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With a second court ruling in late June in favor of the U.S. Department of Education, the Gainful Employment Rules ("GE Rules") took effect on July 1, 2015. The GE Rules will, ultimately, provide new challenges to the eligibility of thousands of vocational programs and impose new demands on thousands of institutions to meet reporting, disclosure, certification and other requirements. The court decision¹ effectively ends hope for immediate relief from the GE Rules, which authorize the Department (or "ED") to calculate new debt-to-earnings rates ("D/E Rates") for all educational programs which, according to the regulation, "prepare students for gainful employment in a recognized occupation" ("GE programs"). While there are bills pending in the Congress that would eliminate or modify the GE Rules, the likelihood of any becoming law soon enough to avoid the initial impact of the rules is presently remote. Therefore the operating assumption should be to proceed with preparations for compliance.

In the near term, the GE Rules impose a host of rapidly approaching deadlines and reporting and certification requirements.² The deadlines and requirements summarized in the following chart apply to almost 40,000 GE programs offered at proprietary, non-profit and public institutions.³ Even if programs may be spared the calculation of D/E Rates (particularly due to small cohorts of graduates), these other requirements still apply. However, in recent communications, ED has signaled that the date for publication of the first set of "final" rates, with the attendant requirement for institutions to issue "warnings" to students about potentially failing programs, is not expected to occur until early 2017, with failing programs subject to termination a year later.

Upcoming Deadlines and Timeline

Important Dates	Deadlines	Explanation
July 31, 2015	First Reporting Deadline	Schools must submit required data (focusing on the enrollment status, tuition charges and educational loans) for all Title IV students enrolled in all GE programs across six award years, from the 2008/2009 – 2013/2014 AYS .
October 1, 2015	Second Reporting Deadline	Schools must submit all required data for Title IV students enrolled in GE programs in the 2014/2015 AY .
July 1, 2015- December 31, 2015	New Certification Requirements	The institution's most senior executive must certify that all GE programs 1) are properly accredited; 2) hold any state and federal programmatic accreditation required for programs in the particular field; and 3) satisfy any prerequisites for graduates to obtain professional licensure for each state in which the institution has a physical presence or is required to be authorized.

Important Dates	Deadlines	Explanation
Fall 2015*	Student List Exchange	ED provides institutions with the list of students whose debt and earnings will be used to calculate the D/E Rates for each GE program. Institutions have 45 days to review and correct the list.
Early 2016*	ED Receives Earnings Data from the Social Security Administration ("SSA")	Estimated period for ED to obtain earnings information for graduates of all GE programs from SSA. Institutions do not take part in this process or have any opportunity to review this data.
Late Spring/Early Summer 2016*	Draft Rates Released	Estimated period for release of draft D/E Rates. These draft rates will become final unless schools contest ED's data on the list of graduates and their debt amounts. If a GE program receives draft rates that are failing or in "the zone," the school may be limited in its ability to add new programs that are "substantially similar" to that GE program. Institutions have 45 days to challenge the median loan debt used to calculate the draft D/E Rates.
Early 2017**	Final Rates Released	Estimated period for release of final D/E Rates. Schools will be required to issue warnings to their students for any program that has final rates that are failing. Schools may only appeal at this based on new earnings data from a state database or a school survey of its graduates.

* These time frames are based on recent informal and non-binding guidance from ED, and are subject to change.

** In the New York lawsuit and in other recent communications to Capitol Hill, ED has signaled that it does not expect to publish the first set of D/E Rates in final form until early 2017. The Department's June 30th Dear Colleague Letter states that ED expects to calculate the first set of rates in 2016, which would seem consistent with a timeline to complete the correction process in order to publish those rates in final and enforceable form in early 2017.

Reporting Requirements

The GE Rules require schools to submit the bulk of the data that ED will use to calculate the all-important median loan debt figures that will be used in the D/E Rates for each GE program, with deadlines of July 31, 2015 and October 1, 2015. Schools must provide tuition charges and loan data on all Title IV recipients enrolled in a covered program, except those students who only received Federal Work-Study aid. Students should be reported in each award year they were enrolled in the GE program regardless of whether they withdrew, completed, or remain enrolled. There are no exceptions to the reporting requirements. If an institution is unable to provide any of the required information, it must provide ED with an explanation of that failure, but it is not clear if or how ED will respond to such failings.

Data to be Reported

Schools must report three general types of information: the identity of the GE program, the identity and enrollment status of the students, and financial information for those students.

The GE program includes the program name, Classification of Instructional Programs ("CIP") code, credential level, and published length in weeks, months or years. A school's GE programs are identified by the institution's six-digit Office of Postsecondary Education ID ("OPEID") number, the program's six-digit CIP code and the program's credential level. It will be particularly vital to use the correct CIP code, since that code is a key variable that ED uses to define a GE program.

The student data includes the student's social security number, date of birth, and full name, and the student's attendance start date and enrollment status during the reporting year.

Finally, the financial information for each student is critically important because it will be used to calculate the median loan debt for the D/E Rates. For each student the institution must report:

- The amount of private loans (including institutional loans) that the institution is or should be "reasonably aware of."
- The amount of institutional debt (such as institutional financing plans) that the student owes at the time of completion or withdrawal. This includes any outstanding fees, such as library fees and graduation costs.
- The tuition and fees charged (this is the total charged before any aid or scholarships are applied, according to ED guidance).
- The allowance for books, supplies and equipment (as established using the school's cost of attendance figures).

Reporting is completed electronically through the National Student Loan Data System. The reporting requirements are both detailed and voluminous. We urge you to consult the ED guidance on the subject.

Certifications

Institutions that are filing initial or recertification applications with ED, or expect to receive a new program participation agreement ("PPA") from ED, at any time before December 31, 2015 will be required to have their CEO or other senior executive officer certify that the institution holds all of the federal, state and accreditor approvals required for each GE program.⁴ Specifically, the executive must certify that each such program is properly listed on the institution's Eligibility and Certification Approval Report and it:

1. is approved by a Department-recognized accrediting agency or is otherwise included in the institution's accreditation by such an agency;⁵
2. is programmatically accredited if such accreditation is required by a federal or state agency in any state in which the institution has a physical location or is required to hold state authorization; and
3. satisfies the educational prerequisites for graduates to seek licensure in their field in any state in which the institution has a physical location or is required to hold state authorization.

The state law ramifications applicable to the second and third points may warrant particularly careful consideration. Effectively, institutions must certify that students who complete a GE program in states where they are required to be authorized will be eligible to take any licensure or certification examination necessary for the student to seek employment in the relevant occupation. Institutions that have, or are required to have, authorization to operate in more than one state will have to make sure they have all of the required approvals which might be issued by professional boards ranging from cosmetology to nursing. This may be particularly challenging since ED's regulation on state authorization (34 C.F.R. 600.9) is so ambiguous.

Institutions that do not have applications or PPAs pending in the near term will be required to submit a separate certification to the Department no later than **December 31, 2015**.

Disclosures

While the GE Rules provide an abundance of new disclosure requirements, those requirements will not take effect until January 1, 2017. Institutions will need to be alert for ED guidance on the formats and procedures for the new requirements, but at this time they can continue to follow the current disclosure requirements using the Department's current GE Disclosure Template.

The new disclosure requirements will cover many new items, including completion rates, loan repayment rates, and program cohort default rates, all of which will be calculated by ED using the data institutions report in conjunction with ED's own data. The GE Rules provide separate appeal mechanisms for these rates so that schools can seek corrections before being obligated to disclose ED's

calculation of these rates.

Consequences of D/E Rates

GE programs with failing D/E Rates for two years in any three-year period will lose eligibility for federal student aid. Based on the Department's current timeline, this might occur in late 2017 or early 2018. However, the issuance of D/E Rates can carry serious consequences well before that time.

Student Warnings

One single year of failing D/E Rates triggers the requirement for the institution to issue written warnings to current and prospective students in that program. The warnings must state:

"This program has not passed standards established by the U.S. Department of Education. The Department based these standards on the amounts student borrow for enrollment in this program and their reported earnings. If in the future the program does not pass the standards, students who are then enrolled may not be able to use federal student grants or loans to pay for the program, and may have to find other ways, such as private loans, to pay for the program."

Further, schools with a failing program for one year must advise students enrolled in that program whether they will be able to complete the program at the institution and their options to transfer to a different program or institution. In effect, institutions will be required to notify new students that they would be enrolling in programs for which they will not be able to receive federal grants and loans the following year and might even face the need to transfer to a different program or institution. Institutions must also refer students and prospective students to College Navigator or other federal resources for information about similar programs offered at other institutions.

The consequences of such a disclosure are quite predictable. Clearly, these student warnings will cause very serious damage since they encourage both current and prospective students to enroll elsewhere. In our view, programs that are subject to one-year warnings will be at serious risk of closure, even though they will not have lost eligibility at that point.

Limitations on Adding New Programs

Schools will find themselves limited in their ability to add new GE programs that are "substantially similar" to an existing GE program as soon as that existing program receives its first set of draft D/E Rates that fail or score in the zone. This is a highly unusual provision that requires early attention since it imposes limits based on rates that have only been issued in draft form even though those rates are in the zone rather than failing. Technically, this provision only applies if the school voluntarily discontinues a GE program that receives a failing or zone draft rate, but one has to wonder if ED will approve any substantially similar new programs if the school accepts or appeals a failing or zone draft rate, regardless of whether the program is voluntarily discontinued.

It is important to note that the GE Rules provide a separate and broad definition for "substantially similar" programs. For purposes of reporting, disclosures and calculating D/E Rates, ED defines a GE program based on the institution's OPEID Number, and the program's credential level and *six-digit* CIP code.⁶ However, the definition of substantially similar programs extends to all programs within the *four-digit* CIP code, without regard to their credential level, which means that many more programs are swept into the "substantially similar" category. Therefore, the issuance of draft rates that score in the zone for a single program could prevent the institution from adding a number of new programs with different credential levels and different occupational objectives.

For example, if an institution discontinues a 51.0801 Medical Assistant associate degree program that had rates in the zone, it could not establish a 51.0803 Occupation Therapist Assistant degree or certificate program, a 51.0805 Pharmacy Technician degree or certificate program, or a 51.0810 Emergency Care Attendant degree or certificate program, because they all share the root 4-digit 51.08 CIP code and because credential levels do not matter in determining whether programs are substantially similar.

According to ED's current timeline, the first draft rates could be issued in spring or summer 2016. Thus, if institutions have plans to add new programs, remove programs, or make other changes to their current program offerings, they have 12 months or less to do so before their draft D/E Rates could limit their ability to make such changes.

Opportunities for Challenges

The serious repercussions of the D/E Rates underscore the importance of taking all necessary steps to challenge any inaccuracies in the rates. This is especially so in the early years, since the procedures and systems necessary for schools to report vast quantities of information, for ED to extract earnings information from the Social Security Administration, and then for ED to process all of this data to run very complex calculations are new and untested.⁷

There are three basic opportunities for institutions to review and challenge the data that ED will use. However, there is limited time to make such challenges, the burden of proof will always be on the institution, and some appeals will cost institutions considerable time and money.

First, before conducting any calculations, ED will provide institutions a list of students whose debt and earnings will be used to calculate the rates for each GE program. These lists will include all students who completed a particular GE program within the applicable cohort period minus any students who qualify under particular exclusions. Institutions will have 45 days to review the list and provide evidence that a student should be included or excluded or correct or update a student's identity and program attendance information. According to ED's current timeline, it expects to issue these first lists in Fall 2015.

Second, when ED issues draft D/E Rates, it will also provide institutions with the loan information for all students included in the calculation of the median debt for the program. Institutions again will have **45 days** to provide evidence to correct the loan information.

Third, after ED publishes the final D/E Rates by – according to ED estimates, early 2017 — institutions will have an opportunity to provide alternative earnings information to recalculate the rates. Institutions must notify ED that they will be conducting an alternative earnings appeal within **14 days** of receiving their final D/E Rates. Institutions will not have access to the earnings data provided by the SSA, so there is no chance to "correct" the SSA data. Rather, the only way to challenge the earnings data is by providing alternative data.

The GE Rules provide two methods to do so. An institution may obtain earnings data from a state-sponsored database, but this does not seem feasible since it appears that few if any states have databases that are up-to-date and detailed enough to hone in on the graduates of a particular educational program in a particular cohort period, graduates may move around so that they are working in multiple states, and few if any states would make such confidential data available to schools in any event.

The second method calls for schools to survey their graduates if they believe they can collect better and more accurate earnings information (possibly including self-employment and tip income, for instance). The survey must be conducted in accordance with National Center for Education Statistics ("NCES") standards that are still in development, but the rules call for the school to have its survey results tested by an independent auditor. This lack of detail on the standards and procedures is problematic since the school survey results, including attestations from the institution's chief executive officer and an independent auditor, must be filed with ED no later than 60 days after the final rates are published. The institutional surveys will take a great deal of time and work, beginning with the time necessary to locate students who graduated three to four year earlier. Institutions that are considering such surveys need to begin their preparations well ahead of time, even before ED has issued the necessary standards and procedures.⁸

Because of the complexity of the GE Rules, which cover about 15 pages in the Federal Register, supplemented with hundreds of pages of commentary, this memorandum just touches on the high points of the new standards and requirements that are now effective for institutions that offer GE programs. The lawyers and subject-matter experts of the Education Group at Cooley can assist institutions in meeting these requirements and planning how to comply with the GE Rules' extensive demands. Please do not hesitate to call us if you need more information.

Notes

1. The decision by the District Court in Washington, D.C. (*Ass'n of Private Sector Colls. & Univs. v. Duncan*, No. 14-1870 (D.D.C. June 23, 2015)) follows another decision in favor of the Department in a separate case

in New York (Ass'n of Proprietary Colls. v. Duncan, --- F. Supp. 3d ---, 2015 WL 3404190, (S.D.N.Y. May 27, 2015)). APSCU has filed a notice of intent to appeal the Washington, D.C. decision. The deadline to file a notice of appeal in the New York case is at the end of July 2015.

2. Please see ED's June 30, 2015 Dear Colleague Letter, "Regulatory Requirements Related to Gainful Employment Programs" for a detailed overview of the mechanics and standards of the GE Rules. The letter is available at: <http://www.ifap.ed.gov/dpcletters/attachments/GEN1512.pdf>. The GE Rules themselves were published on October 31, 2014 and are codified at 34 C.F.R. 668.401-.415.
3. The Department has estimated that in 2010 there were approximately 37,600 GE programs, 33% at proprietary institutions, 6% at non-profit institutions and 61% at public institutions.
4. The electronic announcement regarding the certification requirements and the proposed language for the certification are available here <http://www.ifap.ed.gov/eannouncements/061115GECertificationsFinalJune9.html>. Note that this certification will be considered part of the broader certification that is included in each PPA, which concludes as follows: "I also understand that I may be subject to a fine of not more than \$25,000 or imprisonment of not more than five years, or both, for misinformation that is material to receipt and stewardship of federal student financial aid funds."
5. Public postsecondary vocational institutions may be approved by a state agency recognized to approve such programs in lieu of accreditation.
6. Institutions may offer a program in multiple versions, all of which are considered a single GE Program, and all of which will be measured under a single set of D/E Rates, if they share the same OPEID, six-digit CIP code and credential level.
7. Of course, it is important for institutions to take steps to improve their rates through changes to their programs, tuition charges, debt counseling, scholarship programs and other means. However, based on the retrospective character of the calculations, it takes years for any such changes to bear fruit. The data for the first set of rates is fully "baked." The first rates will be based on (i) the 2014 earnings of students who graduated from July 1, 2010 to June 30, 2012, and (ii) the debt of students who graduated in that same period or, for the transitional rates, the debt of students who graduated from July 1, 2014 to June 30, 2015.
8. ED is currently soliciting comments on two notices related to the NCES survey questions and standards to conduct the surveys. First, ED has requested comments by July 13, 2015 on the GE Recent Graduates Employment and Earnings Survey Pilot Test. The Federal Register notice is available at <http://www.ifap.ed.gov/fregisters/attachments/FR051315NCESGERecentGraduatesEmployandEarningSurveyPilotTe> and related materials are available at <http://www.regulations.gov/#!documentDetail;D=ED-2015-ICCD-0063-0002>.
ED has also requested comments by August 31, 2015 on the NCES survey standards that institutions must follow when conducting their alternative earnings survey. The Federal Register notice is available at <http://www.ifap.ed.gov/fregisters/attachments/FR063015.pdf> and related materials are available at <http://www.regulations.gov/#!documentDetail;D=ED-2015-ICCD-0085-0003>.

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