

NEED-BASED EDUCATIONAL AID ACT OF 2015

JULY 23, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2604]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2604) to improve and reauthorize provisions relating to the application of the antitrust laws to the award of need-based educational aid, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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**Purpose and Summary**

H.R. 2604, the “Need-Based Educational Aid Act of 2015,” would extend for an additional 7 years an expiring exemption to the anti-trust laws, contained in section 568 of the “Improving America’s Schools Act of 1994”, that permits colleges and universities to col-

laborate on certain financial aid practices. The existing antitrust exemption was created in 1992, has been extended on four separate occasions, and is currently set to expire on September 30, 2015. H.R. 2604 narrows the existing antitrust exemption and extends its expiration to September 30, 2022.

## Background and Need for the Legislation

### A. GENESIS OF THE ANTITRUST EXEMPTION

Beginning in the mid-1950's, a number of private colleges and universities agreed to award institutional financial aid (*i.e.*, aid from the school's own funds) solely on the basis of demonstrated financial need. These schools also agreed to use common principles to assess each student's financial need. From the 1950's through the late 1980's, this practice continued undisturbed. In 1991, the Antitrust Division of the Department of Justice (DOJ) brought suit against nine colleges and universities to enjoin this practice.<sup>1</sup> In 1991, eight of the schools entered into a consent decree with DOJ.<sup>2</sup> One of the schools, the Massachusetts Institute of Technology, litigated the issue for some time before ultimately entering into a separate consent decree with DOJ.

In 1992, Congress passed a temporary antitrust exemption authorizing schools to agree to award financial aid on a need-blind basis and to use common principles of need analysis when determining private financial aid awards.<sup>3</sup> This temporary exemption specifically prohibited any agreement as to the terms of a financial aid award to any specific student. By its terms, it expired on September 30, 1994.

In 1994, Congress passed another temporary exemption from the antitrust laws.<sup>4</sup> This exemption resembled the one passed in 1992, in that it allowed agreements to provide aid on the basis of need only and to use common principles of need analysis. It also prohibited agreements on awards to specific students. Unlike the 1992 exemption, however, it also allowed the use of a common aid application form and the exchange of the student's financial information through a third party. The law was modeled after the consent decrees entered into between DOJ and the nine universities and colleges. The temporary exemption was set to expire on September 30, 1997. In 1997, Congress passed a law further extending the exemption until September 30, 2001, as attempts to make the exemption permanent were unsuccessful.<sup>5</sup> The exemption was extended again in 2001 and 2008.<sup>6</sup>

Under the existing antitrust exemption, colleges and universities can engage in the following joint practices:

1. agreeing to award financial aid only on the basis of demonstrated financial need;

<sup>1</sup>See *United States v. Brown Univ.*, 5 F.3d 658, 663–664 (3d Cir. 1993) (discussing the relevant DOJ litigation history).

<sup>2</sup>*Id.*

<sup>3</sup>*Higher Education Amendments of 1992*, § 1544, Pub. L. No. 102–325 (1992).

<sup>4</sup>*Improving America's Schools Act of 1994*, § 568, Pub. L. No. 103–382 (1994).

<sup>5</sup>*Need-Based Educational Aid Antitrust Protection Act of 1997*, Pub. L. No. 105–43 (1997).

<sup>6</sup>*Need-Based Educational Aid Act of 2001*, Pub. L. No. 107–72 (2001); *Need-Based Educational Aid Act of 2008*, Pub. L. No. 110–327 (2008).

2. using common principles of analysis for determining financial need;
3. using a common aid application form; and
4. exchanging, through an independent third party, financial information submitted by students and their families.

Schools and universities are not required to participate jointly in these activities, and only do so on a voluntary basis. Indeed, only a select number of schools utilize the existing antitrust exemption.<sup>7</sup> Furthermore, the common set of principles reached by the participating schools is not binding on those that participate, nor are there prescribed financial aid amounts that are predetermined. Indeed, universities using the common formula offer different, and competitive, financial aid packages to the same student.

Notably, when Congress extended the antitrust exemption in 2001, the relevant legislation included a requirement that the Government Accountability Office (GAO) issue a report determining whether the antitrust exemption impacted the affordability of the colleges and universities. In 2006, GAO published a report finding that the antitrust exemption did not adversely impact the affordability of colleges and universities.<sup>8</sup>

#### B. H.R. 2604, THE “NEED-BASED EDUCATIONAL AID ACT OF 2015”

As a result of the continued need by certain schools to utilize the antitrust exemption for joint collaboration on certain financial aid practices, Rep. Lamar Smith (R-TX) and Rep. Henry C. “Hank” Johnson, Jr. (D-GA) introduced H.R. 2604. The legislation recognizes that schools have not utilized the component of the existing antitrust exemption that allows them to share students’ financial information through an independent third party. Accordingly, H.R. 2604 allows that provision of the existing exemption to expire, and only extends provisions for the three other activities for an additional 7 years.

### Hearings

The Committee did not hold any hearings on H.R. 2604.

### Committee Consideration

On July 8, 2015, the Committee met in open session and ordered the bill, H.R. 2604, favorably reported, without amendment, by a voice vote, a quorum being present.

### Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were

<sup>7</sup> The universities and colleges that currently utilize the exemption are: Amherst College; Boston College; Claremont McKenna College; College of the Holy Cross; Columbia University; Cornell University; Dartmouth College; Davidson College; Duke University; Georgetown University; Grinnell College; Haverford College; Massachusetts Institute of Technology; Middlebury College; Northwestern University; Pomona College; St. John’s College; Swarthmore College; University of Notre Dame; University of Pennsylvania; Vanderbilt University; Wellesley College; and, Williams College.

<sup>8</sup> See U.S. Gov’t Accountability Office, *Schools’ Use of the Antitrust Exemption Has Not Significantly Affected College Affordability or Likelihood of Student Enrollment to Date* (2006).

no recorded votes during the Committee's consideration of H.R. 2604.

### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### **Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2604, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 15, 2015.*

Hon. BOB GOODLATTE, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2604, the "Need-Based Educational Aid Act of 2015."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnett, who can be reached at 226-2860.

Sincerely,

KEITH HALL,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

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### **H.R. 2604—Need-Based Educational Aid Act of 2015.**

As ordered reported by the House Committee on the Judiciary  
on July 8, 2015.

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H.R. 2604 would extend—until September 30, 2022—a provision of current law that exempts institutions of higher education from regulation under Federal antitrust laws when awarding need-based student aid. Under current law, the provision expires on September 30, 2015. With this extension, colleges and universities would be able to continue to collaborate, but CBO expects those activities would not affect the workload of any Federal agency. Thus, CBO

estimates that implementing the bill would not have a significant effect on the Federal budget.

H.R. 2604 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2604 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The staff contact for this estimate is Marin Burnett. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 2604 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Disclosure of Directed Rule Makings**

The Committee estimates that H.R. 2604 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2604 improves and reauthorizes provisions relating to the application of the anti-trust laws to the award of need-based educational aid.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2604 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Section 1. Short Title.* Provides that the bill may be referred to as the “Need-Based Educational Aid Act of 2015.”

*Section 2. Amendments.* Strikes the provision of section 568 of the “Improving America’s Schools Act of 1994” that allows for the exchange, through an independent third party, of financial information submitted by students and their families, and extends the remaining antitrust exemptions contained in that section to September 30, 2022.

### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics,

and existing law in which no change is proposed is shown in roman):

**IMPROVING AMERICA'S SCHOOLS ACT OF 1994**

\* \* \* \* \*

**TITLE V—MISCELLANEOUS PROVISIONS**

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**PART F—MISCELLANEOUS**

\* \* \* \* \*

**SEC. 568. APPLICATION OF THE ANTITRUST LAWS TO AWARD OF NEED-BASED EDUCATIONAL AID.**

(a) TEMPORARY EXEMPTION.—It shall not be unlawful under the antitrust laws for 2 or more institutions of higher education at which all students admitted are admitted on a need-blind basis, to agree or attempt to agree—

(1) to award such students financial aid only on the basis of demonstrated financial need for such aid;

(2) to use common principles of analysis for determining the need of such students for financial aid if the agreement to use such principles does not restrict financial aid officers at such institutions in their exercising independent professional judgment with respect to individual applicants for such financial aid; *or*

(3) to use a common aid application form for need-based financial aid for such students if the agreement to use such form does not restrict such institutions in their requesting from such students, or in their using, data in addition to the data requested on such form【; or】.

【(4) to exchange through an independent third party, before awarding need-based financial aid to any of such students who is commonly admitted to the institutions of higher education involved, data with respect to the student so admitted and the student's family relating to assets, income, expenses, the number of family members, and the number of the student's siblings in college, if each of such institutions is permitted to retrieve such data only once with respect to the student.】

(b) LIMITATIONS.—Subsection (a) shall not apply with respect to—

(1) any financial aid or assistance authorized by the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.); or

(2) any contract, combination, or conspiracy with respect to the amount or terms of any prospective financial aid award to a specific individual.

(c) DEFINITIONS.—For purposes of this section—

(1) the term “alien” has the meaning given such term in section 101(3) of the Immigration and Nationality Act (8 U.S.C. 1101(3));

(2) the term “antitrust laws” has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the

Federal Trade Commission Act (15 U.S.C. 45) to the extent such section applies to unfair methods of competition;

(3) the term “institution of higher education” has the meaning given such term in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a));

(4) the term “lawfully admitted for permanent residence” has the meaning given such term in section 101(20) of the Immigration and Nationality Act (8 U.S.C. 1101(20));

(5) the term “national of the United States” has the meaning given such term in section 101(22) of the Immigration and Nationality Act (8 U.S.C. 1101(22));

(6) the term “on a need-blind basis” means without regard to the financial circumstances of the student involved or the student’s family; and

(7) the term “student” means, with respect to an institution of higher education, a national of the United States or an alien admitted for permanent residence who is admitted to attend an undergraduate program at such institution on a full-time basis.

(d) EXPIRATION.—Subsection (a) shall expire on September 30, **[2015] 2022.**

(e) RELATED AMENDMENTS.—The Higher Education Amendments of 1992 (Public Law 102–325) is amended—

(1) in the table of contents by striking the matter relating to section 1544, and part F of title XV, of such Act; and

(2) by striking part F of title XV of such Act.

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