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# The Nuts and Bolts of Reauthorization

*By Aaron Lacey and Chris Murray, Thompson Coburn LLP*

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As most in higher education are aware, Congress is currently working to reauthorize the Higher Education Act of 1965, as amended (HEA), the seminal legislation that created and governs the administration of the federal student financial aid programs. Throughout the reauthorization period, various legislators will propose bills to establish, terminate, or amend the student aid programs. The education committees in the House and Senate will hold hearings and commission reports, both to gather information and to highlight concerns. White papers will be issued by congressional offices, executive agencies, and think tanks, and trade associations and industry participants will attempt to bend the ear of legislators on policy issues.

As you would expect, in all the commentary and analysis relating to the machinations described above, references to “reauthorization” will be abound. It is, after all, the context in which all the noted activity occurs. And yet it is rare that the nuts and bolts of the process, or even its basic purpose, will be discussed. What, for example, is actually being reauthorized? How is reauthorization ultimately accomplished? And why is

reauthorization necessary? Here we hope to answer such questions, and in doing so, to provide some useful insight into this fundamental process.

## Reauthorization mechanics

As noted above, the HEA was first enacted in 1965. Since then, it has been “reauthorized” on eight separate occasions.

HEA Reauthorizations	
1968	Higher Education Amendments of 1968 (P.L. 90-575, 10/16/1968)
1972	Education Amendments of 1972 (P.L. 92-318, 6/23/1972)
1976	Education Amendments of 1976 (P.L. 94-482, 10/12/1976)
1980	Education Amendments of 1980 (P.L. 96-374, 10/3/1980)
1986	Higher Education Amendments of 1986 (P.L. 99-498, 10/17/1986)
1992	Higher Education Amendments of 1992 (P.L. 102-325, 7/23/1992)
1998	Higher Education Amendments of 1998 (P.L. 105-244, 10/7/1998)
2008	Higher Education Opportunity Act of 2008 (P.L. 110-315, 8/14/2008)

But what, exactly, does it mean to “reauthorize” the HEA? Generally speaking, authorization language creates, extends, or makes changes to a federal program, and specifies the amount of money that the

government may spend to carry out the program. Sometimes Congress authorizes a specific amount for a program, and in others, it leaves the amount open ended.

As most are aware, the HEA is a collection of loan and grant programs. But not everyone realizes that each program has its own authorizing

not accurate. There is not one single section reauthorizing the entire HEA, but instead scores of sections “reauthorizing” the government to spend funds on individual programs and initiatives.

It also is important to appreciate that for each program, the approach to reauthorization can be different. In *most* cases, the HEOA reauthorized appropriations for programs through FY2014, but this was not the case with regard to every program. Authorization of appropriations for the Teacher Quality Partnership Grants, for example, expired in FY2011 (HEA Sec. 209), while certain funding for HBCU’s was authorized through FY2019 (HEA Sec. 371(b)).

Whether funds are authorized, or authorized *and* appropriated, also differs from program to program. In the former case, known as “discretionary spending,” the legislation authorizes an appropriation, but does not go the next step of appropriating funds. In the latter case, often referred to as “mandatory spending,” the authorization bill both authorizes and appropriates the funding for the program, meaning Congress both authorizes the spending and allocates the funds to be spent. Occasionally, the HEA actually contains both discretionary *and* mandatory spending clauses for a single program. For example, HEA

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language. In January 2014, the Congressional Research Service published The Higher Education Act (HEA): A Primer, and included a table

detailing each section of the HEA that authorizes the spending of funds on a particular program. According to the table, there are 110 distinct provisions authorizing programs.

Thus, when the HEA is reauthorized, Congress is actually updating the authorizing language for each, separate assistance program contemplated in the act. Subsequent to the most recent reauthorization, which was accomplished through the passage of the Higher Education Opportunity Act of 2008 (HEOA), it was not uncommon to read that the HEA had been “reauthorized” through FY2014. Though referring to the reauthorization of the HEA as a whole is useful shorthand for a reporter, from a regulatory standpoint, it is

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**AARON LACEY**, is a partner in Thompson Coburn’s higher education practice, and editorial director of *REGucation*, the firm’s higher education law and policy blog. Aaron advises clients on the wide range of federal, state, and accrediting agency laws and standards that govern postsecondary institutions, including the Title IV federal financial aid programs. He also represents institutions in administrative proceedings before state agencies, accreditors, and the U.S. Department of Education, and guides clients through postsecondary transactions,

contract negotiation, policy creation, and compliance systems design. You can find Aaron on Twitter (@HigherEdCounsel) and LinkedIn, and reach him at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com).

**Contact Information:**

Aaron Lacey  
Thompson Coburn LLC  
Phone: 314-552-6405  
Email: [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com)

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Sec. 528(a) authorizes through FY2014 the spending of funds for programs promoting post-baccalaureate opportunities for Hispanic Americans, while HEA Sec. 898 authorizes *and* appropriates additional funds for the same program.

Given the complexity and diversity of reauthorization, one can see why a political commentator would elect to characterize reauthorization as a single legislative action, instead of as a collection of diverse, individual considerations. Breaking down the specific reauthorization or appropriation timeline for each specific program is a time-consuming and technical chore. But it is important to understand that this shorthand is indeed a convenience, and does not accurately reflect the reauthorization process. During this reauthorization cycle, for example, there have been some in Congress who have suggested that it would be more efficient to carry out the current reauthorization via a series of bills, instead of through a comprehensive reauthorization bill. These individuals thus are suggesting that Congress manage a subset of the many required program authorizations in each bill, instead of addressing them all at once. Understanding that reauthorization is in fact a collection of individual actions, each on a separate program, provides the context necessary to make sense of this approach, and to

appreciate why it is a viable option.

**The failure to reauthorize**

Speaking of the present reauthorization cycle, one might ask how the HEA programs are still in operation if most programs' authorization window ended in FY2014? The answer is found in the General Education Provisions Act (GEPA). Section 422 of GEPA provides that if Congress does not pass legislation extending a program in the regular session that ends prior to the beginning of the terminal fiscal year of authorization of appropriations of

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an applicable program, the program is automatically extended for one additional fiscal year. Thus, all those programs for which the current authorization ended in FY2014 were automatically extended for an additional year, through FY2015.

But what happens if Congress does not reauthorize all those extended HEA programs by the end of the present fiscal year? The strong expectation is that Congress will simply act to extend the HEA until the individual programs can be properly authorized for a new period. As we discussed above, formal reauthorization legislation addresses the reauthorization of each individual



**CHRISTOPHER MURRAY**, is a founding partner of Thompson Coburn LLP's lobbying and policy group. His practice focuses on the political and regulatory issues affecting the education sector. He has extensive experience representing institutions, associations, and companies related to eLearning, Title IV program compliance, medical education, federal workforce and military education programs, education technology, international trade, and accreditation. Chris is a frequent speaker and author on various education policy topics, most often on the

intersection of technology and education. You can reach Chris at (202) 585-6916 or [cmurray@thompsoncoburn.com](mailto:cmurray@thompsoncoburn.com).

**Contact Information:**  
Christopher Murray  
Thompson Coburn LLP  
Phone: 202-585-6916  
Email: [cmurray@thompsoncoburn.com](mailto:cmurray@thompsoncoburn.com)

program in the HEA. Temporary legislation to extend the HEA, in contrast, typically is brief, provides a blanket extension of all programs, and authorizes appropriations to match prior year levels. Examples of this approach include the Higher Education Extension Act of 2004 (PL 108-366) and the Higher Education

programs still would be on the books, so to speak, but there would no longer be any authorization to appropriate funds for their execution.

In theory, Congress could act to appropriate funds for the federal student aid programs, despite the fact that appropriations were no longer authorized. In the *The Higher Education Act (HEA): A Primer*, referenced above, the Congressional Research Service observes that so long as a program continues to receive appropriations, it is considered to be *implicitly* authorized, even absent explicit authorization language. Both House and Senate rules, however, allow legislators to object to appropriations for programs not previously authorized (See House Rules XXI, XXII; Senate Rule XVI). It seems far more likely that Congress will simply extend the HEA until such time as it can be properly reauthorized.

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Extension Act of 2005 (PL 109-81).

If Congress failed to act altogether by the end of 2015, the outcome would vary based on the specific authorization language tied to each program or initiative. Recall, there are some programs that already are authorized for several years into the future, beyond FY2014 (e.g., the HBCU funding noted above). Absent some action to alter the present law, these programs would continue. The vast majority of programs, however, for which the current authorization of funding expired in FY2014, would no longer be authorized. These