ANTICIPATING GAINFUL

What will the final rule potentially look like?

By Nicole Kardell, Ifrah Law

After a federal judge overturned part of the Department of Education's (DOE) gainful employment rule in 2012, the agency returned to the drawing board to propose regulations that would address the administration's goals and still pass judicial scrutiny. The DOE said that in preparation for new proposed language, it was seeking public opinion on "potential approaches to distinguish between successful and unsuccessful programs that seek to prepare students for gainful employment." As of the end of November 2013, the public conversation has gone through two rounds of negotiated rule-making, in September and November 2013, and two drafts of proposed rules published before each of the negotiation rounds. Since negotiations began, the proposed rules have grown in both complexity and stringency. The result is that negotiators have been unable to agree on language acceptable to all interested parties (including community colleges, for-profit institutions, consumer advocates, and federal and state agents). The DOE has promised to continue deliberations, and we probably will not see a final rule until late 2014. But there has been enough published commentary to gauge some of what is to come.

Goals for the gainful employment rule

The DOE has framed its goals for the gainful employment rule:

- Define what it means for a program to prepare a student for gainful employment in a recognized occupation and construct an accountability system that distinguishes between programs that prepare students and those that do not.
- Develop measures to evaluate whether programs meet the requirement and provide the opportunity to improve program performance.
- Protect students and taxpayers by identifying gainful employment programs with poor student outcomes and end taxpayer support of programs that do not prepare students as required.
- Support students in deciding where to pursue education and training by increasing transparency about the costs and outcomes of gainful employment programs.

Jeff Appel, Deputy Undersecretary at the DOE, remarked that accomplishing these goals means having a gainful employment rule that would force costly programs bringing little value to students to improve their standards or risk losing taxpayer support. He also noted the need to give marginal programs the opportunity to improve and give exceptional programs recognition and reward. The DOE's commentary suggests that the department is concentrated on an ex post facto approach to determining whether programs will meet the Higher Education Act's gainful employment mandate.

Overview of the draft regulations

The department's proposed revisions to the gainful employment rule are considerably more complex and more stringent than the earlier version that was thrown out in federal court in 2012. Following is an overview of some of the major provisions. The new draft standards would be based on several metrics:

- Two debt-to-earnings (D/E) ratios, debt to annual earnings and debt to discretionary income. D/E is the percentage of a gainful employment program's annual loan payment compared to the earnings of the students who completed that program, as determined under the complex calculation described in §668.404 of the proposed rule.
- Program cohort default rates (pCDR). The program cohort default rate would be calculated using a methodology applied for institution cohort default rates under §668.202 of the federal regs.
- Loan portfolio repayment performance.

The 2012 version of the gainful employment rule provided metrics dealing with D/E and loan performance only, with standards less rigorous than the current proposed language.

Debt-to-earnings ratios

Under the proposed rule, gainful employment programs would be subject to an annual review of their D/E ratios. Based on the review, they would be categorized as passing, failing or in the zone. Passing programs would have discretionary income rates equal to or less than 20 percent, or annual earnings rates equal to or less than 8 percent. Failing programs would have discretionary income rates greater than 30 percent (or a negative or zero income for the denominator) and annual earnings rates greater than 12 percent (or a zero denominator). Zone programs (neither passing nor failing) would have discretionary income rates greater than 20 percent but less than or equal to 30 percent, or annual earnings rates greater than 8 percent but less than or equal to 12 percent.

Programs would lose Title IV funding eligibility after two failures in a three-year period. Programs falling within the zone would lose eligibility if they fail to pass one out of four years.

It would be harder to pass under the proposed standards, as compared to the earlier version of the rule. Under the earlier rule, a passing program was one with an annual ratio equal to or less than 12 percent, and a discretionary ratio equal to or less than 30 percent. In addition, programs would lose Title IV funding eligibility more quickly under the proposed standards. Under the earlier rule, a program needed to fail three times over a four-year period to lose eligibility.

A cleaner, more direct and less arbitrary way to achieve gainful employment goals would be to establish a rule focusing on accreditation and job placement rates.

Program cohort default rates

Gainful employment programs would also be subject to a review of their pCDR every fiscal year. They would be categorized as passing or failing. Passing programs would have a pCDR of less than 30 percent. Failing programs would have a pCDR of greater than or equal to 30 percent. Programs would lose Title IV funding eligibility if their pCDR is greater than 40 percent or if they fail for three consecutive years.

Loan portfolio repayment performance

Finally, gainful employment programs would be subject to an annual review of their loan portfolio and be categorized as passing or failing. Programs would be considered passing if their loan portfolios were not negatively amortized; they would be considered failing if their portfolios were negatively amortized. Any program that failed two out of three consecutive years would lose Title IV funding eligibility.

Under the proposed regulations, more programs would fall under the gainful employment rule requirements, but fewer students in the programs would be factored into gainful employment calculations. The proposed rule would cover programs with just 10 students or more (the earlier version covered programs with 30 or more students) and would thus apply to more than twice those covered in the previous version. But the new rule would factor only those students who received federal loans and Pell Grants (as opposed to considering all students in the program), likely skewing numbers negatively. And the consequences for failing would be harsher at an earlier stage. After its first failing period, a school's Title IV enrollment would be limited to the previous year's enrollment level, notice would be given to all students and prospective students, and the institution would be required to provide "borrower relief" funds to the DOE for students currently enrolled in and borrowing funds for the program. This latter provision may be a little shocking to those aware that the DOE is under fire for raking in $42.5 billion in profits from federal student loans.

Possible outcome of the negotiated rule-making process

Although it remains unclear what the final gainful employment rule will look like, some things are apparent from the draft regulations and comments to date. The DOE is more persuaded by detractors of for-profit education that view such institutions as predatory than it is by industry representatives who articulate for-profit education's ability to reach traditionally underserved populations. The DOE's disposition comes out in the progression of the draft regulations.

Before the negotiated rule-making began in September 2013, the DOE published new draft language for discussion. This draft was considered "lean and mean." It focused solely on D/E ratios but called for more stringent standards than those included in the 2011 rule. That increased stringency was not enough for detractors (such as representatives of some state attorneys general offices and public sector education) who complained about the need for metrics to account for program dropouts and address program issues before programs failed. And this is in spite of the fact that the number of programs subject to review would more than double under the proposed language. The DOE responded by incorporating pCDR and loan repayment metrics, along with new program and certification requirements. Between September 2013 and November 2013, the draft rule roughly doubled in length. Even though the DOE seeks more input from all interested parties, it seems apparent that Title IV programs should brace themselves for complex and tedious recordkeeping.

Points of contention and concern

The proposed metrics are not the most efficient or effective means of determining whether a program will "prepare students for gainful employment in a recognized occupation," the basis of the gainful employment rule as established under the Higher Education Act. A cleaner, more direct and less arbitrary way to achieve gainful employment goals is to establish a rule focusing on accreditation and job placement rates.

Institutions should not be on the hook exclusively for their students' postgraduation employment decisions, regardless of the current economic conditions. Tying educators' funding to how much money their graduates make may discourage those educators from promoting socially desirable but low-paying jobs and from opening their programs to students who are statistically less likely to succeed after graduation, such as single parents.

The current draft standards will be cumbersome for educators and the DOE alike. Although the rule is meant, in part, to make the most effective use of taxpayer dollars by channeling federal funds only to successful programs, the cost of monitoring, reporting and enforcing the rule may outweigh this goal. As drafted, the rule will require tedious recordkeeping and reporting. The increased compliance costs on educators' ends will be absorbed invariably by students (which will result in more federal student loans). Compliance monitoring and enforcement on the department's end will be absorbed ultimately by taxpayers. The DOE's proposed plan could easily eat up more tax dollars than would otherwise be sent to ineffective gainful employment programs.

It would be less costly and more effective to concentrate on accreditation and to ensure that job placement rates accurately reflect gainful employment program performance. As the draft rule stands, the devil is surely in the details. Sifting through the tedium of the proposed regulations buries the fact that the current approach to the gainful employment rule remains poorly focused.

Nicole Kardell is an Attorney at the Washington, D.C.-based law firm of Ifrah Law. She represents clients across matters involving government action. From federal and state enforcement actions to government contract work, Kardell has spent most of her time as a lawyer representing clients on the opposite side of the table of government regulators and prosecutors. She has worked on matters involving the Federal Trade Commission, Department of Justice, Internal Revenue Service, offices of inspector general of several federal agencies and attorneys general of numerous states. She can be contacted at NKardell@IfrahLaw.com.

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