questions may be determined by ED.<sup>6</sup>
  - Although non-exhaustive, the list does not include such topics as student attitudes and perceptions regarding sexual violence on campus. A survey limited to the topics identified in CASA may not provide a comprehensive picture of campus climate with respect to sexual violence.
- Institutions must conduct the first climate survey within one year after CASA’s enactment.

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<sup>5</sup> This requirement did not appear in the 2014 Bill.

<sup>6</sup> The category of “[o]ther questions as determined by the Secretary” was added to the version of CASA introduced in 2015; it was not included in the 2014 Bill.

- Institutions may be given inadequate time to administer the first survey, because they will have to wait until ED prepares and pretests the survey instrument. The less time institutions have to administer the first survey, the harder it may be to achieve a survey response that reflects an adequate, random, and representative sample of enrolled students.

#### New Clery Act statistics

- CASA would require institutions to disclose the following additional information with respect to “sex offenses, forcible or nonforcible”: (i) the number of such incidents that were reported to a Title IX coordinator or other responsible employee of the institution;<sup>7</sup> (ii) of those incidents reported to the Title IX coordinator or other responsible employee, the number of victims who sought campus disciplinary action; (iii) from among those cases for which the victim sought campus disciplinary action, the number of cases processed through the institution’s student disciplinary process; (iv) from among those cases processed through the student disciplinary process, the number of accused individuals found responsible, the number of accused individuals found not responsible, a “description of the final sanctions imposed by the institution for each incident for which an accused individual was found responsible,” and the number of disciplinary proceedings that were closed without resolution.<sup>8</sup>
- The additional statistics may result in a comparison of apples (Clery Act crimes) to oranges (campus disciplinary policy violations), because campus disciplinary policies -- which are not designed to mirror criminal codes -- do not necessarily align with Clery Act crime definitions. Without context, the statistics may not convey accurately the institution’s discipline-related practices.
- The numbers reported as part of the additional statistics regarding disciplinary proceedings may be smaller than the number of sex offenses reported as Clery Act crimes, which may lead to a conclusion that the institution is not addressing all reported sex offenses. Appropriate reasons may explain such disparity, however. In particular, sex offenses that must be reported for purposes of the Clery Act may involve persons not affiliated with the institution and therefore not subject to campus disciplinary rules. For example, if a rape occurs in a geographical area the Clery Act covers, such as certain public property, and the rape involves persons unaffiliated with the institution, the institution would be required to report the crime as part of its Clery Act crime statistics but would not be empowered to bring disciplinary action.
- The additional statistics alone, with no context, may not tell the full story. For example, CASA would require information regarding disciplinary proceeding outcomes, but such information, which would not reflect the myriad considerations that figure in a disciplinary outcome, may lead to incorrect assumptions regarding institutional responsiveness and procedural effectiveness.

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<sup>7</sup> In contrast, the 2014 Bill would have required institutions to report “[t]he number of cases that were investigated by the institution.”

<sup>8</sup> The Bill does not retain a provision of the 2014 Bill, which would have required institutions to report the number of such cases that were referred to local or State law enforcement.

- The requirement to disclose the number of disciplinary proceedings that closed without resolution needs specification, because institutions must resolve all disciplinary proceedings.

#### New Clery Act policy statements

- CASA would require institutions to state, as part of their policies related to domestic violence, dating violence, sexual assault, and stalking, that the institution “will, based on the victim’s wishes, cooperate with local law enforcement with respect to any alleged criminal offenses involving students or employees.”
  - Such a policy may conflict with institutional Title IX obligations, because under Title IX institutions must take certain steps to address sexual harassment allegations, and those steps may not always be consistent with law enforcement requests or a victim’s wishes. For example, in response to a student’s request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address alleged sexual violence, Title IX requires an institution to weigh a range of factors related to its responsibility to provide a safe and nondiscriminatory environment. An institution’s decision to take action based on its Title IX obligations may reasonably differ from law enforcement’s approach to a criminal investigation.
- CASA would require institutions to state, as part of their policies related to domestic violence, dating violence, sexual assault, and stalking, “the fact that these are crimes for the purposes of this subsection and reporting under this subsection.”
  - In some states, “domestic violence”, “dating violence”, “sexual assault”, and “stalking” are not by those terms “crimes”. Without clarification, the required policy statement may be misleading or confusing. Under the Clery Act, institutions must report to ED and disclose in their annual security report statistics concerning the number of incidents of domestic violence, dating violence, sexual assault, and stalking as those offenses are defined by the Clery Act and its implementing regulations. Local jurisdictions within which institutions are located may have different terminology for, and definitions of, those offenses for purposes of criminal prosecution.

#### New notice requirements for student disciplinary proceedings

- CASA would require higher education institutions to provide both the accuser and the accused student with written notice of the institution’s decision to proceed with an institutional disciplinary process regarding an allegation of sexual misconduct within 24 hours of such decision, and sufficiently in advance of a disciplinary hearing to provide each party with the opportunity to exercise any due process rights afforded to them under institutional policy. CASA prescribes certain elements that would be required in the written notice. CASA would also require an institution to provide the parties with written notification of the determination of responsibility that is made by the disciplinary board, any sanction assessed, and any applicable appeal process, within 24 hours of such determination.
  - Existing federal law requires institutions to provide *simultaneous* notification, in writing, to both the accuser and the accused of the outcome of any institutional disciplinary proceeding

that arises from an allegation of sexual assault. CASA would require that such notice be provided within 24 hours, but as a practical matter and keeping interest of fairness in mind, there are circumstances under which it may not be possible for an institution to ensure simultaneous written notification to each party in such a limited timeframe.

- CASA does not specify what is meant by an institution's "decision to proceed with an institutional disciplinary process regarding an allegation of sexual misconduct." Institutions' disciplinary processes may be comprised of several steps, and it is not clear at which point or points the notification obligation is triggered. CASA also does not specify whether the notification obligation would be triggered in cases where the institution makes a decision to proceed initially with an institutional process that is considered non-punitive in nature, such as through voluntary informal mechanisms.
- As drafted, CASA presupposes the existence of a "disciplinary board" that will render a determination of responsibility. However, as acknowledged by OCR, institutional student disciplinary procedures and practices vary in detail, specificity, and components, reflecting differences in the school size, administrative structure, and state and local legal requirements. Without clarification, institutions may infer that they must have a "disciplinary board" to adjudicate allegations of sexual misconduct.
- CASA would require an institution's written notice to include the name and contact information for an individual at the institution, "who is independent of the disciplinary process," to whom the victim and the accused student can submit questions about any of the information described in the written notice. Clarification about what it means to be "independent of the disciplinary process"—for example, whether the Title IX Coordinator or a member of a "disciplinary board" pool who is not serving in an active fact-finding or adjudicatory role for the specific case in question might be considered "independent"—is required.

#### Agreements with law enforcement agencies

- CASA would require higher education institutions that receive funds under the Higher Education Act to enter into, "review" every two years,<sup>9</sup> and update "as necessary" a memorandum of understanding ("MOU") with "each law enforcement agency that has jurisdiction to report as a first responder to a campus of the institution (excluding a campus located outside the United States)<sup>10</sup> to clearly delineate responsibilities and share information . . . about certain serious crimes, including sexual violence."
- The term "campus of the institution" is not defined by CASA, and the Bill does not specify whether institutions must satisfy the MOU requirement for physical locations at which students are not regularly present (e.g., research sites distant from the main campus; office

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<sup>9</sup> In contrast, the 2014 Bill required institutions to "update" the MOU every two years.

<sup>10</sup> The Bill limits the number of MOUs in which an institution would be required to enter, as compared to the 2014 Bill, in two ways: (1) it narrows the number of MOUs that might be required from "all applicable local law enforcement agencies" to only those that have jurisdiction to report as a first responder to a campus of the institution; and (2) it clarifies that the requirement does not extend outside the United States.

space that an institution leases for occasional evening or weekend classes). It is unclear how an institution would determine whether a U.S. site at which it has operations would qualify as a “campus of the institution” for purposes of the MOU requirement.

- CASA does not specify the extent to which the MOU requirement would apply to non-residential or primarily non-residential institutions. CASA also does not specify the extent to which the requirement would apply to wholly online institutions. The non-residential or online nature of an institution may mean that sexual assault is less prevalent and an MOU with local law enforcement therefore less germane.
- The required MOUs would apparently need to go beyond that which is necessary to address sexual violence, because CASA would require the MOUs to address “certain serious crimes, including, sexual violence.” An MOU that covers a range of crimes, some unrelated to sexual violence, may require provisions on investigation protocols and other information that differ from investigation protocols and other information pertinent to crimes that involve sexual violence. A broad MOU is likely to be more complex, which may impede development of protocols and other salutary arrangements to address sexual violence on campus. It also may make it more difficult to obtain an MOU.
- CASA would authorize ED to impose a civil penalty (described below) for each year an institution fails to comply with the MOU requirements. ED would be required to waive the penalty if an institution (a) explains why it was unable to obtain an agreement and demonstrates that it acted in good faith and (b) submits to ED a copy of its final proposed MOU submitted to the law enforcement agency that was ultimately rejected.
  - The waiver would apparently be subject to some degree of discretion by ED (“the Secretary shall waive the penalty *if* the Secretary determines that the following conditions have been met . . .”).<sup>11</sup> CASA does not indicate what evidence will satisfy ED that the conditions for waiver have been met.
  - The rationale for the “final proposed [MOU]” requirement is unclear. An institution may reasonably not have a “final proposed [MOU]”, such as where a law enforcement agency is nonresponsive to requests to discuss an MOU. Also unclear is what ED is expected to do with copies of such documents, of which it may receive hundreds. A final proposed MOU will not convey context and negotiation history. Viewed in isolation, a final proposed MOU may not adequately capture an institution’s effort to obtain an MOU or enable ED to evaluate meaningfully whether to grant an exemption. CASA would allow for administrative review of a waiver decision, at which point additional information could be provided, but such a two-step process may needlessly delay receipt of a waiver.

#### “Higher education responsible employee” definition

- CASA would define the term “higher education responsible employee.” Under Office for Civil Rights (“OCR”) guidance, an institution is deemed to have notice of an alleged Title IX violation,

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<sup>11</sup> The 2014 Bill provided ED with even more discretion: “the Secretary of Education *may* waive the penalty . . . . The Secretary of Education will then have discretion to grant the waiver.”



and Title IX requirements are triggered, when a “responsible employee” knows or reasonably should have known of an alleged Title IX violation. OCR has broadly defined “responsible employee” to include any employee authorized to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate designee; or whom a student could reasonably believe has such authority or duty. CASA would adopt a more limited definition of “higher education responsible employee,” to include only those employees who: (1) have “the authority to take action to redress sexual harassment . . . or the duty to report sexual harassment or other misconduct by students or employees”; (2) have completed or have agreed to complete certain institutional training; and (3) are responsible for providing a student or employee who reports having been a victim of sexual harassment with a written explanation of his or her rights and options.

- CASA may cause confusion as to whether the CASA definition of “higher education responsible employee,” or the OCR definition of “responsible employee,” will be followed in Title IX enforcement actions, because CASA does not make clear how its definition of “higher education responsible employee” relates to OCR’s existing definition of “responsible employee.”
- CASA would amend the Clery Act to provide that a “responsible employee” must be treated as a “campus security authority” for Clery Act purposes.
  - Treating all “responsible employees” as “campus security authorities” may increase the burden and administrative complexities of Clery Act compliance. A campus security authority must report, to the official or office the institution designates to collect crime report information, allegations of Clery Act crimes that he or she concludes were made in good faith, and an institution must collect and report annually statistics about all such reports. Institutions may consider “responsible employees” to include a broader range of persons than “campus security authorities”, particularly because those employees’ functions are different based on the different purposes of Title IX and the Clery Act.

#### Timeframe for Title IX sexual violence complaints

- CASA would expand the time period within which a Title IX complaint for sexual violence must be filed with OCR. OCR’s current policies generally require that a complaint be filed within 180 days after the date of the last act of alleged discrimination. CASA would allow individuals to file within 180 days after graduation or disaffiliation from the institution complaints of sexual violence.
  - CASA’s extension of time for complaints may lead to investigations of situations where memories have faded, evidence is stale, and pertinent students and employees are no longer at the institution, which may result in unreliable outcomes.

#### New penalties for violations

- CASA would authorize a new civil fine of not more than one percent of an institution’s operating budget (a) for each violation of Title IX that involves circumstances “related to sexual violence” and for each violation of a Title IX regulation related to sexual violence, (b) for each year an

institution fails to comply with CASA requirements related to confidential advisors, (c) for each year an institution fails to comply with CASA requirements related to MOUs with law enforcement agencies, and (d) for each year an institution fails to carry out other CASA requirements related to “university support for survivors of sexual assault,” including: publication of certain information on its website; provision of training to certain employees; application of a uniform campus-wide student disciplinary proceeding for all students, including athletes; submission of information about the Title IX Coordinator to ED; and provision of detailed written notice, within 24 hours, of the institution’s decision to proceed with an institutional disciplinary process regarding an allegation of sexual misconduct. ED would have authority to define an institution’s operating budget for purposes of the penalty. CASA would grant to ED the discretion to determine the amount of a civil penalty, based on certain factors, such as the “gravity of the violation or failure, and whether the institution committed the violation or failure intentionally, negligently, or otherwise.”

- The justification for the new civil fines is unclear.
- No common definition of “operating budget” exists.
- CASA would increase civil fines for Clery Act violations from up to \$35,000 for each violation to up to \$150,000 for each violation or misrepresentation or for each month a climate survey is not completed at the required standard.
  - Unclear is whether an increase in the maximum civil fine amount for Clery Act violations is justifiable. A range of factors may pertain to a fine amount, such as the nature of the violation and whether the violation was reckless or intentional. The Clery Act is highly complex, with substantial compliance challenges. Fines may be assessed for violations that are due to inadvertent oversight, unintentional reporting errors, or good faith compliance efforts that prove inconsistent with ED’s interpretation of the law. A fine of up to \$150,000 for each violation may be excessive in such circumstances.<sup>12</sup>

#### Title IX and Clery Act overlap

- CASA would direct ED to publish guidance regarding the intersection between the Clery Act and Title IX. Such guidance is intended to clarify and resolve “any potential discrepancies or inconsistencies” between the two laws.
  - CASA is unclear as to whether the guidance must clarify and resolve potential discrepancies or inconsistencies in subregulatory guidance regarding the Clery Act and Title IX, where

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<sup>12</sup> In general, CASA provides that ED use any civil penalties collected to carry out a competitive grant program established by the Bill (*i.e.*, the Grants to Improve Prevention and Response to Sexual Harassment, Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus program). Fines collected for violations of the MOU provision are to be used to carry out the existing DOJ Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus program. The 2014 Bill proposed that collected monies be supplied to the enforcement agency, *i.e.*, ED or the U.S. Department of Justice (“DOJ”), which would have been permitted to use such monies for enforcement purposes.

discrepancies and inconsistencies often arise. Further, CASA does not require ED to develop the guidance through a public process that solicits input from all stakeholders.

- CASA would require ED to publish the guidance not later than 180 days after CASA's enactment.
  - Six months may be insufficient to develop the guidance.

#### Implementation calendar

- Many CASA provisions would have an effective date of not later than one year after enactment. Some of those provisions are subject to negotiated rulemaking.
  - CASA will likely go into effect before implementing regulations are promulgated for some requirements. The negotiated rulemaking process typically takes many months to complete, and after negotiated rulemaking ED must provide notice and comment to the public, which takes additional months to complete. Institutions consequently may be required to comply with some CASA provisions before ED promulgates regulations that account for stakeholder input.