Cooley

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The Gainful Employment Rules became effective on July 1, 2015, and you probably already know that your institution has a deadline to report six years' worth of institutional, student and financial data to the Department of Education ("ED") by July 31. In recent discussions, ED has re-emphasized the importance of this deadline. It has thus far declined to extend the date (although a recent request from the National Association of Student Financial Aid Administrators remains pending) and, instead, has stated that it plans to promptly issue a series of reminder and warning letters to institutions in August if they fail to report. ED staff have also indicated that they are prepared to enforce the reporting requirements by placing institutions on delayed disbursement of their federal student aid funds under the heightened cash monitoring-level two system if institutions fail to report in an acceptable time frame after the follow-up warning letters.

Once you have completed the monumental task of filing the first wave of reports, there are other important steps your institution should be taking to prepare for what comes next.

1. Evaluate whether any of your programs might be at risk and, if applicable, begin preparing for the correction and arduous appeal processes

If an institution is concerned that its GE programs may be at risk, it should take all opportunities to ensure that the data ED uses to calculate the Debt-to Earnings ("D/E") Rates are accurate. Institutions will have three limited opportunities to challenge the D/E data and can begin preparing for those opportunities to challenge now.

First, following the issuance of the initial student lists, institutions will have 45 days to review and attempt to correct the list of students whose information ED will use to establish the debt and earnings for the D/E Rate calculations. It will be very helpful for institutions to start compiling their own internal list of students who graduated in the relevant cohort periods in each GE program and determining which students should be excluded from the D/E Rate calculations to compare against the list ED will provide them for review and correction. According to ED's preliminary timeline, it may be able to provide institutions with these student lists in late 2015.

Similarly, following the calculation of draft D/E Rates, institutions will have a 45 day window to review ED's calculation of the median debt for each program. Institutions should have access to the student debt information involving private loans and institutional debt, since they are currently reporting this information to ED, but they should also ensure they have updated information regarding the Title IV debt for the relevant cohorts of graduates so they are in a position to correct any inaccuracies in ED's information.

If an institution is concerned that its GE programs are at risk based on inaccurate or under-reported earnings that ED will gather from the Social Security Administration, there are two narrow and difficult options to appeal its D/E Rates when they are issued in final form: a state data system report or a Recent Graduate Employment and Earnings Survey.[1]

In our view, the state data system is not a viable option because 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 graduate earnings survey may be slightly more feasible, but will still be extremely challenging to appropriately administer to ED's expected standards. Institutions that are considering such an appeal should begin preparing the lists of GE program graduates for at-risk programs as soon as possible, even before ED has issued the necessary standards and procedures.[2] By having a dataset of names, contacts and other necessary information, an institution will be in a much better position to act when the D/E Rates are issued. The process of gathering information on students who left an institution five to six years earlier will likely be time consuming and

will require concerted effort and expense. Schools may consider employing a credit tracking company or other "skip trace" options to identify current contact information for students.

2. Review existing programs to determine substantially similar CIP codes and consider the feasibility of new programs

Once a GE program fails or falls in the zone based on its D/E Rates, even draft D/E Rates, there are consequences for "substantially similar" programs as well. Substantially similar programs are those that share the same four-digit CIP code.[3] For example, general cosmetology programs may be designated with the 12.0401 CIP code, while aesthetician programs are designated with the 12.0409 CIP code. Although ED would not initially consider these to be the same GE program using the six-digit CIP measurement, they are substantially similar programs because they share the same four-digit 12.04 CIP code.

A GE program will lose Title IV eligibility for three years after receiving failing D/E Rates twice in three years, or after receiving a combination of zone and failing rates for four years in a row. Once an institution loses Title IV eligibility for one of its GE programs or voluntarily discontinues a program based on non-passing rates, the institution cannot reestablish that GE program or start a new substantially similar program for three years.

The GE Rules explicitly provide that ED will not approve a new GE program that is substantially similar to another GE program that is ineligible or has been voluntarily discontinued after receiving failing draft or final rates. Technically, this provision does not apply if an institution continues to offer the GE program with failing or zone rates (perhaps because the institution expects the program to achieve passing rates the next year). However, as a matter of caution, we would assume that it will always be difficult to get ED to approve a new program that is substantially similar to a failing or zone program.

Thus, the timing to develop substantially similar programs is very sensitive. If you have considered developing new programs, and those programs could be considered substantially similar to a zone or failing program, you need to act quickly to develop and seek approval of those programs.

3. Evaluate your student payment plans: are they institutional loans or extensions of credit?

Under the GE Rules, an institution reports private education loans, including those loans extended by your institution, differently than it reports "any other credit" that the institution might extend to a student. For a private loan, your institution must report the total amount lent to the student, whereas for an extension of credit, it reports only what is still owed at the time the student completes or withdraws from the program. This difference can be significant and may have a substantial impact on the median loan debt of the students in a GE program cohort.

Institutions should evaluate whether they are currently offering a loan or an extension of credit. An extension of credit must meet one of these requirements:

1. the term of the extension of credit can be no longer than 90 days; OR
2. there is no interest applied to the credit and the term of the extension of credit is no more than one year, even if it is payable in more than four installments.[4]

If your institution has the means to change its institutional loan program to a credit extension program meeting one of these requirements, it would only be obligated to report the balance on the student's account at the time s/he graduates or withdraws, which would reduce the amount of debt ED uses in its calculations.

4. Create scholarship and grant programs that reduce your students' educational debt

The Department has made it clear that institutions must report total program costs and cannot consider institutional aid or scholarships to reduce program costs for reporting purposes. However, scholarships and grants may still be effective for reducing the debt that your students incur and, correspondingly, the median debt that ED uses to calculate the D/E Rates for a GE program. The key is to ensure that the scholarships or grants actually result in a reduction in student borrowing and reduce loan debt incurred below program costs. This can be a challenge for any institution as most students choose to borrow more than program costs to assist with other expenses. In addition, the GE Rules make it difficult because, even if your school offers grants and/or scholarships to reduce the tuition your students actually pay, ED will still count the total debt your students incur, including for living expenses. Thus, unless a number of students actually take out fewer loans or borrow less than program costs, there could be minimal effect on the debt that ED uses in the rates.

However, we believe that certain grant and scholarship programs can still be helpful to your students and reduce the median debt in your GE programs, and these are worth consideration.

If your institution is considering a scholarship program, be sure to carefully assess your accreditor's requirements and your administrative ability to closely manage such a program.

5. Update your campus GE disclosure delivery method

Starting on July 1, 2015, the required process by which an institution discloses information about its GE programs has changed. The method of delivery of certain GE disclosures has become more prescriptive, even though the content and the requirements for inclusion of the GE program information in promotional materials and through prominent links on the school's webpage remain largely the same for now. (The template itself will change to include all of the new required disclosures in January 2017.)

- Before a prospective student signs an enrollment agreement or registers, schools must provide a copy of the disclosure template for the GE program by hand-delivery or email.
- If hand-delivered, the school must obtain and maintain written confirmation of receipt.
- If sent via email, the GE program disclosure template must be the only substantive content of the email, and the institution must have an electronic (or other) method for acknowledging the prospective student's receipt of the email.
- If there is no acknowledgment that the student has received the email, the institution may try other means of delivery, but must document all efforts to deliver the disclosure template.

Under the 2011 rules, where the GE disclosure information was first codified, there was no requirement that the student be handed the information or acknowledge receipt, so institutions need to immediately update their processes for delivering this information to prospective students.

Note that there will be additional disclosure and warning requirements that will be triggered in the future with respect to any GE programs that have failing Debt-to-Earnings Rates.

6. Certify compliance with state and accreditation approvals before December 31, 2015

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 on the new PPA that the institution holds all of the federal, state and accreditor approvals required for each GE program.[5] Those without a pending PPA recertification will be required to complete a separate certification by that same date.

7. Prepare for the October reporting deadline

When you have finished addressing all these issues, get ready for another reporting deadline.

Your institution will be obligated to report another wave of institutional, program and student data for the 2014/2015 award year, with these reports due on October 1, 2015. This 2014/15 data will not only be used to

calculate D/E Rates for future years. It will also be used by ED to calculate the first set of "transitional rates" based on students who graduated in 2014/15, which might provide institutions with another opportunity to achieve passing or zone scores in the first year. Institutions should review their data gathering processes and IT infrastructure to determine if improvements can be made for the next round.

The lawyers and subject-matter experts of the Education Group at Cooley can assist institutions in preparing and implementing the action steps outlined here. Please do not hesitate to call us if you need more information.

NOTES

1. The timing for ED to issue the first set of D/E Rates is the subject of considerable discussion. ED has advised the federal court in the Southern District of New York that the first set of rates would not be issued in final form until 2017. ED has also indicated in a Dear Colleague Letter that it expects to calculate the first set of rates, which would presumably mean draft rates, in 2016. In informal discussions, some ED staff members have indicated that they hope to issue the first set of draft rates in the summer of 2016.
2. ED is currently soliciting comments on two notices related to the earnings survey questions and the standards to conduct the surveys. First, ED has requested the first round of comments on the actual questions to be used in the earnings survey. See the Federal Register notice and related materials. ED is expected to republish the survey for a second round of comments in the late summer or fall.
   ED has also requested comments by August 31, 2015 on the survey standards that institutions must follow when conducting their alternative earnings survey. See the Federal Register and related materials.
3. 34 C.F.R. § 668.410(b)(2)(iv)
4. 34 C.F.R. §601.2
5. The electronic announcement regarding the certification requirements and the proposed language for the certification are available here.

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