



IT'S A JUNGLE OUT THERE

FALL 2014 CONFERENCE

MISSOURI ASSOCIATION OF STUDENT FINANCIAL AID PERSONNEL

Grappling with Gainful

Breaking Down and Understanding
the New Gainful Employment Rule

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Introduction

Thompson Coburn LLP

- Full-service firm with 375+ attorneys
- Offices in Chicago, Los Angeles, St. Louis, Southern Illinois, and Washington, D.C.

Higher Education Practice

- Counsel clients concerning federal, state, and accrediting agency laws and standards, to include federal financial aid programs and consumer information.
- Represent institutions in litigation, as well as administrative proceedings before state licensing entities, accrediting agencies, and federal government.
- Assist clients with the postsecondary mergers and acquisitions, contract drafting and negotiation, policy creation and implementation, and compliance systems design.

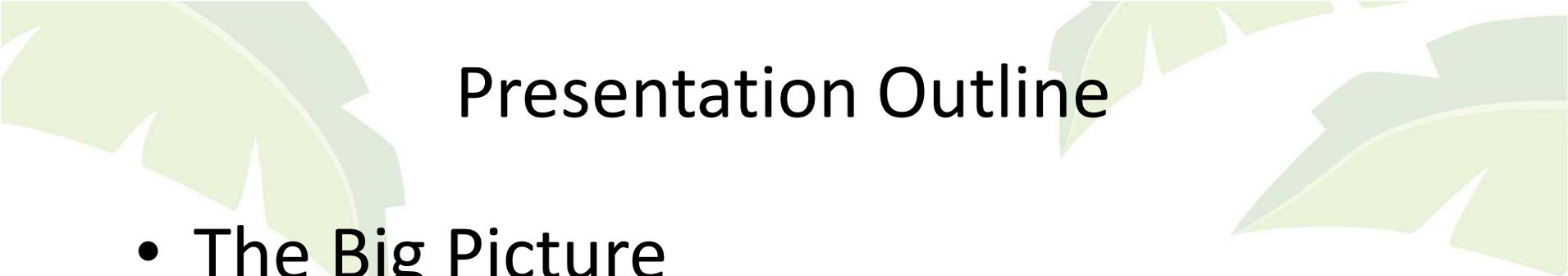


Introduction

Aaron D. Lacey

- Partner, Higher Education Practice
- Served four years as Senior Vice President of Regulatory Affairs and Strategic Development for a multi-campus, postsecondary education company, with 24 campus locations and online division.
- Prior to going in-house, served eight years in the postsecondary education practice of prominent Washington, D.C. law firm.





Presentation Outline

- The Big Picture
- The Nitty Gritty
 - D/E Rates
 - GE Reporting
 - GE Disclosures
 - GE Certification





THE BIG PICTURE



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The Big Picture

Why do we have gainful employment regulations?

- To address concerns that “gainful employment programs”:
 - do not train students in the skills they need to obtain and maintain jobs
 - provide training for an occupation for which low wages do not justify program costs
 - have high number of withdrawals, which leads to leads to default



The Big Picture

Which programs are “gainful employment programs”?

- Almost all programs offered by for-profit institutions.
- Almost all non-degree programs offered by any postsecondary institution.
- In a 2011 Dear Colleague Letter (DCL Gen-11-10), the Department identified with additional specificity the range of programs that would qualify as GE programs, as well as handful of exceptions to the general rule.



The Big Picture

What are the main institutional responsibilities under the new GE rules?

- Satisfying D/E rate thresholds
- Reporting data
- Disclosure of GE program information
- Certification of GE program compliance



The Big Picture

What are the stakes?

- Warning disclosures
- Loss of program eligibility
- Institutional fine, suspension, termination



The Big Picture

When will the new rules get here?

- **July 1, 2015:** Effective date of Regulations
- **July 31, 2015:** Data due for AY 2008-09 to 2013-14
- **October 1, 2015:** Data due for AY 2014-2015
- **December 31, 2015:** Deadline for Certification
- **January 2016:** New standard disclosures required (GEDT)
- **Spring 2016:** First year D/E rates issued; disclosure sanctions apply
- **October 1, 2016:** Data due for AY 2015-2016
- **Spring 2017:** Second year D/E rates issued; disclosure sanctions apply; ineligibility sanctions apply



The Big Picture

What should I be doing right now?

- Identify GE programs
- Begin gathering data that must be reported for July 31, 2015
- Begin preparations for disclosures in marketing and promotional materials
- Project D/E rates to determine whether there is a need for program revision or teach-out
- Integrate D/E analysis into the program design process





THE NITTY GRITTY



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D/E Rates

(34 C.F.R § 668.404-410)



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D/E Rates

What are the D/E Rates?

$$\text{Annual Earnings Rate} = \frac{\text{Annual Loan Payment}}{\text{Annual Earnings}}$$

$$\text{Discretionary Income Rate} = \frac{\text{Annual Loan Payment}}{\text{Discretionary Income}}$$

D/E Rates

Where does the data come from?

- Data used to calculate Annual Loan Payment (numerator for both equations) based on:
 - data reported by institutions (e.g., enrollment, private and institutional loan debt) through GE reporting process; and
 - USED student loan data
- Annual Earnings data from Social Security Administration



D/E Rates

How are the rates calculated?

- Annual Loan Payment
 - For each GE program, USED takes either a 2- or 4-year cohort of qualifying students, determines the lesser of the median loan debt or median costs assessed for the cohort, then amortizes that median loan debt over the applicable repayment period using the applicable interest rate to calculate an annual payment amount



D/E Rates

- Annual Earnings
 - USED obtains from SSA the most currently available mean and median annual earnings for qualifying students who completed GE program during the applicable cohort period (and who are not excluded), and use the higher of the mean or median annual earnings.
- Discretionary Income
 - Annual Earnings minus 150% of the Poverty Guideline for a single person residing in the United States as published by HHS ($\$11,670 \times 1.5 = \$17,505$)



D/E Rates

Who calculates the D/E rates?

- The U.S. Department of Education
- If you are projecting rates, you will necessarily be estimating, because you will not have SSA data



D/E Rates

Does USED calculate D/E rates for every GE program?

- No if cohort has insufficient number of students
 - USED will use a two-year cohort for calculating D/E rates. If there are not 30 qualifying students in the 2-year cohort, an expanded 4-year cohort will be used. If the expanded 4-year cohort does not have 30 qualifying students, USED will *not* calculate D/E rates for that program for the applicable award year.
- No, if SSA provides earnings data for fewer than 30 students in the cohort



D/E Rates

- If USED does not calculate D/E rates for a program, it does not mean that the program passes. Rather, the GE program receives a “no result” for that award year and remains in the same status as in the previous award year, when rates were calculated.
- If USED does not calculate rates for four or more consecutive award years, it will disregard rates for any award year *prior* to the four-year period when determining the program’s eligibility.



D/E Rates

How good do my rates need to be?

Pass	Programs whose graduates have annual loan payments less than 8% of total earnings <u>OR</u> less than 20% of discretionary earnings.
Zone	Programs whose graduates have annual loan payments between 8% and 12% of total earnings <u>OR</u> between 20% and 30% of discretionary earnings.
Fail	Programs whose graduates have annual loan payments greater than 12% of total earnings <u>AND</u> greater than 30% of discretionary earnings.



D/E Rates

What happens if my D/E rates are below the thresholds?

- GE program becomes ineligible if the program:
 - Fails two out of any three consecutive award years *for which the program's D/E rates are calculated*; **OR**
 - Has a combination of zone and failing rates for four consecutive award years *for which the program's D/E rates are calculated*.



D/E Rates

- Must issue student warnings to current and prospective students for any year for which USED notifies an institution that the program could become ineligible based on its D/E rates for the next award year.
 - If USED informs you in spring 2016 of a failing rate for AY 14-15, you issue warning until AY 15-16 rates are in.



D/E Rates

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



D/E Rates

- With regard to prospective student warning:
 - Must be made at first contact “about the program”
 - Must be carried out by third-parties if they have first contact with prospective students
 - If by email, must obtain written acknowledgement of receipt (among other things)
 - Must wait three days after disclosure provided to enroll prospective student
 - If 30 days pass since first warning, must provide prospective student second warning and wait another three days



D/E Rates

What if I disagree with USED's calculations?

- Institutions will have opportunity to review and challenge:
 - cohort enrollment lists (within 45 days of list distribution)
 - loan debt information (within 45 days of draft D/E rate distribution)
- Institution bears burden of proof; USED accepts or rejects challenges at its discretion



D/E Rates

- Institutions also can file alternate earnings appeals (if it will change outcome)
 - Institution requests recalculation of D/E rates using earnings from an institutional survey or from a State-sponsored data system.
 - Must file notice of intent to appeal between issuance of draft D/E rates and 14 days following issuance if final D/E rates.



D/E Rates

When can I bring back a program that failed?

- From the date USED informs an institution that a program is ineligible, or the date an institution voluntarily discontinues a program, it must wait three years to:
 - reestablish the eligibility of a failing or zone program that it discontinued voluntarily;
 - reestablish the eligibility of a program that is ineligible under the D/ E rates measure; or
 - establish the eligibility of a program that is substantially similar to the discontinued or ineligible program.
- A program is substantially similar to another program if the two programs share the same four-digit CIP code.



D/E Rates

- Institution may not reestablish eligibility of program that it discontinued voluntarily after receiving draft D/E rates that are failing or in the zone, or establish the eligibility of a program that is substantially similar to the discontinued program, until
 - Final D/E rates that are passing are issued for the program for that award year; or
 - If the final D/E rates for the program for that award year are failing or in the zone, three years following the date the institution discontinued the program.



D/E Rates

When does this all start happening?

- **July 1, 2015:** Effective date of Regulations
- **July 31, 2015:** Data due for AY 2008-09 to 2013-14
- **October 1, 2015:** Data due for AY 2014-2015
- **Spring 2016:** First year D/E rates issued (warning disclosure could be required for failing programs)
- **October 1, 2016:** Data due for AY 2015-2016
- **Spring 2017:** Second year D/E rates issued (ineligibility for programs with two years failing programs)



D/E Rates

Wait a minute, are the D/E rates retroactive?

- Standard FY 2015 D/E rates will be based on cohorts from AY 2008-09 to 2011-12. Thus, first year standard rates, and related sanctions, would indeed be based on conduct pre-dating regulations.
- Folks complained, so USED will calculate transitional rates (from five to seven award years following the first year the Department calculates D/E rates, varies depending on program length)
- Transitional rates calculated using standard methodology except USED uses median loan debt only of students who completed the program during most recently completed award year





GE Reporting

(34 C.F.R § 668.411)



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GE Reporting

What data must be reported?

- For *every* student enrolled in the program during the award year who received T4 funds for enrolling in the program:
 - Information needed to identify the student and the institution
 - Name, CIP code, credential level, and length of GE program
 - Whether program is a medical or dental program whose students are required to complete an internship or residency
 - Date the student initially enrolled in the program
 - Student's attendance dates and attendance status (e.g., enrolled, withdrawn, or completed) in the program during the award year
 - Student's enrollment status (e.g., full-time, three-quarter time, half-time, less than half-time) as of the first day of the student's enrollment in the program



GE Reporting

- For every student who completed or withdrew from the program during the award year:
 - Date student completed or withdrew from the program
 - Total amount student received from private education loans for enrollment in program (that institution is, or should reasonably be, aware of)
 - The total amount of institutional debt student owes *any party* after completing or withdrawing from program;
 - Total amount of tuition and fees assessed the student for student's entire enrollment in program; and
 - Total amount of allowances for books, supplies, and equipment included in student's T4 COA for each award year in which student was enrolled in program, or higher amount if assessed by institution



GE Reporting

- For every GE program:
 - If required by accreditor or state to calculate a placement rate for either the institution or the program, or both, the placement rate for the *program*, calculated using the applicable methodology.



GE Reporting

When must the data be reported?

- July 31, 2015: Must report data for award years 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, and 2013-14. For medical and dental programs that require an internship or residency, must also provide data for award year 2007-08.
- October 1, 2015: Must report data for award year 2014-15.
- October 1 of subsequent years: Data for most recently completed award year.



GE Reporting

How must data be reported?

- “[I]n the manner prescribed by the Secretary in a notice published in the Federal Register.”



GE Reporting

How must data be reported?

- “[I]n the manner prescribed by the Secretary in a notice published in the Federal Register.”

What if I don't get the data reported in time?

- If an institution fails to provide all or some of the data, must provide USED an acceptable explanation.





GE Disclosures

(34 C.F.R § 668.412)



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GE Disclosures

What information must be disclosed?

- At USED discretion. USED will conduct “consumer testing” to determine best disclosure mix. Periodic notification through Federal Register.
- Practically speaking, disclosure mix will be reflected in GE disclosure template (GEDT), and based on data reported by institution in prior year.



GE Disclosures

- Potential disclosure information provided by institution:
 - Primary occupations (by name and SOC code) that program prepares students to enter, along with links to occupational profiles on O*N
 - Program length (i.e., weeks, months, years)
 - Program clock or credit hours
 - Total cost of tuition and fees books, supplies, and equipment (normal time)
 - Placement rate for the program (if required by state or accreditor)



GE Disclosures

- Total number of individuals enrolled in the program during most recently completed award year
- Percentage of the individuals enrolled in the program during most recently completed award year that received a title IV loan or a private loan
- Whether the program is programmatically accredited
- A link to USED College Navigator Web site



GE Disclosures

- Whether program satisfies educational prerequisites for professional licensure or certification in each State within the institution's MSA
- Whether program satisfies educational prerequisites for professional licensure or certification in any other State for which institution has made a determination regarding such requirements.
- For any other States, a statement that institution has not made a determination with respect to the licensure or certification requirements of those States.



GE Disclosures

- Potential disclosure information generated by USED:
 - Completion rates for full-time and less- than-full-time students
 - Withdrawal rates
 - Loan repayment rate for students who entered repayment during the two-year cohort period, including for all students, for students who completed, or for students who withdrew
 - Median loan debt for students who completed during most recent award year, students who withdrew during most recent award year, or for both



GE Disclosures

- Mean or median earnings for students who completed during the applicable cohort period, students who withdrew during the applicable cohort period, or for both
- Program cohort default rate
- Annual earnings rate

NOTE: USED methodology for generating GE disclosures at 34 C.F.R. 668.413.



GE Disclosures

Where must the information be disclosed?

- School website
 - Includes any page containing academic, cost, financial aid, or admissions information about program maintained by **or on behalf** of institution
 - Must provide GEDT or “prominent, readily accessible, clear, conspicuous, and direct link” to GEDT



GE Disclosures

- Marketing and promotional materials
 - Includes all “promotional materials” made available by **or on behalf** of institution to prospective students that **identify program by name or otherwise promote the program**
 - Promotional materials include, but are not limited to, an institution’s catalogs, invitations, flyers, billboards, and advertising on or through radio, television, print media, the Internet, and social media



GE Disclosures

- Must include GEDT “in prominent manner”
- If space or airtime constraints, may include link to GEDT, provided link is “prominent, readily accessible, clear, conspicuous, and direct” **and** states “Important Information about the educational debt, earnings, and completion rates of students who attended this program”



GE Disclosures

When must disclosures be made?

- Website and marketing disclosures are ongoing
- Also must make pre-enrollment disclosure
 - Must provide GEDT before prospective student signs an enrollment agreement, completes registration, or makes a financial commitment.



GE Disclosures

- Pre-enrollment disclosure may be made in-person (individually or as part of a group presentation) or via email
 - If provided in-person, must obtain written confirmation of receipt
 - If provided via email, must ensure GEDT is only substantive content in email, obtain written confirmation of receipt, send using different address if institution receives undelivered response, maintain records of efforts to provide GEDT



GE Disclosures

When must new disclosures be made?

- First set of expanded disclosures “likely” required by January 2016 (using data reported to USED in 2015).



GE Disclosures

When must disclosures be updated?

- Generally, must update GEDT information at least annually with most recent data available.
- Must update GEDT immediately to include any required student warning (due to program failing or being in the zone).



GE Disclosures

What if I think the disclosures are wrong?

- Institutions will have opportunity to challenge disclosure information generated by USED in advance of finalization.
 - 45 days to challenge list of students informing earnings data.
 - 45 days to challenge draft completion rate, withdrawal rate, repayment rate, and median loan debt, institution may challenge accuracy of data used to calculate draft rates and draft median loan debt.
 - 45 days to challenge data included on loan record detail report used for pCDR.



GE Disclosures

Additional points of interest

- Certain data may not be included in GEDT if based on fewer than 10 students.
- If institution offers program in more than one length, *must* publish separate GEDT for each length.



GE Disclosures

- If institution offers program in more than one location or format (e.g., full-time, part-time, accelerated), *may* publish separate GEDT for each, if doing so would result in clearer disclosures.
 - In such cases, institution must disaggregate appropriate data by length of the program, location, or format (e.g., number of clock hours, enrollments, cost, placement rate).





GE Certification

(34 C.F.R § 668.414)



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GE Certification

What must I certify?

- Must certify for each program on the ECAR that:
 - Program is approved by accreditor
 - Program is programmatically accredited (if such accreditation is required by a federal governmental entity or by a state in which institution is required to have approval)
 - Program satisfies applicable educational prerequisites for professional licensure or certification requirements (for states in which institution is (or should be) licensed)
 - Program is not substantially similar to program that in prior three years became ineligible or was voluntarily discontinued for failing D/E rates



GE Certification

Who must certify?

- The institution's most senior executive

What is the certification deadline?

- December 31, 2015

Additional points of interest

- Certification is addendum to PPA
- Certification will be incorporated into the PPA on a going-forward basis
- Institution must update "certification" within 10 days if any changes in program or program approval that make existing certification inaccurate





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