National Association of College and University Attorneys
Presents:

An Overview of the U.S. Department of Education's 2023 Financial Value Transparency & Gainful Employment Rule

Webinar

November 30, 2023

1:00 PM – 3 :00 PM Eastern
12:00 PM – 2:00 PM Central
11:00 AM – 1:00 PM Mountain
10:00 AM – 12:00 PM Pacific

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An Overview of the U.S. Department of Education’s 2023 Financial Value Transparency & Gainful Employment Rule

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Yvette was appointed by Texas Governor Ann Richards to the Texas Guarantee Student Loan Board and served as President of the Texas Association of Chicanos in Higher Education and the Texas Association of State University Attorneys. Yvette holds a B.A. from Yale University and her J.D. from University of Texas School of Law.

Aaron Lacey is a Partner at Thompson Coburn where he chairs the firm’s Higher Education Practice and assists institutions to navigate a wide range of complex legal and regulatory matters. Aaron has substantive experience in federal, state, and accrediting agency laws and standards that govern postsecondary institutions, and regularly advises on issues involving students, faculty and staff, facilities, academics, governance, and operations. He also leads the Firm's extremely active higher education transactional practice. He and his colleagues have experience negotiating, documenting, and implementing merger, asset acquisition, stock acquisition, joint venture, and religious sponsorship and affiliation transactions for both nonprofit and proprietary higher education clients. In recent years, the practice has managed numerous non-traditional arrangements, as well, including for-profit to non-profit conversions and the acquisition of distressed institutions.

Aaron and his colleagues are valued for their deep understanding of the postsecondary regulatory framework, including requirements relating to the federal financial aid programs, incentive compensation, distance education, the Clery Act, FERPA, and Title IX, among others. In October 2017, Aaron was selected by the U.S. Department of Education to serve as one of 17 negotiators charged with overhauling the Department's complex and controversial "borrower defense" rule.

The Department appointed him to negotiate on behalf of general counsels, attorneys, and compliance officers at postsecondary institutions nationwide.

Aaron routinely represents institutions in administrative proceedings before state licensing entities, accrediting agencies, and the U.S. Department of Education, including matters arising from audits, program reviews, and investigations of the Office of Inspector General. He assists with the management of regulatory and government agency relationships, policy creation and implementation, strategic planning, and compliance systems design. In support of institutional initiatives, Aaron drafts and negotiates a wide variety of agreements, including domestic and international articulation, consortium, licensing, marketing, and bundled service provider (OPM) contracts.

The host of the Firm's popular Higher Education Webinar Series, and editorial director of REGucation, the Firm's higher education law and policy blog, Aaron is a frequent writer and speaker on topics relating to higher education policy and regulation. He is a member of the National Association of College and University Attorneys and of the American Bar Association.

AN OVERVIEW OF THE U.S. DEPARTMENT OF EDUCATION'S 2023 FINANCIAL VALUE TRANSPARENCY & GAINFUL EMPLOYMENT RULE[1]

November 30, 2023

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From its enactment in 1965, the Higher Education Act ("HEA") has required all programs offered by proprietary institutions, and all non-degree programs offered by public and private non-profit institutions, to "prepare students for gainful employment in a recognized occupation."[2] In 2010, the Department determined to develop a system for measuring whether programs were satisfying this "gainful employment" standard.[3] The Department created a complex gainful employment rule that, among other things, attempted to compare the typical debt a program's graduates took on with their typical earnings after graduation. If a program's D/E rate did not consistently meet certain thresholds established by the Department, the program would lose its Title IV eligibility.

The 2010 GE Rule, the first promulgated by the Obama administration, was largely vacated by the U.S. District Court in D.C. on the grounds that the Department did not sufficiently justify certain of its proposed thresholds.[4] In 2014, a new GE Rule was created, and again, the Court took issue with the rule, granting the plaintiff's motion for summary judgment and finding, among other things, that the Department acted arbitrarily and capriciously with respect to its overall methodology for determining typical earnings.[5] In 2019, the Trump administration rescinded the 2014 GE Rule for myriad reasons, concluding that it relied on a D/E rate formula that was "fundamentally flawed," was "inconsistent with the requirements of currently available student loan repayment programs," and failed "to properly account for factors other than institutional or program quality that directly influence student earnings and other outcomes."[6]

The Department now resurrects the GE Rule, in its own words introducing "the most effective set of safeguards ever against unaffordable debt or insufficient earnings for postsecondary students."[7] Notably, it is advancing this new rule despite having afforded a very brief period to negotiate the rule, and despite

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[1] This document was prepared in connection with the November 30, 2023, NACUA webinar titled *The Financial Value Transparency Wake-Up Call: Navigating a New Compliance and Business Landscape*. It was primarily derived from a previous publication authored by Aaron D. Lacey, titled [*A Desk Guide for the 2023 Final Financial Value Transparency & Gainful Employment Rule*].

[2] *See* Pub. L. 89-329 (Nov. 8, 1965).

[3] This decision was not made in response to any new legislation or other mandate from Congress.

[4] *See Ass'n of Priv. Colleges & Universities v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012).

[5] *See Am. Ass'n of Cosmetology Sch. v. Devos*, 258 F. Supp. 3d 50, 63 (D.D.C. 2017).

[6] 84 Fed. Reg. 31392 (July 1, 2019).

[7] *See Biden-Harris Administration Announces Landmark Final Rules to Protect Consumers from Unaffordable Student Debt and Increase Transparency*, U.S. DEP'T OF EDUC., Press Release (September 27, 2023).

the 2014 GE Rule, insofar as it still includes various metrics designed to assess whether a program offers graduates a reasonable return on their investment, as well as certification, reporting, and disclosure requirements. However, the new rule differs in many, significant ways, including:

- With limited exceptions, the Department will now calculate and disclose D/E rates and a new "Earnings Premium" for every Title IV-participating program on a new "program information website." To be clear, it is still the case that Title IV eligibility determinations will only be made for GE programs (Title IV non-degree programs offered by public and private non-profit institutions and all Title IV programs offered by proprietary institutions). But D/E rates and an Earnings Premium for non-GE programs (Title IV degree programs offered by public and private non-profit institutions) will be calculated and disclosed to prospective and current students and will be labeled "low-earning" or "high-debt-burden," per the agency's determination. Moreover, beginning on July 1, 2026, if a Title IV graduate degree program offered by a public or private non-profit institution has failing D/E rates, prospective students must acknowledge that they have reviewed the Department's new program information website before the institution may enter into an agreement to enroll the student.

- In addition to the D/E rates, the GE Rule introduces an "Earnings Premium" that also will be used to determine whether a GE program should remain eligible to participate in Title IV. Even if a GE program's D/E rates are passing, the program will still lose its Title IV eligibility if the median earnings of the program's graduates fail to consistently exceed the median earnings of young adults who have only a high school diploma.

Impact Projections

In both the proposed and final GE Rule, the Department projected the impact of the new GE framework on non-GE and GE programs. The data set it uses as the basis for these projections, referred to as the "2022 Program Performance Data (2022 PPD)," is described in detail in the preamble to the final rule.[9] The 2022 PPD includes data assembled for all Title IV-participating programs operating "as of March 2022 that also had completions reported in the 2015–16 and 2016–17 award years (AY)." The earnings data used in the data set are based on 2018 and 2019 calendar year earnings. As acknowledged in the "2022 Program Performance Data Description," a standalone document the Department released with the proposed rule, "[t]he variables included in the 2022 PPD are constructed using different methodology than that described in the proposed regulations in several ways." Nonetheless, this represents the most recent data for GE and non-GE programs released by the Department. The 2022 PPD data description document, as well as the dataset and a related data codebook, all are available at regulations.gov under Docket ID ED-2023-OPE-0089.[10]

In the commentary to the final rule, the Department observes that there are 123,524 non-GE programs at public or private nonprofit institutions included in the 2022 PPD.[11] The agency projects over 820,000 students in nearly 1,500 failing non-GE programs. Specifically, the Department indicates 842 public

language. During the final tally, all six institutional representatives voted against the Department's proposal, including the negotiators representing minority-serving institutions, two-year public institutions, four-year public institutions, private non-profit institutions, financial aid administrators, and proprietary institutions.

[9] For the Department's discussion of the 2022 PPD, *see* 88 Fed. Reg. 70122-24 (Oct. 10, 2023).

[10] *Available at* https://www.regulations.gov/docket/ED-2023-OPE-0089/document.

[11] For the Department's impact projections for non-GE programs, *see* 88 Fed. Reg. 70129-32 (Oct. 10, 2023).

programs (representing 555,000 students) and 640 private, non-profit degree programs (representing 264,400 students) would fail at least one of the D/E rate or Earnings Premium tests. Of these, the Department projects 390 are graduate-level, non-GE programs that would be subject to sanctions (representing 122,000 students). According to the agency, "[r]ates of not passing at least one of the metrics are particularly high for professional programs in law (CIP 22, about 19 percent of law programs representing 29 percent of enrollment in law programs), theology (CIP 39, about 7 percent, 25 percent) and health (CIP 51, about 10 percent, 19 percent)." Note that these numbers may be understated. The Department excluded 82.7% of non-GE programs from the data set because the programs had fewer than 30 students in the two-year completer cohorts. Many of these programs may be included under the new GE Rule.

In the preamble to the final rule, the Department observes that there are 32,058 GE programs included in the 2022 PPD.[12] The Department projects nearly 700,000 students in 1,709 failing GE programs. The Department indicates 193 public GE programs (38,000 students), 73 private, non-profit degree programs (32,600 students), and 1,440 proprietary GE programs (620,800 students) would fail at least one of the D/E rate or Earnings Premium tests. Of the 1,440 proprietary GE programs that fail one of the two tests, 939 (65%) are undergraduate certificate programs that fail only the Earnings Premium threshold test. The highest rate of failure is in Personal and Culinary Services, where about 73% of enrolled students are in programs that would have failing metrics (primarily under the Earnings Premium). Note that here, again, the numbers may be understated. The Department excluded 87.7% of GE programs from the data set because they had fewer than 30 students in the two-year completer cohorts.

Institutional Exemptions

There are two institutional exemptions in the new GE Rule. First, due to data quality concerns, the Department exempts institutions "located in the Territories or freely associated states from most of the requirements in the transparency framework under subpart Q, and from the GE accountability provisions under subpart S."[13] However, such institutions will still be required to comply with reporting requirements, and the Department will calculate median debt and median earnings for their programs. Second, there is a general exemption for institutions with small program cohorts. Specifically, most elements of the GE Rule do not apply if "over the most recently completed four award years, [an institution] offered no groups of substantially similar programs, defined as all programs in the same four-digit CIP code at an institution, with 30 or more completers."[14]

For all non-exempt Title IV institutions, the Department annually will calculate and disclose D/E rates and an Earnings Premium for every Title IV program, as described below.

Calculating D/E Rates for all Title IV-Participating Programs[15]

Under the new rule, there are two D/E rates, each of which attempts to measure graduate debt as a percentage of post-graduation earnings: (1) the Annual D/E Rate, and (2) the Discretionary D/E Rate. The formula associated with each metric is as follows:

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[12] For the Department's impact projections for GE programs, *see* 88 Fed. Reg. 70132-70136 (Oct. 10, 2023).
[13] 88 Fed. Reg. 70027 (Oct. 10, 2023); *see also* 34 C.F.R. §§ 668.401(b)(1) and 668.601(b)(1) (July 1, 2024).
[14] *See* 34 C.F.R. §§ 668.401(b)(2) and 668.601(b)(2) (July 1, 2024).
[15] The formulas and thresholds for D/E rates are set out at 34 C.F.R. §§ 668.401-03 (July 1, 2024).

Annual D/E Rate	Discretionary D/E Rate
Annual Loan Payment / Median Annual Earnings	Annual Loan Payment / Discretionary Earnings

With limited exceptions, each year the Department will calculate the D/E rates for all Title IV-participating programs utilizing data obtained from institutions, the agency's systems, and a federal agency that will provide the earnings information ("Earnings Agency").[16] The Department will determine whether a program "fails" the D/E rates test in any given year in accordance with the thresholds set out below:

Fail
Annual D/E Rate is greater than 8% (or the denominator of the rate is zero and the numerator is positive) **AND** Discretionary D/E Rate is greater than 20% (or the income for the denominator of the rate is negative or zero and the numerator is positive)

Calculating an Earnings Premium for all Title IV-Participating Programs[17]

With limited exceptions, each year the Department also will calculate an "Earnings Premium" for all Title IV-participating programs using the following formula:

Earnings Premium
Median Annual Earnings – Earnings Threshold

The Department will determine whether a program "fails" the Earnings Premium test in any given year in accordance with the following threshold:

Fail
Earnings Premium is zero or negative

Reporting Requirements for all Institutions[18]

[16] Though no agency has been selected, the Department indicated in the proposed GE Rule that its current preference is the Internal Revenue Service. 88 Fed. Reg. 32328 (May 19, 2023).
[17] The formulas and thresholds for the Earnings Premium are set out at 34 C.F.R. §§ 668.401-02, and 404 (July 1, 2024).
[18] The reporting requirements for both standard and transitional cohorts are detailed at 34 C.F.R. § 668.408 (July 1, 2024).

Under the GE Rule, all institutions will be required to report to the Department an extraordinary array of data for their Title IV-participating programs and students. A complete listing of all data elements that must be reported is contained in 34 C.F.R. § 668.408. Such data includes, for each Title IV program: the name, CIP code, credential level, and length of the program; whether the program is programmatically accredited and, if so, the name of the accrediting agency; whether the program meets licensure requirements or prepares students to sit for a licensure examination in a particular occupation for each state in the institution's metropolitan statistical area; the total number of students enrolled in the program during the most recently completed award year, including both recipients and non-recipients of Title IV funds; and whether the program is a Qualifying Graduate Program whose students are required to complete postgraduate training programs.[19]

For each student in a Title IV program, institutions must report for the applicable award year (or years), the student's attendance dates, attendance status, enrollment status, and residency tuition status; the amount of tuition and fees assessed; the amount of institutional grants and scholarships disbursed; the amount of other state, tribal, or private grants disbursed; and the amount of any private education loans disbursed to the student for enrollment in the program that the institution is, or should reasonably be, aware of, including private education loans made by the institution.

Institutions also must report additional data for each student who completed or withdrew from a Title IV program during the applicable award year (or years). This additional data includes, but is not limited to, the date the student completed or withdrew; the total amount the student received from private education loans for the program that institution is, or should reasonably be, aware of; the total amount of institutional debt the student owed any party after completing or withdrawing from the program; and the total amount of tuition and fees assessed the student for his or her entire enrollment in the program.

For programs *other* than Qualifying Graduate Programs, institutions generally will be required to report by July 1, 2024, all required data for the second through seventh award years prior to July 1, 2024. This would include data for award years 2017-2018 through 2022-2023. For Qualifying Graduate Programs, institutions generally will be required to report by July 1, 2024, all required data for the second through eighth award years prior to July 1, 2024. This would include data for award years 2016-2017 through 2022-2023. In future years, institutions would be required to annually report by October 1 all required data for the prior award year.

We strongly recommend that institutions begin developing reporting plans as early as possible. In addition, please note the following important exceptions to the general reporting framework.

First, for the first six years for which D/E rates and an Earnings Premium are calculated, institutions may elect to only report the required data for the two most recently completed award years. For the initial round of reporting, this would be award years 2022-2023 and 2023-2024. If an institution provides "transitional reporting," as it is labeled in the regulation, the Department will calculate "transitional" D/E rates and Earnings Premium measures using the median debt for individuals who completed the program during the two award years reported. As the Department observes in the commentary to the final rule, "[d]uring this transition period, changes to programs' borrowing outcomes will be reflected more rapidly in the D/E rates published by the Department." When calculating these transitional rates, the Department

[19] The GE Rule includes a new definition of "qualifying graduate program" at 34 C.F.R. § 668.2 (July 1, 2024). See Part II for additional discussion.

indicates that it will use "the earnings for six years." Though not clear, we understand this to mean that the agency will use the median earnings data for the students who completed during the standard two-year or four-year completer cohorts. Below, we have included a chart that sets out the standard and transitional cohort periods for the initial round of calculations.

<table>
<tr><th>Cohort Period</th><th colspan="3">Periods for First Year Calculations
Standard Cohorts</th><th colspan="2">Periods for First Year Calculations
Transitional Cohorts</th></tr>
<tr><td></td><td>Award Years (AY) used for Cost/Debt: Standard Programs</td><td>Award Years (AY) used for Cost/Debt: Qualifying Graduate Programs</td><td>Calendar Years (CY) used for Earnings</td><td>Award Years (AY) used for Cost/Debt</td><td>Calendar Years (CY) used for Earnings</td></tr>
<tr><td>2-Year Cohort</td><td>2018-2019
2017-2018</td><td>2015-2016
2014-2015</td><td>2022
2021</td><td rowspan="2">2023-2024
2022-2023</td><td rowspan="2">2022
2021
2020
2019</td></tr>
<tr><td>4-Year Cohort</td><td>2018-2019
2017-2018
2016-2017
2015-2016</td><td>2015-2016
2014-2015
2013-2014
2012-2013</td><td>2022
2021
2020
2019</td></tr>
</table>

Second, only institutions "offering any group of substantially similar programs, defined as all programs in the same four-digit CIP code at an institution, with 30 or more completers in total over the four most recent award years" must comply with the noted reporting requirements.

Finally, as with prior versions of the rule, the Department appears to anticipate that some institutions may no longer have data on hand for years that exceed record retention requirements. Per the new rule, if an institution fails to report all or some of the information required, it may submit to the agency an explanation regarding why it is unable to fulfill the requirement.

Program Information Website and New Disclosure Requirements

Annually, the Department will compile for each program a draft list of all students it believes graduated during the applicable cohort period (a "Completer List") and provide institutions 60 days to review and correct the list.[20] The final Completer List will be sent to the Earnings Agency to obtain the Median Annual Earnings of the students on the list. Once the earnings information is received, the Department will calculate the D/E rates and Earnings Premium for each program.

[20] The annual process is detailed at 34 C.F.R. § 668.405 (July 1, 2024).

As part of the new GE Rule framework, the Department will establish a new "program information website" with information about "institutions and their educational programs."[21] Per the regulation, the website will include a wide range of data for each GE and non-GE program, including program length, cost, enrollment, median loan debt, and median earnings, as well as the program's D/E rates and Earnings Premium, in every case as calculated and determined by the agency. The Department also may include completion, withdrawal, and loan repayment rates, among other discretionary items. In the preamble to the final rule, the Department indicates that, despite objections, it also intends to move forward with labeling programs as "low-earning" or "high-debt-burden" if they fail to meet the required thresholds.[22] However, it offers that it will "consider adding language to the Department's program information website noting that the debt and earnings outcomes of programs are a subset of the myriad of factors students may consider important in deciding where to attend."[23] The rule states that the Department must "establish and maintain" the new website "[b]eginning on July 1, 2026."[24]

For their part, institutions will be required to provide a "prominent link to, and any other needed information to access," the Department's disclosure website "on any webpage containing academic, cost, financial aid, or admissions information about the program or institution." The Department may require institutions to "modify a webpage if the information is not sufficiently prominent, readily accessible, clear, conspicuous, or direct." In addition, institutions will be required to distribute the information needed to access the disclosure website to current Title IV recipients on a periodic basis, and to "any prospective student, or a third party acting on behalf of the prospective student, before the prospective student signs an enrollment agreement, completes registration, or makes a financial commitment to the institution."

In the commentary to the final rule, the Department states that it has "specified that the [disclosure] requirements under § 668.43(d)… are not applicable until July 1, 2026."[25] However, there does not appear to be any exemption from the disclosure requirements located in the regulatory text at 34 C.F.R. 668.43(d). Should the Department launch its program information website before July 1, 2026, we recommend that institutions consult counsel regarding whether to begin making their disclosures.

Consequences of Failure for non-GE Programs

Each year, upon finalizing the D/E rates and Earnings Premium, the Department will issue a notice of determination to the institution informing it of the D/E rates and Earnings Premium measure for each program, as well as whether each program is passing or failing, and the consequences of that determination.[26]

Beginning on July 1, 2026, if a non-GE graduate degree program (*i.e.*, a Title IV graduate degree program offered by a public or private, non-profit institution) has failing D/E rates, prospective students must acknowledge that they have reviewed the Department's new program information website before the institution may enter into an agreement to enroll the student. The Department will "administer and collect

[21] Provisions relating to the new program information website are located at 34 C.F.R. § 668.43(d) (July 1, 2024).
[22] 88 Fed. Reg. 70072 (Oct. 10, 2023).
[23] 88 Fed. Reg. 70074 (Oct. 10, 2023).
[24] 34 C.F.R. § 668.43(d)(1) (July 1, 2024).
[25] 88 Fed. Reg. 70077 (Oct. 10, 2023).
[26] The provisions concerning the notice of determination are located at 34 C.F.R. § 668.406.

the acknowledgment from students through the program information website."[27] Prospective students will be required to provide the acknowledgement until the program has achieved passing D/E rates or three years have passed since the Department notified the institution that the program had failing D/E rates, whichever is earlier.

Significantly, in the final rule, the Department exempts non-GE undergraduate degree programs from the acknowledgement requirement, "thus avoiding undue burden for programs where prospective students may not generally apply to a particular major (but rather 'declare' a major after being enrolled for some time in the institution)."[28] The Department also has limited the acknowledgement requirement to prospective graduate students, thereby relieving concerns regarding disruptions to current graduate students. It is unclear how and to what extent institutions that do not utilize enrollment agreements would be required to comply with the acknowledgement requirement for non-GE graduate degree programs. We speculate, however, that the Department will expect prospective students to complete the acknowledgement prior to beginning their enrollment.

Consequences of Failure for GE Programs

The GE Rule outlines three fundamental consequences of failure for GE programs:

- **Loss of Title IV Eligibility**. A GE program becomes ineligible for federal financial aid if the program (1) fails the D/E rates test in two out of any three consecutive award years for which the program's D/E rates are calculated, **<u>OR</u>** (2) fails the Earnings Premium test in two out of any three consecutive award years for which the program's Earnings Premium is calculated.[29]

- **Warnings and Acknowledgements**. Beginning July 1, 2026, an institution must provide a warning to current and prospective students if its GE program could become ineligible in the next award year for which D/E rates or the Earnings Premium are calculated.[30] As a practical matter, this means institutions will be required to issue warnings if a GE program fails a single year, because a GE program would be one year from potentially losing eligibility following a single failure. Among other things, the warning must inform the student that the program has not passed the Department's standards based on student debt and reported earnings, and direct the student to the Department's program information website. An institution may not sign an enrollment agreement, complete registration, enter a financial commitment with, or disburse Title IV funds to a prospective student earlier than three business days after the institution delivers the warning and until the prospective student completes an acknowledgment on the Department's website. An institution may not disburse Title IV funds to a current student until the student completes the acknowledgment on the Department's website. The GE Rule includes further, detailed instructions regarding how and when an institution must deliver the warning to current and prospective students.

[27] 34 C.F.R. § 668.407(b)(2) (July 1, 2024).
[28] 88 Fed. Reg. 70076 (Oct. 10, 2023).
[29] *See* 34 C.F.R. § 668.602 (July 1, 2024). Note that in determining a program's eligibility, the Department disregards any D/E rates or Earnings Premium calculated more than five "calculation years" prior to the year for which eligibility is being determined.
[30] Warning requirements are discussed at 34 C.F.R. § 668.605 (July 1, 2024).

- **Period of Ineligibility**. An institution "may not seek to reestablish the eligibility of a failing GE program that it discontinued voluntarily either before or after D/E rates or the Earnings Premium measure are issued for that program, or reestablish the eligibility of a program that is ineligible under the D/E rates or the Earnings Premium measure, until three years following the earlier of the date the program loses eligibility… or the date the institution voluntarily discontinued the failing program."[31] Significantly, this prohibition covers any "substantially similar program," which includes any program with "the same four-digit CIP code," even, it appears, if the two programs are offered at different credential levels.[32]

Appeal Rights

Unlike prior versions of the GE Rule, the new regulation includes neither an opportunity for institutions to review and correct D/E rates prior to reaching determinations, nor an alternate earnings appeal. Institutions may be able to challenge the accuracy of the Department's calculations, but only in very limited circumstances.[33]

Certification Requirements

As a condition of continued participation in the federal financial aid programs, an institution must certify that each GE program it offers is "approved by a recognized accrediting agency or is otherwise included in the institution's accreditation by its recognized accrediting agency, or, if the institution is a public postsecondary vocational institution, the program is approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation."[34] Institutions will have to make initial certifications for all GE programs by December 31, 2024, and update certifications within 10 days "if there are any changes in the approvals for a program, or other changes for a program that render an existing certification no longer accurate."

[31] 34 C.F.R. § 668.603(c) (July 1, 2024).
[32] 34 C.F.R. § 668.2 (July 1, 2024) ("Substantially similar program"). Curiously, the rule further states that the Department "presumes a program is not substantially similar to another program if the two programs have different four-digit CIP codes, but the institution must provide an explanation of how the new program is not substantially similar to the ineligible or voluntarily discontinued program…" This seems to suggest that even where a new program is radically different from an ineligible one (*e.g.*, a certificate in cosmetology and a doctor of nursing practice), the school will have to provide the required explanation.
[33] *See* 88 Fed. Reg. 70090 (Oct. 10, 2023); see also 34 C.F.R. § 668.603(a) (July 1, 2024).
[34] Certification requirements are discussed at 34 C.F.R. § 668.604 (July 1, 2024).

About the Authors

Aaron D. Lacey, the Chair of Thompson Coburn LLP's Higher Education Practice, has over two decades of experience assisting institutions to navigate complex legal and policy matters. He and his colleagues are valued for their deep understanding of the postsecondary regulatory framework, including requirements relating to the federal financial aid programs, accreditation, and state authorization. The host of Thompson Coburn's popular Higher Education Webinar Series, and editorial director of REGucation, the firm's higher education law and policy blog, Aaron is a frequent writer and speaker on topics relating to higher education policy and regulation. He currently resides in Saint Louis, Missouri, with his wife and three kids, the world's greatest dog, another dog, and five rowdy chickens. Aaron can be contacted via email at alacey@thompsoncoburn.com.

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November 30, 2023

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The Financial Value Transparency Wake-Up Call: Navigating a New Compliance and Business Landscape

November 30, 2023

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The Financial Value Transparency Wake-Up Call: Navigating a New Compliance and Business Landscape

November 30, 2023

FOR KANSAS, NEW YORK, OHIO AND PENNSYLVANIA ATTORNEYS ONLY

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11/30/2023 12:00 PM ET	The Financial Value Transparency Wake-Up Call: Navigating a New Compliance and Business Landscape		

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Webinar

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The Financial Value Transparency Wake-Up Call

(Navigating a New Compliance and Business Landscape)

R. Yvette Clark, Senior Vice President and General Counsel, Southern New Hampshire University

Aaron Lacey, Partner & Chair, Higher Education Practice, Thompson Coburn LLP

Agenda

- Introduction
- Origins of the New Financial Value Transparency Framework
- Reporting Requirements
- Disclosures and Distribution
- How the Metrics Work
- The Consequences of Failure
- GE Program Certifications
- Implications for Academic Program Planning and Review
- Audience Q&A and Closing Remarks

Origins of the New Financial Value Transparency Framework

The “Gainful Employment” Rule

- Since 1965, the Higher Education Act has required all non-degree programs offered by public and private non-profit institutions and all programs offered by proprietary institutions to “prepare students for gainful employment in a recognized occupation...”

Type of Institution	GE Programs	Non-GE Programs
Public and Private Non-Profit	Title IV Non-Degree Programs (e.g., certificate program)	Title IV Degree Programs (e.g., bachelor’s degree)

Pub. L. No. 89-329 (Nov. 8, 1965); 20 U.S.C §§ 1001 and 1002.

The "Gainful Employment" Rule

- In 2010, the Obama administration decided to create a framework to measure whether programs satisfied this "gainful employment" standard.
- ED created a complex rule that, among other things, attempted to compare the typical debt a program's graduates took on with their typical earnings after graduation. If a program's debt-to-earnings (D/E) rate did not consistently meet certain thresholds established by ED, the program will lose its Title IV eligibility.

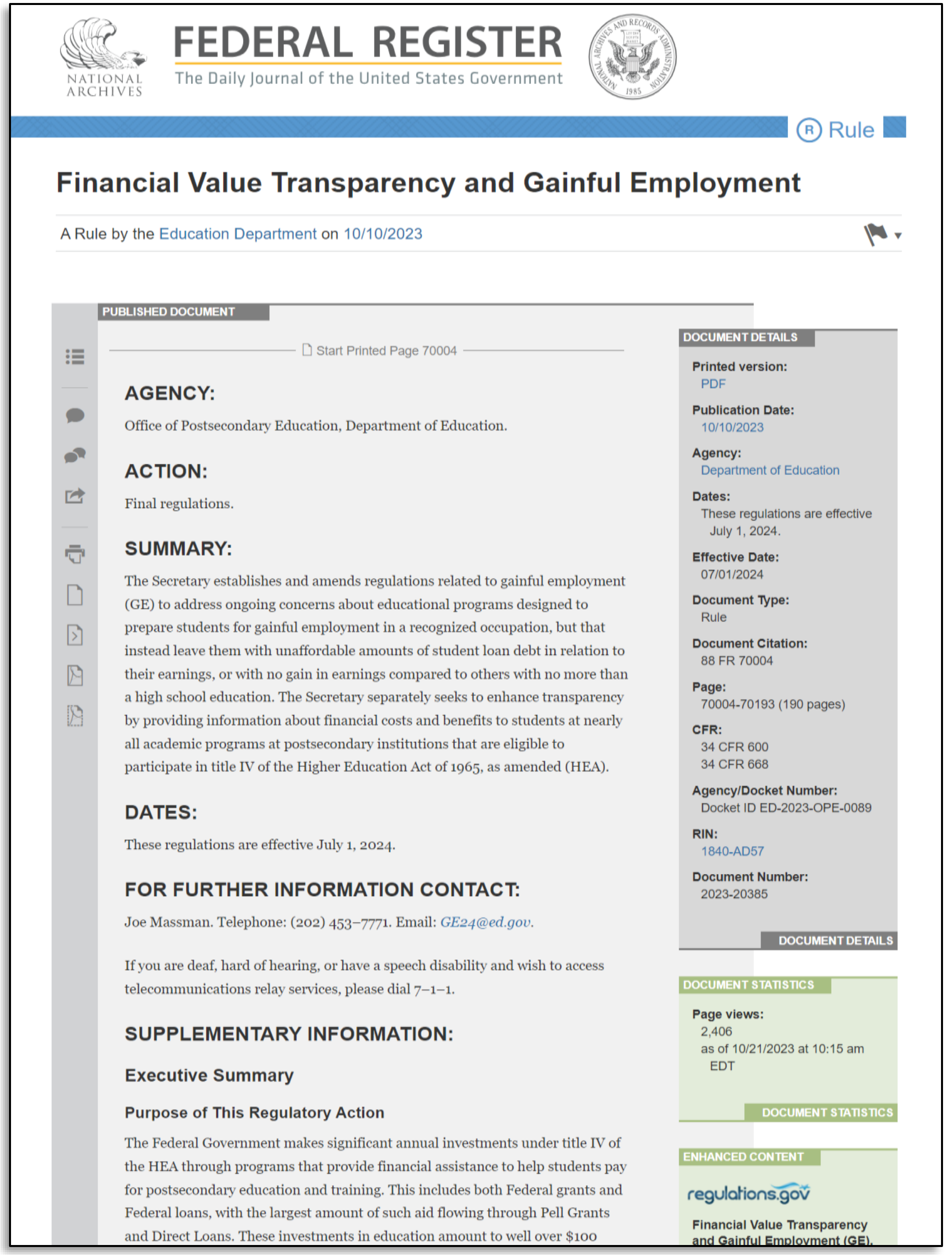
75 Fed. Reg. 66832 (Oct. 29, 2010).

Prior GE Rulemaking Activity

Date	Event
Oct. 2010	Obama administration publishes 2010 GE rule.
April 2011	2010 GE rule largely vacated by U.S. District Court D.C.; ED did not sufficiently justify thresholds.
Oct. 2014	Obama administration publishes final version of 2014 GE rule, revised to avoid prior pitfalls.
June 2017	U.S. District Court D.C. finds ED acted arbitrarily and capriciously with respect to overall methodology for determining average income, grants plaintiff's motion for summary judgment.
July 2019	Trump administration rescindes 2014 GE rule for multiple reasons, including that it relied on a D/E rate formula that is "fundamentally flawed."
Jan./Mar. 2022	Biden administration holds negotiated rulemaking covering multiple topics, including a new GE rule. During final vote on GE proposal, all six institutional representatives vote no.
May 2023	ED publishes NPRM proposing "Financial Value Transparency and Gainful Employment" rule.

The Final 2023 GE Rule

- On October 10, 2023, ED published its final Financial Value Transparency and Gainful Employment (GE) rule.
- The rule is set to take effective on July 1, 2024.



NATIONAL ARCHIVES

FEDERAL REGISTER

The Daily Journal of the United States Government

Rule

Financial Value Transparency and Gainful Employment

A Rule by the Education Department on 10/10/2023

PUBLISHED DOCUMENT

Start Printed Page 70004

AGENCY:

Office of Postsecondary Education, Department of Education.

ACTION:

Final regulations.

SUMMARY:

The Secretary establishes and amends regulations related to gainful employment (GE) to address ongoing concerns about educational programs designed to prepare students for gainful employment in a recognized occupation, but that instead leave them with unaffordable amounts of student loan debt in relation to their earnings, or with no gain in earnings compared to others with no more than a high school education. The Secretary separately seeks to enhance transparency by providing information about financial costs and benefits to students at nearly all academic programs at postsecondary institutions that are eligible to participate in title IV of the Higher Education Act of 1965, as amended (HEA).

DATES:

These regulations are effective July 1, 2024.

FOR FURTHER INFORMATION CONTACT:

Joe Massman. Telephone: (202) 453–7771. Email: *GE24@ed.gov*.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action

The Federal Government makes significant annual investments under title IV of the HEA through programs that provide financial assistance to help students pay for postsecondary education and training. This includes both Federal grants and Federal loans, with the largest amount of such aid flowing through Pell Grants and Direct Loans. These investments in education amount to well over $100

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Dates: These regulations are effective July 1, 2024.

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DOCUMENT STATISTICS

ENHANCED CONTENT

regulations.gov

Financial Value Transparency and Gainful Employment (GE).

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An Extraordinary Expansion

- ED will calculate and disclose D/E rates and a new Earnings Premium metric for every Title IV program at every Title IV institution, meaning both non-GE and GE programs.
- These metrics, along with other data, will be made available to prospective and current students through a new ED website, and ED will label failing programs as "low-earning" or "high-debt-burden," per the agency's determination.
- It still will be the case that only GE programs can lose Title IV eligibility. But failing graduate-level, non-GE programs also will be sanctioned.
- The new rule also includes significant reporting and disclosure requirements for all institutions.

Impact Projections

- In connection with both the proposed and final rules, ED used a data set referred to as the "2022 Program Performance Data (2022 PPD)" to model the impact of the new rule.
- Metrics were projected for Title IV programs that were active in 2022.
- The debt and cost figures were calculated using NSLDS data for students who completed their program in award years 2015-2016 and 2016-2017.
- The earnings figures were calculated using data obtained from Treasury for students who completed in award years 2014-2015 and 2015-2016, using their earnings from calendar years 2018 and 2019.

88 Fed. Reg. 70122 (Oct. 10, 2023).

Impact Projections (non-GE)

- ED projects over 820,000 students in nearly 1,500 failing non-GE programs.
  - ED indicates 842 public programs (555,000 students) and 640 private, non-profit degree programs (264,400 students) would fail at least one of the D/E rate or Earnings Premium tests.
  - “Rates of not passing at least one of the metrics are particularly high for professional programs in law (CIP 22, about 19 percent of law programs representing 29 percent of enrollment in law programs), theology (CIP 39, about 7 percent, 25 percent) and health (CIP 51, about 10 percent, 19 percent).”
  - ED projects 390 graduate-level, non-GE programs would fail and be subject to sanctions (122,000 students).
- Note that ED excluded 82.7% of non-GE programs from the data set because they had fewer than 30 students in the two-year completer cohorts.

Impact Projections (GE)

- ED projects nearly 700,000 students in 1,709 failing GE programs.
  - ED indicates 193 public GE programs (38,000 students), 73 private, non-profit degree programs (32,600 students), and 1,440 proprietary GE programs (620,800 students) would fail at least one of the D/E rate or Earnings Premium tests.
  - Of the 1,440 proprietary GE programs that fail one of the two tests, 939 (65%) are undergraduate certificate programs that fail only the Earnings Premium threshold test.
  - The highest rate of failure is in Personal and Culinary Services, where about 73% of enrolled students are in programs that would have failing metrics (primarily under the Earnings Premium).
- Note that ED excluded 87.7% of GE programs from the data set because they had fewer than 30 students in the two-year completer cohorts.

88 Fed. Reg. 70133-70136 (Oct. 10, 2023).

What roadblocks might impede implementation of the new rule?

Roadblocks to Implementation

- The results of the 2024 presidential election will impact the rule's viability.
- We strongly anticipate that the rule will be challenged in court, like the prior versions.
  - Whether it is implemented July 1, 2024, will likely turn on whether an injunction is issued.
- ED also may struggle to timely implement the rule given current resource constraints.

Reporting Requirements

Reporting Requirements

- Institutions will be required to report to ED an extraordinary array of data.
- These reporting obligations generally fall into three categories: Title IV program data; all students data; and completed and withdrawn students' data.
- ED also retains the right to collect "any other information the Secretary requires the institution to report."

34 C.F.R. § 668.408(a) (July 1, 2024).

Reporting Exemption

- An institution is not required to report if it has not offered any group of substantially similar programs with 30 or more completers in total over the four most recent award years.
    - "[F]or the purposes of qualifying for this exemption, we measure completers among all such programs at the four-digit CIP code level to avoid incentives for institutions to create new, smaller programs that are substantially similar in order to avoid being covered by these rules."
- "Approximately 700 institutions will benefit from this exemption, including about 85 percent of participating foreign institutions..."

34 C.F.R. § 668.408(a) (July 1, 2024); 88 Fed. Reg. 70061 (Oct. 10, 2023).

Title IV Programs

For each GE program and eligible non-GE program, for the most recently completed award year

- Name, CIP code, credential level, and length.
- Whether program is programmatically accredited and, if so, name of accreditor.
- Whether program meets licensure requirements or prepares students to sit for licensure exams in a particular occupation for each state in the institution's metropolitan statistical area.
- Total number of students enrolled during most recently completed award year, including both recipients and non-recipients of Title IV funds.
- Whether program is a qualifying graduate program whose students are required to complete postgraduate training programs.

34 C.F.R. § 668.408(a)(1) (July 1, 2024).

All Students (1/2)

For each student

- Information needed to identify student and institution.
- Date student initially enrolled.
- Attendance dates and attendance status (e.g., enrolled, withdrawn, or completed) during the award year.
- Enrollment status (e.g., full time, half time) as of first day of student's enrollment;
- Total annual cost of attendance (COA).
- Total tuition and fees assessed to the student for most recent award year.
- Residency tuition status by state or district.

34 C.F.R. § 668.408(a)(2) (July 1, 2024).

All Students (2/2)

For each student

- Total annual allowance for books, supplies, and equipment from student's COA.
- Total annual allowance for housing and food from student's COA.
- Amount of institutional grants and scholarships disbursed to student.
- Amount of state, tribal, or private grants disbursed to student.
- Amount of any private education loans disbursed to student for enrollment in the program that institution is, or should reasonably be, aware of, including private education loans made by institution.

34 C.F.R. § 668.408(a)(2) (July 1, 2024).

Completed/Withdrawn Students

For students who completed or withdrew during the applicable award year

- Date student completed or withdrew.
- Total amount student received from private education loans for program that institution is, or should reasonably be, aware of.
- Total amount of institutional debt student owes any party after completing or withdrawing from program.
- Total amount of tuition and fees assessed student for student's entire enrollment in program.
- Total amount of the allowances for books, supplies, and equipment included in student's COA for each award year in which student was enrolled in program, or a higher amount if assessed student by institution; and
- Total amount of institutional grants and scholarships provided for student's entire enrollment in program.

34 C.F.R. § 668.408(a)(3) (July 1, 2024).

Challenges for Reporting Requirements

Items Not Currently Reported:

- Total # students enrolled by program in most recently completed award year including both Title IV and non-Title IV. (Possible award year alignment issues with AY or FY versus July 1 –June 30.)
- Total tuition and fees by award year. (Same issue.)
- Residency tuition status. (Not a challenge for privates.)
- Total cost of books, supplies and equipment. (High challenge, very difficult to calculate.)
- Total grants, scholarships, private grants, State/Tribal grants, and private loans. (Disaggregating by award year.)

Standard Reporting

- For qualifying graduate programs, institutions will be required to report all required data for "the second through eighth award years prior to July 1, 2024" by July 31, 2024.
- For all other programs, institutions will be required to report all required data for "the second through seventh award years prior to July 1, 2024" by July 31, 2024.

34 C.F.R. § 668.408(b) (July 1, 2024).

Standard Reporting

- Institutions electing to participate in standard reporting will be required to report by July 31, 2024, data for award years 2017-2018 through 2022-2023.
- Data for 2023-2024 would be due by October 1, 2024.
- In subsequent years, October 1 is the deadline for reporting data for the prior award year.

July 1, 2024

2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022	2022-2023	2023-2024
8th Prior AY	7th Prior AY	6th Prior AY	5th Prior AY	4th Prior AY	3rd Prior AY	2nd Prior AY	1st Prior AY

34 C.F.R. § 668.408(b) (July 1, 2024).

Transitional Reporting

- For the first six years for which D/E rates and Earnings Premiums are calculated, institutions may opt for transistional reporting, which only requires reporting for the two most recently completed award years (2022-2023 and 2023-2024).
- It is unclear whether data for both award years would be due by July 31, 2024 (or if 2023-2024 would be due by October 1).

							July 1, 2024
2016-2017	**2017-2018**	**2018-2019**	**2019-2020**	**2020-2021**	**2021-2022**	**2022-2023**	**2023-2024**
8th Prior AY	7th Prior AY	6th Prior AY	5th Prior AY	4th Prior AY	3rd Prior AY	2nd Prior AY	1st Prior AY

34 C.F.R. § 668.408(c) (July 1, 2024).

How might institutions go about deciding between the standard and transitional reporting options?

Weighing the Options

Standard	Transitional
• Higher reporting burden. • Unable to impact cost/debt data for years. • Once you go standard, you can't go back. • Programs may have been significantly less expensive in prior years.	• Lower reporting burden. • Opportunity to impact cost/debt data in near term. • May be opportunity to switch to standard in future years. • Decreased likelihood of reaching cohort of 30 over 2 years. • Programs may be more expensive in more recent years.

Disclosures and Distribution

Program Information Website

- Beginning on July 1, 2026, ED will establish and maintain a new "program information website" that will include extensive information about institutions and their educational programs.
- This new website will be the foundation for all institutional disclosure, acknowledgment, and warning requirements.
- It is unclear how this website and the data displayed will interface with College Navigator, College Scorecard, and IPEDS.
- ED indicates it will provide further information and announcements regarding the specific contents of the website. This also may impact reporting obligations.

34 C.F.R. § 668.43(d)(1) (July 1, 2024).

ED's Program Information Website

Data that will be included for every Title IV program

- Published length (i.e., weeks, months).
- Total enrollments in most recent AY.
- Total for tuition and fees and for books, supplies, and equipment if completing in normal time.
- Of enrollments during most recent AY, percent who received a Direct Loan, private loan, or both (for the program).
- Median Loan Debt and Median Earnings for most recent AY (for just completers or for completers and withdrawals).
- Any programmatic accreditation and name of accreditor.
- D/E rates and Earnings Premium measure.

34 C.F.R. §668.43(d)(1)(i) (July 1, 2024).

ED's Program Information Website

Data that might be included for every Title IV program

- Primary occupations (by name, SOC code, or both) program prepares students to enter, with links to occupational profiles on O*NET.
- Program or institution's completion and withdrawal rates for full-time and less-than-full-time students.
- For completers, median total (1) cost of tuition/fees; (2) cost of books, supplies, and equipment; and (3) net cost.
- Loan repayment rate for students or graduates who entered repayment on Direct Loan Program loans.
- Whether program graduates must complete postgraduation training and obtain licensure to be eligible for independent practice.

34 C.F.R. §668.43(d)(1)(ii) (July 1, 2024).

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Links in Institutional Materials

- Institutions must provide a "prominent link" to ED's program information website "on any webpage containing academic, cost, financial aid, or admissions information about the program or institution."
- ED "may require the institution to modify a webpage if the information is not sufficiently prominent, readily accessible, clear, conspicuous, or direct."

34 C.F.R. § 668.43(d)(2) (July 1, 2024).

Prospective Student Distribution

- Institutions "must provide the relevant information to access" ED's program information website "to any prospective student, or a third party acting on behalf of the prospective student, before the prospective student signs an enrollment agreement, completes registration, or makes a financial commitment to the institution."

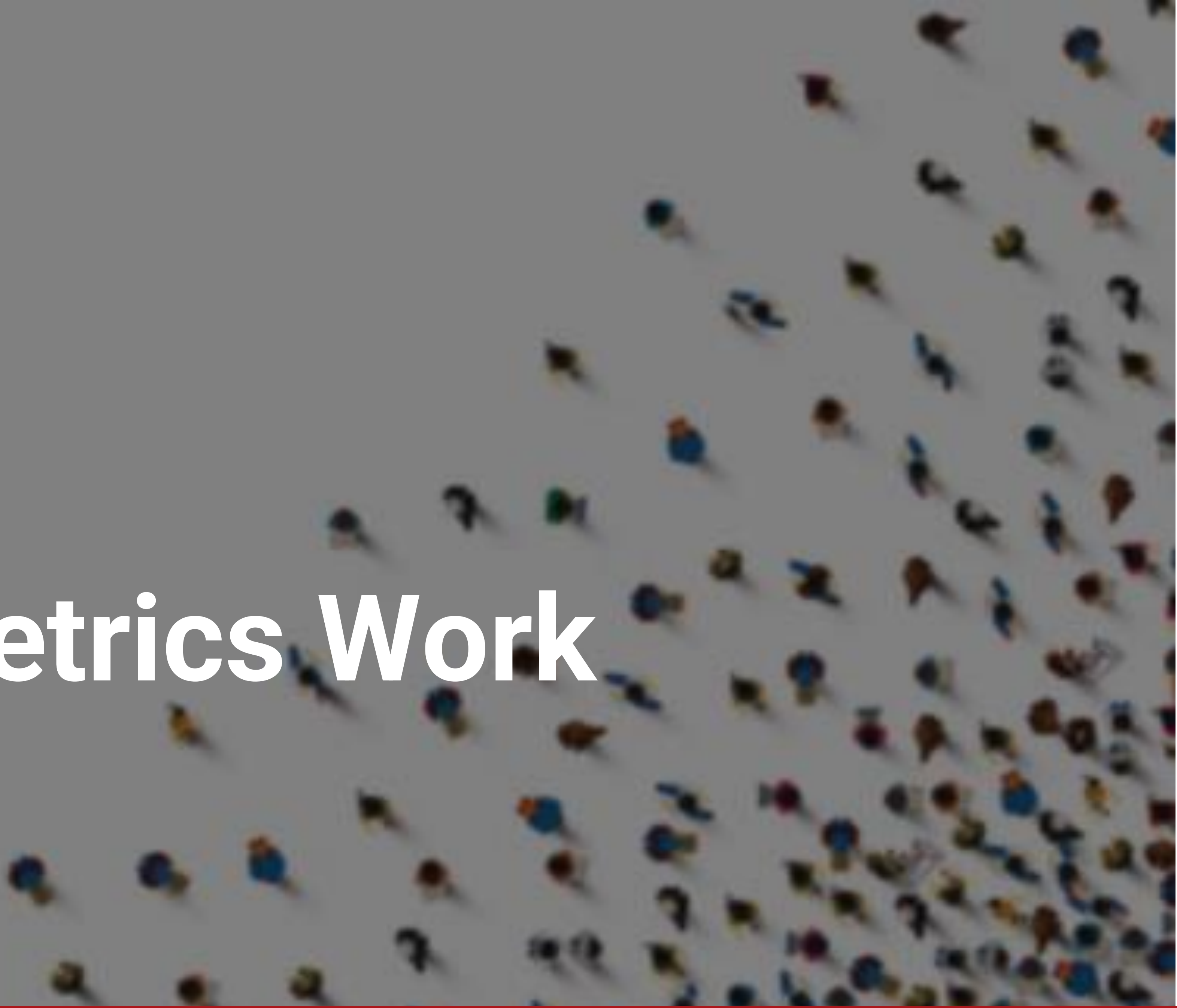
Current Student Distribution

- Institutions "must provide the relevant information to access" ED's program information website to "any enrolled title IV, HEA recipient prior to the start date of the first payment period associated with each subsequent award year in which the student continues enrollment at the institution."

If ED launches its new website before July 1, 2026, should institutions start making their disclosures?

Timing of Implementation

- In the commentary to the final rule, ED states that it has "specified that the requirements under § 668.43(d) and the acknowledgment requirements under §§ 668.407 and 668.605 are not applicable until July 1, 2026."
- However, there is no clear exemption from the standard disclosure requirements located in the regulatory text at 668.43(d).
- Further, institutions may run the risk of AG claims, class actions, or other challenges if they do not make the disclosures, particularly if they have received notice that a program is failing.



How the Metrics Work

Annual Process

ED compiles for each program a list of all students who completed during the applicable cohort period (Completer List), removing any student satisfying certain exclusion criteria (e.g., total and permanent disability, deceased).

ED provides the draft Completer List to the institution and affords it 60 days to “correct the information reported by the institution on which the list was based.”

The final Completer List is sent to a yet-to-be-named federal agency (Earnings Agency) to obtain the median annual earnings of the students on the list and the “number, but not the identities” of students it could not match.

Once the earnings information is received, ED makes any needed adjustments and calculates the D/E rates and Earnings Premium for the program.

34 C.F.R. §§ 668.405 and 668.406 (July 1, 2024).

D/E Rates: Formulas

- With limited exceptions, each year ED will calculate the following two D/E rates for all Title IV eligible programs.

Annual D/E Rate	Discretionary D/E Rate
$\frac{\text{Annual Loan Payment}}{\text{Median Annual Earnings}}$	$\frac{\text{Annual Loan Payment}}{\text{Discretionary Earnings}}$

D/E Rates: Standards

- ED will determine whether a program "fails" the D/E rates test in any given year in accordance with the standards set out below:

Fail
Annual D/E Rate is greater than 8% (or Annual Loan Payment is positive and Median Annual Earnings is zero) **AND** Discretionary D/E Rate is greater than 20% (or Annual Loan Payment is positive and Discretionary Earnings is negative or zero)

D/E Rates: The Completers List

- To calculate the Annual Loan Payment for each Title IV program, ED will begin by identifying the Completers List for the program.
- The Completers List is comprised of a 2-year or 4-year cohort of qualifying completers.
- Qualifying completers are students who completed the program, received some form of Title IV aid, and do not otherwise fall into an excluded category (*e.g.*, deceased students).

D/E Rates: Completer Cohorts

- In the commentary to the proposed rule, ED indicates that "given current data production schedules" the initial D/E rates and Earnings Premium "would be calculated in late 2024 or early in 2025."
- For most programs, the two-year cohort period would be comprised of qualified completers who completed in "award years 2017–2018 and 2018–2019" using their earnings data measured in calendar years 2021 and 2022, as applicable.
- ED confirms these projections in the final rule, observing "[t]he first official rates published under these regulations will, for most programs, be based on students who completed a program in award years 2018 and 2019, measuring their earnings outcomes in 2021 and 2022."

D/E Rates: Completer Cohorts

	Periods for First Year Calculations Standard Cohorts		Periods for First Year Calculations Transitional Cohorts	
Award Year of Calculation	2024-2025		2024-2025	
	Award Years (AY) of Completion used for Cost/Debt	Calendar Years (CY) used for Earnings	Award Years (AY) of Completion used for Cost/Debt	Calendar Years (CY) used for Earnings
Standard 2-Year Cohort	2018-2019 2017-2018	2022 2021	2023-2024 2022-2023	2022 2021 2020 2019
Standard 4-Year Cohort	2018-2019 2017-2018 2016-2017 2015-2016	2022 2021 2020 2019		

88 Fed. Reg. 32329 (May 19, 2023) 34 C.F.R. § 668.408(b) (July 1, 2024).

D/E Rates: Qualifying Graduate Programs

- The final rule includes a new definition of "qualifying graduate program," which has one meaning for the first three award years and another afterward.
  - Fundamentally, these are programs with students who must complete required postgraduation training programs to obtain licensure in fields like medicine, osteopathy, dentistry, clinical psychology.
- For qualifying graduate programs only, the two-year cohort period will be award years 2014–2015 and 2015–2016, and the four-year cohort period would be award years 2012–2013 through 2015–2016.

34 C.F.R. § 668.2 (July 1, 2024); 88 Fed. Reg. 70040 (Oct. 10, 2023).

D/E Rates: Calculating Median Loan Debt

- For each student on the Completers List, ED will determine the lesser of the total loan debt or net direct costs
- ED then will calculate the Median Loan Debt for the program.

Program Cohort			
Student Number	Actual Debt	Net Direct Costs	Lesser of Debt/Cost
Student 12	$0	$60,000	$0
Student 10	$0	$80,000	$0
Student 2	$5,000	$80,000	$5,000
Student 13	$30,000	$25,000	$25,000
Student 7	$50,000	$45,000	$45,000
Student 6	$50,000	$45,000	$45,000
Student 11	$50,000	$80,000	$50,000

34 C.F.R. §§ 668.403 and 668.404(b) (July 1, 2024).

D/E Rates: Amortizing Median Loan Debt

- Finally, ED will amortize that Median Loan Debt over the applicable repayment period using the prescribed interest rate, which will yield the Annual Loan Payment for the program.
- This is the numerator for your program's D/E rate calculations.

D/E Rates: Median Annual Earnings

- ED will calculate the Median Annual Earnings for a program by obtaining the most currently available median annual earnings of the students on the Completers List from the Earnings Agency. This is the denominator for your program's Annual D/E rate calculation.
- ED will calculate Discretionary Earnings by subtracting from the Median Annual Earnings the HHS Poverty Guideline multiplied by 1.5. This is the denominator for your program's Discretionary D/E rate calculation.

Earnings Premium: Formula

- ED also will calculate an Earnings Premium for all Title IV eligible programs at all Title IV-participating institutions using the following formula:

Earnings Premium
Median Annual Earnings – Earnings Threshold

- A program's Median Annual Earnings is the same as for the D/E rates.

34 C.F.R. § 668.2 (definition of "Earnings premium") (July 1, 2024).

Earnings Premium: Standard

- Each year, ED will determine whether a program "fails" the Earnings Premium in accordance with the following standard:

Fail
Earnings Premium is zero or negative

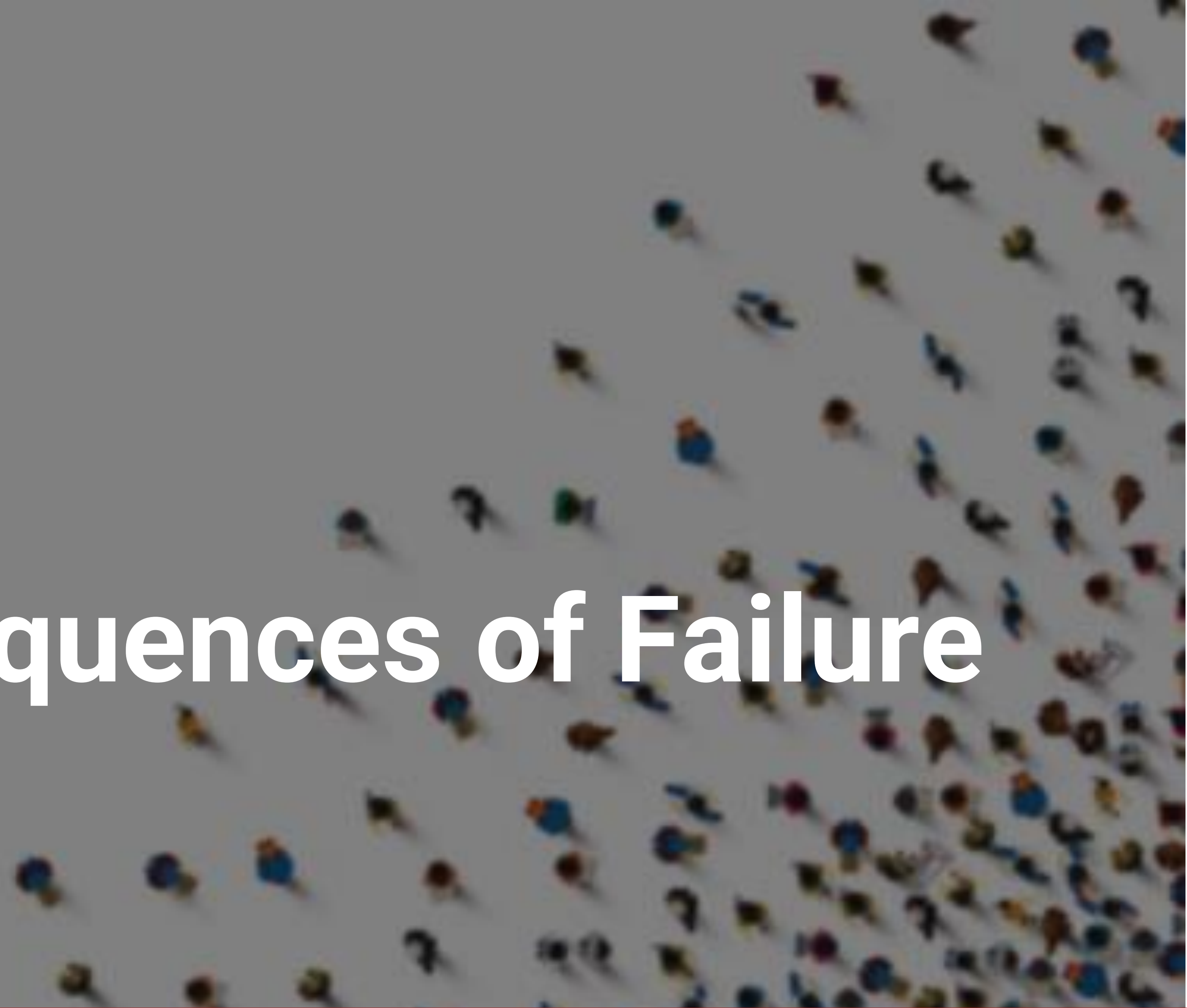
34 C.F.R. § 668.402 (July 1, 2024).

Where does ED get the "Earnings Threshold" it is using in the formula?

Earnings Premium: Calculation

- The Earnings Threshold is defined as "[b]ased on data from the Census Bureau, the median earnings for working adults aged 25-34, who either worked during the year or indicated they were unemployed (i.e., not employed but looking for and available to work) when interviewed, with only a high school diploma (or recognized equivalent) (1) In the State in which the institution is located; or (2) Nationally, if fewer than 50 percent of the students in the program are from the State where the institution is located, or if the institution is a foreign institution."

34 C.F.R. § 668.2 (definition of "Earnings threshold") (July 1, 2024).



The Consequences of Failure

Notice of Determination

- Each year, upon finalizing the D/E rates and Earnings Premium for each program, ED will issue a notice of determination to the institution informing it of the D/E rates and Earnings Premium measure for each program, as well as whether each program is passing or failing, and the consequences of that determination.

Consequences of Failing

Title IV GE Programs	Title IV Non-GE Programs	
Non-Degree Programs	**Undergraduate Degree Programs**	**Graduate Degree Programs**
Student Warnings	None	Student Acknowledgements
Loss of Title IV Eligibility		
Period of Ineligibility for New Substantially Similar GE Programs		

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GE: Student Warnings

- Beginning on July 1, 2026, an institution will be required to provide a warning to current and prospective students if its GE program could become ineligible in the next award year for which D/E rates or the Earnings Premium are calculated.
- As a practical matter, this means institutions will be required to provide the required warnings if a GE program fails a single year, because under the rule, after a single failure a GE program will be one year from potentially losing eligibility.

34 C.F.R. § 668.605 (July 1, 2024).

GE: Student Warnings

- An institution may not sign an enrollment agreement, complete registration, enter a financial commitment with, or disburse Title IV funds to a prospective student earlier than three business days after the institution delivers the warning and until the prospective student completes the acknowledgment on ED's website.
- An institution may not disburse Title IV funds to a current student until the student completes the acknowledgment on ED's website.
- Specific content and distribution requirements for student warnings are located at 34 C.F.R. § 668.605.

34 C.F.R. § 668.605 (July 1, 2024).

GE: Loss of Title IV Eligibility

A GE program becomes ineligible for federal financial aid if the program:

Fails the D/E rates test in two out of any three consecutive award years for which the program's D/E rates are calculated	Fails the Earnings Premium test in two out of any three consecutive award years for which the program's Earnings Premium is calculated

34 C.F.R. § 668.602(a) (July 1, 2024).

GE: Period of Ineligibility

- An institution "may not seek to reestablish the eligibility of a failing GE program that it discontinued voluntarily either before or after D/E rates or the earnings premium measure are issued for that program, or reestablish the eligibility of a program that is ineligible under the D/E rates or the earnings premium measure, until three years following the earlier of the date the program loses eligibility... or the date the institution voluntarily discontinued the failing program."

GE: Period of Ineligibility

- An institution may not add a GE program that is “substantially similar” to a program that the institution voluntarily discontinued or became ineligible until the three-year period expires.
- A program is “substantially similar” to another program if the two programs share the same four-digit CIP code.

Non-GE: Student Acknowledgements

- Beginning on July 1, 2026, if a non-GE graduate degree program has failing D/E rates, prospective students must acknowledge that they have reviewed ED's website before the institution may enter into an agreement to enroll the student.
- Note that the acknowledgement requirement is limited to prospective students.
- There also is no consequence for non-GE programs that fail the Earnings Premium test (apart from disclosure on ED's website). The student acknowledgement requirements for non-GE graduate degree programs are based solely on D/E rate performance.

34 C.F.R. § 668.407 (July 1, 2024).

Non-GE: Student Acknowledgements

- ED will "administer and collect the acknowledgment from students through the program information website."
- Prospective students will be required to complete the acknowledgements until (i) the program has achieved passing D/E rates or (ii) three years have passed since ED notified the institution that the program had failing D/E rates, whichever is earlier.

34 C.F.R. § 668.407 (July 1, 2024).

Non-GE: Student Acknowledgements

- It is unclear how and to what extent institutions that do not utilize enrollment agreements will be required to comply with the acknowledgement requirement for non-GE graduate degree programs.
- We speculate, however, that ED will expect prospective students to complete the acknowledgement prior to beginning their program.
- ED indicates that it will enforce this rule through “audits, program reviews, or other investigations.”

34 C.F.R. § 668.407 (July 1, 2024).

Is it possible to appeal ED's rate determinations?

A Very Limited Appeal

If a GE program is rendered ineligible, its “participation” in the Title IV programs ends upon the earliest of:

The issuance of a new ECAR omitting the program	The completion of a termination action of program eligibility, if an action is initiated under subpart G by ED	A revocation of program eligibility if the institution is provisionally certified

34 C.F.R. § 668.603(a) (July 1, 2024).

A Very Limited Appeal

- In the commentary, ED observes “institutions with programs that are not eligible... as the result of failing GE rates can appeal under subpart G of part 668 if they believe the Secretary erred in the calculation of the program’s D/E rates... or the earnings premium...”
- But an institution may only initiate an appeal under subpart G if ED first initiates a termination action of program eligibility under subpart G. If ED simply updates the ECAR, or revokes eligibility for a provisionally certified school, the appeal right does not appear to exist.
- Further, the institution may only appeal “if it believes the Secretary erred in the calculation of” the program’s D/E rates or the Earnings Premium.

88 Fed. Reg. 70090 (Oct. 10, 2023); 34 C.F.R. § 668.603(a) (July 1, 2024).

No other Challenges or Appeals

- The final rule omits any other opportunity to challenge the accuracy of the D/E rate and Earnings Premium calculations.
- ED also declined to include any form of alternate earnings appeal.
- “With the benefit of experience, other developments since 2014, and the inclusion in these rules of various safeguards against significantly inaccurate or underestimated completer earnings, we have concluded that alternate earnings appeals of the kind the commenters suggested would be unreasonable if not arbitrary.”

88 Fed. Reg. 70095 (Oct. 10, 2023).

GE Program Certifications

GE Program Certifications

- As a condition of continued participation in the Title IV programs, an institution must certify that each GE program it offers is “approved by a recognized accrediting agency or is otherwise included in the institution’s accreditation by its recognized accrediting agency, or, if the institution is a public postsecondary vocational institution, the program is approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation.”

GE Program Certifications

- For existing GE programs, institutions will be required to submit the required certification by December 31, 2024.
- On a go-forward basis, institutions will be required to update the certification within 10 days "if there are any changes in the approvals for a program, or other changes for a program that render an existing certification no longer accurate."

34 C.F.R. § 668.604 (July 1, 2024).

Implications for Academic Program Planning and Review

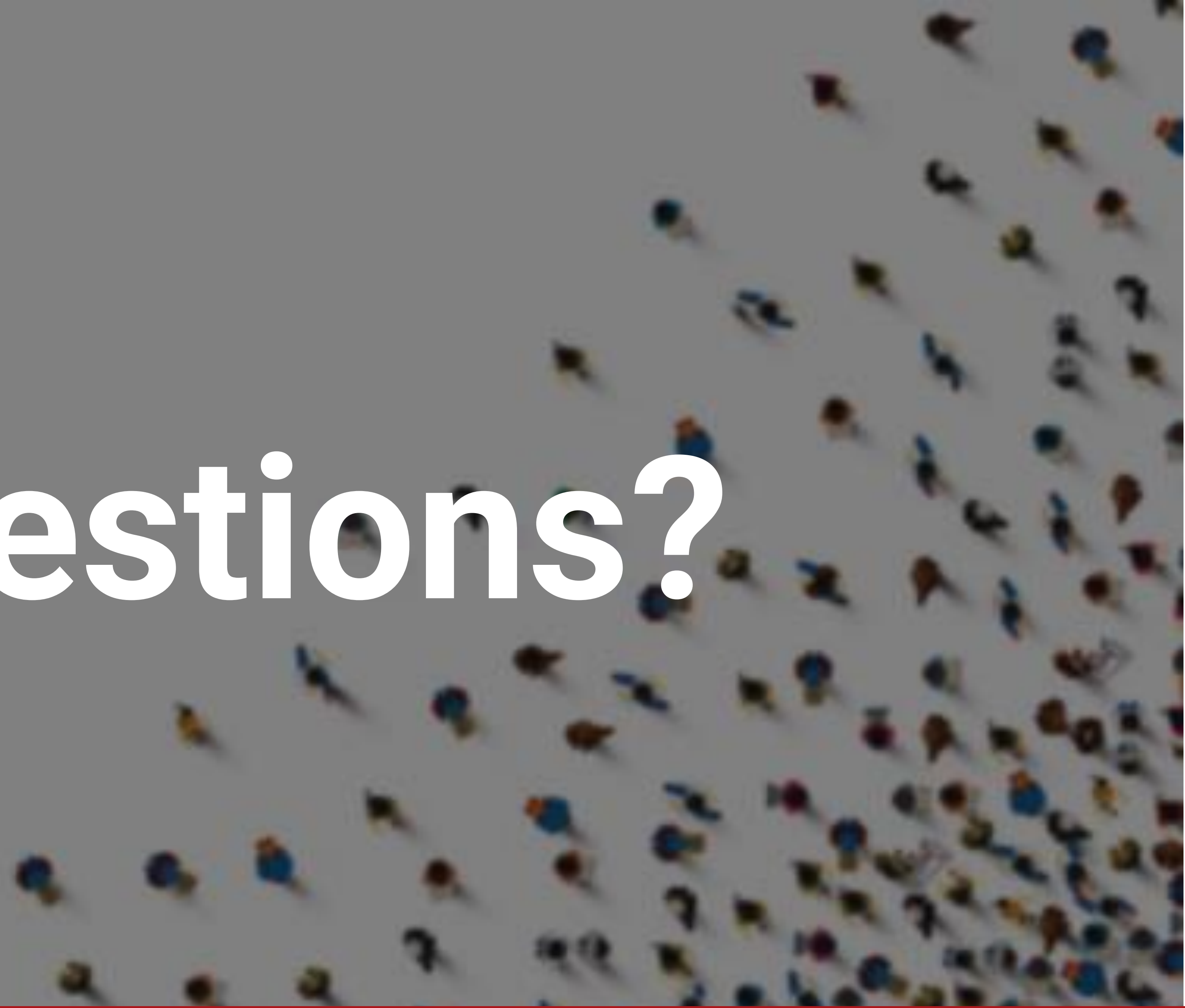
Implementation Timeline

July 1 2024	• Effective date of the new GE Rule
July 31 2024	• Deadline to report first tranche of data
October 1 2024	• Deadline to report most recent award year data
December 31 2024	• Deadline for initial certification of GE programs
January - June 2025	• ED issues first round of determinations to schools
October 1 2025	• Deadline to report most recent award year data
July 1 2026	• Disclosure, distribution, acknowledgement, and warning requirements begin

Institutional Action Plans

- Initiate conversations among institutional leadership, legal counsel, academics and others to determine who will be responsible for compliance with this rule.
- Determine whether to elect standard or transitional reporting and begin developing a reporting plan.
- Work to model program performance to determine whether action may be taken to improve outcomes, retire existing programming, or develop new programs.

Questions?



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