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# Policy Areas Impacting Endowments and Foundations Today

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*Commonfund Institute aims to lift up and provide insight into how significant policy developments may impact nonprofit institutional investors. In the prior article, we covered implications of the Supreme Court ruling on affirmative action in higher education, a debt ceiling resolution that ended the 2020 student debt payment pause, The Charitable Act, and developments in policies related to investing with a lens toward diverse managers and environmental, social and governance (ESG) factors.*

Below we highlight a few developments that have taken place since June 2023, including those related to diversity, equity, and inclusion (DEI), taxes, and operations.

## AFFIRMATIVE ACTION AND DEI POLICY DEVELOPMENT

We previously discussed the implications of the SCOTUS ruling against affirmative action in higher education admissions for the broader nonprofit field. Since then, pressures have mounted to both dismantle and defend DEI broadly. Initiatives to curb these initiatives across sectors have arisen, using interpretation of existing laws. Regarding higher education alone, since the beginning of 2023, The Chronical of Higher Education has tracked 85 anti-DEI policies proposed in 28 states and the U.S. Congress. These proposals target DEI offices and staff, DEI training, diversity statements, and identity-based preferences for hiring and admissions—fourteen have become law. Meanwhile, more than 20 proposals have been introduced in 11 states to promote or require DEI initiatives, and college leaders are finding other ways to ensure equal opportunities for their students.

In terms of how philanthropy is responding, more than half of foundations in one study had internal discussions of the implications of the Supreme Court ruling, and also a majority reported not making any changes to their ongoing work as a result of those discussions. However, a federal appeals court recently ruled against Fearless Fund's use of race to determine eligibility for their grants program focused on supporting Black women entrepreneurs. This ruling may raise further questions among fund managers and grant-makers with diversity programs or initiatives that explicitly focus on race as a criteria.

In corporate DEI initiatives, public-facing policy will change in order to mitigate legal risks, impacting internal policies to varying degrees. For example, research shows that some are removing the letters, "DEI," from materials, while maintaining the same programs and intentions. While others, as in the case of Blackrock, are removing diversity targets, and it is unclear whether those goals will be maintained or met.

## TAXES

### Tax Breaks Upcoming Expiration

Many 2017 Tax Cuts and Jobs Act (TCJA) provisions expire at the end of 2025, including those related to charitable deductions. As we covered in our first article, TCJA nearly doubled the standard deduction level, which had the result of reducing the incentive to make tax-deductible charitable contributions. Many organizations that support fundraising institutions, including the Council for Advancement and Support of Education (CASE), are working with their members to help understand and advance the Charitable Act (H.R. 3435/S.566), which would restore and expand deductions for non-itemizers who make charitable donations.

### Endowment Tax

The TCJA also introduced a 1.4 percent excise tax on net investment income of large, private colleges and universities (those with >500 students and average assets of >$500k per student). Proposals have been made to tax endowment wealth—rather than the current policy that taxes endowment income—and to raise the current tax from 1.4 percent to 10 percent. Neither of these proposals have been considered since 2021-2022 when they were first proposed, but some suggest they may be re-considered—especially as TCJA provisions come up for review. Further, states are considering their own policies, for example a proposal in Massachusetts would target endowments with assets over $1 billion.

### Donor-advised Funds (DAFs)

New proposed federal regulations have garnered attention from foundations and other philanthropic organizations. The proposals include taxing DAFs to ensure funds are spent for their intended purpose, rather than for tax benefits, and would bring DAF distribution requirements in line with those of private foundations' 5 percent. This would be a sizeable change from the estimated 9 percent median payout rate, according to one study (that study also found that more than one-in-five DAFs had a zero payout rate). According to the Council on Foundations, the proposed regulations would reduce funds flowing to nonprofits that administer these vehicles, stifling their capacity to support their communities, and negate the benefits of DAFs for streamlining giving. *Public hearing on the proposed regulations was held in May 2024, and Commonfund Institute will monitor ongoing developments.*

## OPERATIONS

The Institute tracks these broader policies as they pertain to operations, budget and finance, and inflation.

### Free Applications for Federal Student Aid (FAFSA) Changes

One of the biggest operational concerns has been changes to FAFSA. Changes to FAFSA systems, which had been previously unchanged for over 40 years, aim to simplify and make aid more accessible. However the rollout has been characterized by persistent challenges. Lawmakers anticipate this year's cycle will be on schedule, while higher education leaders brace for ongoing delays.

### Gainful Employment Rule

The new Gainful Employment Rules first reporting submission has been extended from July 31st to October 1st, 2024. The data collected under the newly implemented framework will track the extent to which students are improving their income potential through their degree programs, as well as the sustainability of their student debt (e.g. by using debt-to-earnings ratios and an earnings premium test). According to the Biden-Harris Administration, this is part of an effort "to ensure that postsecondary education remains an engine for equal opportunity, upward mobility, and global competitiveness." For more details here is one summary of the new rules.

### Department of Labor Changes Overtime Rules

Also going into effect on July 1, 2024, is a raise in the Federal Fair Labor Standards Act (FLSA) overtime minimum salary threshold, or the minimum wage one must earn to qualify for overtime pay. Note that teachers including full- and part-time faculty, are exempt, and it is anticipated that the changes will most likely apply to academic and admissions advisors and counselors, financial aid and residence counselors, athletic trainers, marketing an accounting staff, and event coordinators. The College and University Professional Association for Human Resources (CUPA-HR) suggests all institutions conduct an audit to document and understand the roles and pay of all workers, and to consult with legal staff to understand the best path forward. It may be advisable to work across your institution to amend operating budgets and requisite endowment withdrawal forecasts based on those audits. Access the detailed FAQ about these developments.

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**Published July 2024**

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