Gainful Employment Regulations Rescinded as of July 1, 2020, with Institutional Option for Early Implementation

By Jonathan D. Tarnow

On July 1, 2019, the U.S. Department of Education (the Department) published final regulations (the “Final Rule”) rescinding requirements for programs that are eligible for Title IV federal student financial aid based on preparing students for gainful employment in a recognized occupation. Because such gainful employment programs (GE Programs) include all postsecondary educational programs offered at for-profit institutions, as well as all nondegree programs offered at public and private nonprofit institutions, the Final Rule affects the vast majority of U.S. higher education institutions.

The Final Rule is consistent with the Department’s August 2018 Proposed Rule, in that it eliminates the regulatory regime implemented by the previous administration for GE Programs (the “GE Regulations”), in its entirety, effective July 1, 2020. That means that as of July 1, 2020, the Department’s regulations governing Title IV federal student aid will no longer include debt-to-earnings metric calculations for GE Programs, sanctions and alternate earnings appeals related to those calculations, or the various reporting, disclosure, and certification requirements specifically applicable to GE Programs.

Further, as described in more detail below, the Department is permitting institutions to “early implement” the Final Rule’s rescission of GE Program requirements. However, institutions that do not early implement must continue to comply with the GE Regulations (including the expanded distribution requirements for GE program disclosures discussed in our June 19, 2019 alert) until the Final Rule becomes effective on July 1, 2020.

Although it rescinds the GE Regulations, the Final Rule also describes the Department’s preliminary plans for the expansion of the College Scorecard. Specifically, the Department announced plans for the College Scorecard to include the following program-level data: (1) program size; (2) the median federal student loan debt and the monthly payment associated with that debt based on a standard repayment period; (3) the median Graduate PLUS loan debt and the monthly payment associated with that debt based on a standard repayment period; (4) the median Parent PLUS loan debt and the monthly payment associated with that debt based on a standard repayment period; and (5) student loan default and repayment rates. This new program-level data would accompany the current elements of the College Scorecard that reflect institution-level data, such as admissions selectivity, student demographics, and student socioeconomic status.

Early Implementation Option

As noted above, the Department also has exercised its statutory authority under the Higher Education Act of 1965 to designate the Final Rule, which is not effective until July 1, 2020, “for early implementation, beginning on July 1, 2019, at the discretion of each institution.” In its Gainful Employment Electronic Announcement #122 – Early Implementation of the Recession of the Gainful Employment Rule, released shortly after the Final Rule became publicly available, the Department provided more specific guidance regarding (1) how institutions may early implement the Final Rule’s rescission of GE Program requirements, and (2) the specific effects of early implementation.

There is no formal process with the Department by which an institution may elect to early implement the Final Rule. Rather, an institution that early implements the rescission must only internally document that decision. An institution also does not have to publish its decision to early implement; however, it must make the internal documentation available to the Department upon request. As noted above, institutions that do not early implement the rule are expected to still comply with the GE Regulations until the Final Rule’s rescission of GE program requirements becomes effective on July 1, 2020.

The Department does not prescribe any specific format for institutional documentation of a decision to early implement the rescission. At a minimum, though, in addition to stating the decision to early implement, an institution’s internal documentation should clearly indicate the date on which the institution implements the rescission, and it should reference both the Final Rule as issued on July 1, 2019, and Gainful Employment Electronic Announcement #122. It is important, once an institution decides on an implementation date, that it take all corresponding actions to promptly and completely implement that rescission, and that it not continue to comply in part but not completely with the GE Regulations. (If an institution wishes to maintain certain program-level disclosures that have been required by the GE Regulations—notwithstanding the expanded program-level disclosures information now present on the College Scorecard—it may continue to provide such disclosures but should remove any reference to “Gainful Employment.” It also must ensure that all institutional disclosures remain factually accurate at all times so as not to be misleading or create any false or misleading information, which could create other compliance concerns.)
Institutions that early implement the Final Rule’s rescission of the GE Regulations will not be required to report GE Program data for the 2018–2019 award year, which otherwise will be due October 1, 2019. Additionally, institutions that early implement will not be required to comply with current requirements to include the disclosure template, or a link thereto, in their GE Program promotional materials and to directly distribute the disclosure template to prospective students, both of which were required as of July 1, 2019. Institutions that early implement will no longer be required to post the prescribed GE Disclosure Template and may remove the template and any other required GE Program disclosures from their Web pages. Finally, an institution that early implements will not be required to comply with the certification requirements for GE Programs.

Please do not hesitate to contact the author or any member of our Education Team if you have any questions regarding the Proposed Rule, this alert, or other educational regulatory matters.

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