

# RULE PROPOSALS

## INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

## HIGHER EDUCATION

### (a)

#### SECRETARY OF HIGHER EDUCATION

#### Financial Assessment and Risk Monitoring of Independent and Proprietary Institutions of Higher Education

#### Proposed New Rules: N.J.A.C. 9A:2

Authorized By: Brian Bridges, Secretary of Higher Education.

Authority: P.L. 2021, c. 27 (N.J.S.A. 18A:3B-91).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2021-105.

Submit comments by December 31, 2021, to:

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The agency proposal follows:

#### Summary

P.L. 2021, c. 27, enacted on March 1, 2021, and effective September 1, 2021, authorizes the Secretary on Higher Education (Secretary) to promulgate new rules to establish a system to assess each independent institution's, and each proprietary institution's, financial information to identify whether an institution is at risk of imminent closure; to require an institution that has been determined by the Secretary to be at risk of imminent closure to submit a contingency plan for closure; and to implement the requirement for independent institutions and proprietary institutions to immediately notify the Secretary of any known financial liabilities or risks that are reasonably likely to result in the imminent closure of the institution or otherwise negatively affect the institution's ability to fulfill its obligations to current and admitted students.

Pursuant to the enactment of P.L. 2021, c. 27, the Office of the Secretary of Higher Education (OSHE) conducted an extensive consultation with institutions and institutional associations. This collaborative process resulted in this rulemaking.

As the Secretary has provided a 60-day comment period on this notice of the proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5. The proposed new rules are set forth within the following subchapters.

Proposed new Subchapter 1 contains definitions and presents the general standards regarding the financial assessment and risk monitoring

of independent institutions of higher education and proprietary institutions licensed to offer academic degrees.

Proposed new N.J.A.C. 9A:2-1.1, Scope and purpose, sets forth the scope and purpose of the proposed new rules.

Proposed new N.J.A.C. 9A:2-1.2, Definitions, sets forth the following new terms: "accrediting agency," "independent institution," "OSHE," "proprietary institution," and "Secretary."

Proposed new N.J.A.C. 9A:2-1.3, Institutional reporting of a risk of imminent closure, sets forth the manner in which an institution should provide immediate notification to the Secretary of any known financial liabilities or risks that are reasonably likely to result in the imminent closure of the institution or otherwise negatively affect the institution's ability to fulfill its obligations to current and admitted students. In addition, the proposed new section establishes that the Secretary shall determine if there is a risk of imminent closure of an institution that has made a notification to the Secretary. Additionally, the section establishes that when the Secretary determines there is a risk of imminent closure, the procedures at proposed new N.J.A.C. 9A:2-1.5 shall apply. The proposed new section also sets forth the possible action the Secretary may take for institutions that are not at risk of imminent closure by requesting a risk mitigation plan. Finally, the proposed new section establishes that OSHE will issue annual guidelines to assist institutions with meeting the requirements of this section.

Proposed new N.J.A.C. 9A:2-1.4, Annual financial monitoring procedures, sets forth the process for the Secretary to conduct annual financial monitoring of independent institutions and proprietary institutions to determine whether those institutions are at risk of imminent closure. The proposed new section establishes that the OSHE will annually provide institutions with a reporting template and reporting schedule for submission of the annual report to the Secretary. The proposed new section also establishes that the Secretary may request additional information from institutions and conduct additional assessments at the Secretary's discretion. In addition, it provides that the Secretary shall determine if there is a risk of imminent closure of an institution that has made a report to the Secretary. When that occurs, proposed new N.J.A.C. 9A:2-1.5 would apply. The proposed new section also delineates actions that may be taken by the Secretary in relation to institutions that are not at risk of imminent closure.

Proposed new N.J.A.C. 9A:2-1.5, Procedures that apply when the Secretary determines there is a risk of imminent closure, sets forth the process to be followed when the Secretary has determined that an institution is at risk of imminent closure. It requires OSHE to notify the institution upon a determination by the Secretary that an institution is at risk of imminent closure, in writing, no later than five business days from the date the determination is made by the Secretary. The proposed new section further establishes that, upon receipt of the Secretary's determination, the institution shall, within five business days: 1. notify the Secretary of any known liabilities, risks, or financial issues at the institution; 2. provide the Secretary with any additional information

requested by the Secretary; and 3. prepare, and submit, to the Secretary a contingency plan for closure, which shall meet the requirements for such a plan at N.J.S.A. 18A:3B-91. Finally, the proposed new section establishes that an institution may submit additional information and seek a reconsideration of the initial determination by the Secretary.

Proposed new N.J.A.C. 9A:2-1.6, Risk mitigation plan, sets forth that the Secretary may request a risk mitigation plan from an institution that is not at risk of imminent closure but has demonstrated significant potential financial weakness. The proposed new section establishes the minimum contents of a risk mitigation plan and provides that OSHE may conduct additional assessments in order to monitor the institution's progress in the implementation of a risk mitigation plan.

Proposed new N.J.A.C. 9A:2-1.7, Applicability of the Open Public Records Act, sets forth that any information submitted to, or developed by, the Secretary in furtherance of this chapter shall not be a public record and shall be exempt from disclosure under provisions at N.J.S.A. 47:1A-1 et seq., commonly known as the Open Public Records Act.

#### **Social Impact**

The proposed new rules establish criteria and processes to ensure that private nonprofit institutions and proprietary institutions shall notify the Secretary if the institution is at risk of imminent closure and give the Secretary's office the tools to assess institutions annually for risk of imminent closure. Furthermore, the proposed new rules establish a requirement for a contingency closure plan that will require institutions to consider the potential closure of the institution and the necessary steps to take in the event a closure should occur. Application of the standards protects the citizens of New Jersey, individuals attending private nonprofit institutions and proprietary institutions in New Jersey, the employees of those institutions, and the community or communities where those institutions are located. The proposed new rules contribute further to the stability of higher education in the State, provide standards for effective compliance, and in specific instances, will mitigate the negative consequences of an imminent closure of a private nonprofit institution and proprietary institution.

#### **Economic Impact**

The proposed new rules have no direct economic impact on New Jersey or the State's higher education institutions. An indirect impact flows from the fact that to meet the requirements set forth in the proposed new rules, private nonprofit institutions and proprietary institutions must allocate resources (employees, materials, equipment, etc.) to ensure compliance with the standards. The cost of such compliance will vary from institution to institution and within a particular institution, depending on the area involved, but may not always represent additional cost.

#### **Federal Standards Statement**

The proposed new rules are not subject to a Federal standards analysis pursuant to N.J.S.A. 52:14B-22 et seq., because the statutory function of the Secretary of Higher Education, in regard to the potential imminent closure of private nonprofit institutions and proprietary institutions, is not subject to any Federal requirements or standards.

#### **Jobs Impact**

The proposed new rules are not estimated to result in the generation or loss of any jobs.

#### **Agriculture Industry Impact**

The proposed new rules will have no impact on the agriculture industry.

#### **Regulatory Flexibility Statement**

The proposed new rules affect some proprietary and private nonprofit institutions in the State with fewer than 100 full-time employees. These are small businesses as defined at N.J.S.A. 52:14B-16 et seq., the Regulatory Flexibility Act. Currently, between 30 to 35 colleges in the State meet this definition; others may seek licensure in the future. The proposed new rules require such schools to meet certain criteria to comply with the annual financial monitoring requirement and the duty to give notice to the Secretary if a private nonprofit institution or proprietary institution determines that it is at risk of imminent closure. In order to meet these criteria, the school must allocate resources to ensure compliance with the standards; the cost of compliance varies but may not

always represent additional cost. In certain instances, professional services may need to be employed to comply with the proposed new rules. The schools meeting the definition of small businesses are held to the same standards as other private nonprofit institutions and proprietary institutions. The standards cannot be lessened for small businesses without seriously diluting the intent of the statutory authority. Therefore, no differing standards based on business size are offered.

#### **Housing Affordability Impact Analysis**

The proposed new rules do not impact housing affordability because the proposed new rules establish criteria and processes to ensure that any institution (public, private nonprofit, or proprietary), whether incorporated in the State or not, offering college-level coursework in New Jersey meets standards of quality and there is an extreme unlikelihood that the proposed new rules will evoke a change in the average costs associated with housing.

#### **Smart Growth Development Impact Analysis**

The proposed new rules are not likely to have any impact on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan because the proposed new rules govern the financial assessment and risk monitoring of independent institutions of higher education and proprietary institutions.

#### **Racial and Ethnic Community Criminal Justice and Public Safety Impact**

The Secretary has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

**Full text** of the proposed new rules follows:

### **CHAPTER 2**

#### **FINANCIAL ASSESSMENT AND RISK MONITORING OF INDEPENDENT AND PROPRIETARY INSTITUTIONS OF HIGHER EDUCATION**

##### **SUBCHAPTER 1. GENERAL STANDARDS**

##### **9A:2-1.1 Scope and purpose**

(a) This chapter implements P.L. 2021, c. 27, which authorizes the Office of the Secretary of Higher Education to adopt rules regarding the financial assessment and risk monitoring of independent institutions of higher education and proprietary institutions licensed to offer academic degrees pursuant to P.L. 2021, c. 27.

(b) This chapter applies to all independent institutions of higher education and proprietary institutions licensed to offer academic degrees in New Jersey.

##### **9A:2-1.2 Definitions**

The following words and terms, as used in this chapter, shall have the following meanings:

"Accrediting agency" means a non-governmental entity that grants formal recognition or acceptance of an institution or of programs or portions of the institution and is recognized by the U.S. Secretary of Education.

"Independent institution" means a private postsecondary institution that is not operated for profit.

"OSHE" means the New Jersey Office of the Secretary of Higher Education.

"Proprietary institution" means a postsecondary institution that is operated for profit.

"Secretary" means the New Jersey Secretary of Higher Education.

##### **9A:2-1.3 Institutional reporting of a risk of imminent closure**

(a) An independent institution, or a proprietary institution, licensed to offer academic degrees shall immediately notify the Secretary of any known financial liabilities or risks that:

1. Are reasonably likely to result in the imminent closure of the institution; or

2. Otherwise negatively affect the institution's ability to fulfill its obligations to current and admitted students.

(b) A notification sent pursuant to (a) above shall be in writing and sent in both physical and electronic format to the OSHE and shall contain the following information, at a minimum:

1. A description of the known liabilities or risks that are the basis for the notification;
2. Any other additional financial information necessary to perform an analysis of the items at (b)1 above;
3. A description of the impact of the items at (b)1 above on the institution, including a detailed description of the specific services that the institution is either unable to, or expects to be unable to, provide to current and admitted students in relation to the notice provided to the Secretary pursuant to (a) above; and
4. The anticipated date of imminent closure, if applicable.

(c) Upon receipt of a notification sent pursuant to (a) above, the Secretary may seek additional information from the institution, as determined by the Secretary.

(d) The Secretary shall determine if there is a risk of the imminent closure of the institution.

1. If the Secretary determines that there is a risk of imminent closure, the procedures at N.J.A.C. 9A:2-1.5 shall apply.
2. If the Secretary determines that there is not a risk of imminent closure, the Secretary may request the institution to submit a risk mitigation plan pursuant to N.J.A.C. 9A:2-1.6.

(e) OSHE shall issue guidelines on an annual basis to assist institutions with meeting the requirements of this section. The guidelines shall contain:

1. Examples of financial liabilities or risks that would require notification pursuant to (a) above;
2. A notification template; and
3. Notification submission instructions.

#### 9A:2-1.4 Annual financial monitoring procedures

(a) The Secretary shall annually assess each independent institution's, and proprietary institution's, financial information to identify whether an institution is at risk of imminent closure.

(b) On an annual basis, OSHE shall provide institutions with a template for the fiscal monitoring report and set a submission schedule for the fiscal monitoring report. The Secretary shall set the submission schedule for each institution and shall consider the fiscal calendar of each institution when determining the schedule.

(c) Utilizing the template provided by OSHE pursuant to (b) above, each independent institution, and each proprietary institution, shall submit an annual fiscal monitoring report to the Secretary, in accordance with the submission schedule established by the Secretary pursuant to this section.

(d) In addition to the annual fiscal monitoring report, the Secretary may require the submission of additional supplemental information from an institution, if necessary, for the Secretary's assessment as to whether the institution is at risk of imminent closure.

(e) At the Secretary's discretion, the OSHE may conduct additional assessments of an institution for the purpose of identifying whether an institution is at risk of imminent closure. Such assessments may include, but are not limited to, a review of:

1. Financial and non-financial indicators from publicly available data sources;
2. Credit ratings assigned to institutions by credit rating agencies or services; and/or
3. Information obtained from other regulatory, oversight, or law enforcement entities, including, but not limited to, accrediting agencies, the U.S. Department of Education, and the New Jersey Office of the Attorney General.

(f) The Secretary shall determine if there is a risk of the imminent closure of the institution.

1. If the Secretary determines that there is a risk of imminent closure, the procedures at N.J.A.C. 9A:2-1.5 shall apply.
2. If the Secretary determines that there is not a risk of imminent closure, the Secretary may request the institution to submit a risk mitigation plan pursuant to N.J.A.C. 9A:2-1.6.

9A:2-1.5 Procedures that apply when the Secretary determines there is a risk of imminent closure

(a) Upon a determination by the Secretary that an institution is at risk of imminent closure, OSHE shall notify the institution no later than five business days from the date the determination is made by the Secretary. The notification shall be in writing and shall include:

1. A summary of the Secretary's determination;
2. The results of the review process, including the analytical methodology utilized by OSHE;
3. A description of the procedures at (b) and (c) below; and
4. A request for additional information from the institution, if applicable.

(b) Unless extended by the Secretary for good cause, no later than five business days from the receipt of the Secretary's determination that the institution is at risk of imminent closure, the institution shall:

1. Notify the Secretary of any known liabilities, risks, or financial issues at the institution;
2. Provide, to the Secretary, any information requested pursuant to (a)4 above; and
3. Prepare and submit, to the Secretary, a contingency plan for closure, which shall meet the requirements set forth at N.J.S.A. 18A:3B-91.d(3).

(c) The institution may submit additional information to OSHE that the institution deems relevant to the Secretary's determination, including updated data, within 10 business days of the date of the notification sent pursuant to (a) above. Upon the submission of additional relevant information by the institution, the Secretary may extend, upon request, the period to submit a contingency plan for closure pursuant to (b)3 above by an additional 10 business days, and the Secretary:

1. Shall review the additional information submitted;
2. Shall notify the institution within 10 business days of the date of submission whether the determination that the institution is at risk of imminent closure remains unchanged;
3. Shall require an institution determined to remain at risk of imminent closure to submit a contingency plan for closure within 10 business days of the date of the notification made pursuant to (c)2 above; and
4. May request an institution found no longer to be at risk of imminent closure to submit a risk mitigation plan pursuant to N.J.A.C. 9A:2-1.6.

#### 9A:2-1.6 Risk mitigation plan

(a) During the course of a review pursuant to this chapter, the Secretary may find that an institution that is not at risk of imminent closure has demonstrated significant potential financial weakness and may request the institution to submit a risk mitigation plan, which shall, at a minimum:

1. Notify the Secretary of any known liabilities, risks, or financial issues at the institution;
2. Provide the institutional plan, both short-term and long-term, to sustain operations and to improve the financial stability of the institution; and
3. Provide any additional information required by the Secretary.

(b) OSHE may conduct additional assessments of an institution in order to monitor the institution's progress in the implementation of a risk mitigation plan.

#### 9A:2-1.7 Applicability of the Open Public Records Act

Any information submitted to, or developed by, the Secretary in furtherance of this chapter shall not be a public record and shall be exempt from disclosure under provisions at N.J.S.A. 47:1A-1 et seq., commonly known as the Open Public Records Act.