



Department of Education Final Rules for Postsecondary Education Programs That Prepare Students for Gainful Employment in a Recognized Occupation

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Summary

Some types of postsecondary education programs at institutions of higher education that are eligible for participation in the federal student aid programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), face additional conditions for Title IV aid eligibility. These programs, which are offered by public and private not-for-profit institutions of higher education and postsecondary vocational institutions, and by for-profit proprietary institutions of higher education, must prepare students for gainful employment in recognized occupations.

For many years, the U.S. Department of Education (ED) had not promulgated regulations that explicitly defined what it means for a program to be preparing students for gainful employment in a recognized occupation. To address concerns about the quality of programs that prepare students for gainful employment and concerns about the level of student loan debt assumed by students who attend these programs, ED issued new rules on gainful employment in late 2010 and early 2011.

The final rules established a series of reporting and disclosure requirements for institutions of higher education that offer gainful employment programs and additional requirements for institutions that add new gainful employment programs. The rules also established a series of three performance metrics designed to measure how effectively completers of gainful employment programs repay the student loans they borrow to attend these programs, and the relationship between their student loan debt and their earnings. One metric, a loan repayment rate, was designed to measure how effectively students who are borrowers of federal student loans and who attended a gainful employment program repay the loans they borrowed to attend the program. Two additional metrics—an earnings rate and a discretionary income rate—are debt-to-earnings measures and were designed to measure the proportion of students who complete a gainful employment program whose combined federal and non-federal student loan debt exceeds certain percentage thresholds of their earnings. A program failing to pass at least one of the three performance metrics for any three out of the most recently completed four fiscal years would lose eligibility to participate in HEA, Title IV programs.

The Department of Education's efforts to establish new rules on gainful employment were very contentious. When ED published proposed rules in the summer of 2010, it received an unprecedented volume of comments. Overall, ED received more than 90,000 comments, with approximately three-quarters opposed to the rules and one-quarter in support. Many were concerned that the new rules would increase regulatory burden and potential adverse effects from programs losing eligibility to participate in HEA, Title IV federal student aid programs. Others supported the regulation of gainful employment programs, particularly with regard to the student loan debt of students who attend them.

Prior to the effective date of the gainful employment regulations, they were challenged in court by the Association of Private Sector Colleges and Universities. On June 30, 2012, the U.S. District Court for the District of Columbia issued a decision that vacated most aspects of the regulations and remanded them to ED for further action. At present, only the disclosure requirements remain in effect.

This report provides an overview of the Department of Education's rules on gainful employment and their current status.

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Department of Education Rules on Gainful Employment

Since the enactment of the Higher Education Act of 1965, as amended (HEA; P.L. 89-329), participation in the federal student aid programs authorized under Title IV of the HEA has been available for certain educational programs on the condition that the programs prepare students for gainful employment in recognized occupations. Such programs include non-degree educational programs offered by public and private not-for-profit institutions, and most educational programs at private for-profit (proprietary) institutions.

For many years, however, the U.S. Department of Education (ED) had not promulgated regulations that explicitly defined what it means for a program to be preparing students for gainful employment in a recognized occupation. In 2010, ED initiated an effort to develop new regulations on gainful employment to address concerns about the quality of programs that prepare students for gainful employment and concerns about the level of student loan debt assumed by students who attend these programs. The new rules would be particularly relevant for proprietary institutions since borrowing is more prevalent among students who are enrolled in the programs they offer.

According to ED, proprietary institutions enrolled 4.0 million students, or 13.5% of all students enrolled in Title IV-participating institutions in academic year (AY) 2010-2011, up from 2.2 million, or 9.0% of all students enrolled in AY2006-2007.¹ Also, according to ED many proprietary institutions receive most of their income from funds made available to students through the Title IV aid programs.² Importantly, many students who receive Title IV aid to enroll in programs at proprietary institutions receive at least some of their aid in the form of loans that they are required to repay. Students enrolled at proprietary institutions have often also borrowed non-Title IV loans to help finance their educations. Over the years, concerns have been raised about the quality of programs offered by proprietary institutions and whether individuals who have attended these programs are adequately prepared for employment. For example, in the 1990s the Government Accountability Office (GAO) identified lower student completion rates and placement rates, and higher default rates, at proprietary institutions that relied most heavily on Title IV aid.³ Overall, borrowing by students to finance their enrollment in training programs has raised concerns about student loan debt and the ability of students to repay their student loans.

¹ L.G. Knapp, J.E. Kelly-Reid, and S.A. Ginder, *Postsecondary Institutions and Price of Attendance in 2011-12; Degrees and Other Awards Conferred, 2010-11; and 12-Month Enrollment, 2010-11: First Look (Provisional Data) (NCES 2012-289rev)*. U.S. Department of Education, Washington, DC: National Center for Education Statistics, 2012, Table 3, p. 6; and L.G. Knapp, J.E. Kelly-Reid, and S.A. Ginder, *Postsecondary Institutions in the United States: Fall 2007, Degrees and Other Awards Conferred: 2006-07, and 12-Month Enrollment: 2006-07* (NCES 2008-159), U.S. Department of Education, Washington, DC: National Center for Education Statistics, 2008, Table 8, p. 12.

² U.S. Department of Education, "Program Integrity; Gainful Employment; Proposed Rule," *75 Federal Register* 142, July 26, 2010, pp. 43617-43618, at <http://www.ifap.ed.gov/fregisters/attachments/FR072610ProgramIntegrity.pdf> (hereinafter cited as ED, July 26, 2010, NPRM). Also, see U.S. Department of Education, Federal Student Aid Data Center, School Data, "Proprietary School 90/10 Revenue Percentages," at <http://federalstudentaid.ed.gov/datacenter/proprietary.html>.

³ U.S. Government Accounting Office (GAO), *Proprietary Schools: Poorer Student Outcomes at Schools That Rely More on Federal Student Aid*, GAO/HEHS-97-103, June 1997, at <http://www.gao.gov/archive/1997/he97103.pdf>. This report was prepared as part of an examination of the "85/15 rule," which subsequently was changed to the "90/10 rule." For additional information, see CRS Report RL32182, *Institutional Eligibility and the Higher Education Act*: (continued...)

Department of Education Regulatory Procedures

The Secretary of Education (the Secretary) has general authority to issue rules and regulations governing the operation of programs administered by ED.⁴ For programs authorized under HEA, Title IV, the Secretary is required to obtain public involvement in the development of proposed regulations through a process of negotiated rulemaking with stakeholders in the higher education community who would be affected by the regulations.⁵ Through negotiated rulemaking, ED and participating stakeholders work to achieve consensus on the content of the proposed regulations. If consensus is achieved, ED proceeds with the regulations as agreed to with negotiators and publishes them as a notice of proposed rulemaking in the *Federal Register*. If consensus is not achieved, ED decides how to proceed with regulations and may develop its own regulatory language.⁶

ED initiated the 2009-2010 negotiated rulemaking process to develop proposed regulations on a number of issues affecting the integrity of postsecondary education programs that participate in HEA, Title IV federal student aid (FSA) programs. One of these issues concerned the establishment of regulations on certain programs whose eligibility for participation in the HEA, Title IV FSA programs is contingent on the requirement that they “prepare students for gainful employment in a recognized occupation.”⁷ As part of the negotiated rulemaking process, an issue paper was prepared on the topic of “Gainful Employment in a Recognized Occupation,” along with draft regulations.⁸ Ultimately, the team negotiating on program integrity issues was unable to reach consensus on how to proceed with regulations on gainful employment.

Proposed Rules

In the summer of 2010, ED published two notices of proposed rulemaking (NPRM) in the *Federal Register* that contained proposed rules on programs that prepare students for gainful employment (hereinafter referred to as gainful employment programs). These proposed rules were designed to address concerns about the quality of the programs and the amount of student loan debt that students who attend such programs incur. Essentially, the proposed rules called for the establishment of a series of reporting and disclosure requirements⁹ and a set of performance metrics¹⁰ designed to measure how effectively program attendees repay the student loans they

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Legislative History of the 90/10 Rule and Its Current Status, by (name redacted).

⁴ Department of Education Organization Act, §414, (20 U.S.C. 3474); and General Education Provisions Act (GEPA), §401 (20 U.S.C. 1221e-3). For additional information on GEPA, see CRS Report R41119, *General Education Provisions Act (GEPA): Overview and Issues*, by (name redacted) and (name redacted).

⁵ HEA, §492, (20 U.S.C. §1098a).

⁶ For further information on the process of negotiated rulemaking, see U.S. Department of Education, Office of Postsecondary Education, “The Negotiated Rulemaking Process for Title IV Regulations—Frequently Asked Questions,” at <http://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html>.

⁷ HEA, §§101(b)(1), 102(b)(1)(A)(i), and 102(c)(1)(A); (20 U.S.C. §§1001(b)(1), 1020(b)(1)(A)(i), and 1002(c)(1)(A)).

⁸ See U.S. Department of Education, Office of Postsecondary Education, Negotiated Rulemaking for Higher Education 2009-10 - Team I—Program Integrity Issues, “Issue Paper #6, Gainful Employment in a Recognized Occupation,” at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-session3-issues.pdf>.

⁹ U.S. Department of Education, “Program Integrity Issues; Proposed Rule,” 75 *Federal Register* 117, June 18, 2010, pp. 34806-34890 (hereinafter cited as ED, June 18, 2010, NPRM).

¹⁰ ED, July 26, 2010, NPRM, pp. 43616-43708.

borrow to attend these programs, and the relationship between the debt of program completers and their earnings.

ED published the first set of proposed rules on gainful employment in a June 18, 2010, NPRM. This NPRM contained proposed rules to specify the types of programs to which the gainful employment requirements would apply and to establish reporting and disclosure requirements for gainful employment programs.¹¹ The proposed rules would be applicable to programs whose eligibility to participate in HEA, Title IV FSA programs is predicated on the requirement that the training programs prepare students for gainful employment in a recognized occupation. These would include programs offered by public and private not-for-profit institutions of higher education and postsecondary vocational institutions, as well as proprietary or private for-profit institutions. This set of proposed rules essentially called for the establishment of a series of reporting requirements for these programs.

ED published the second set of proposed rules in a July 26, 2010, NPRM. This NPRM contained proposed rules to establish a set of performance measures for ED to use in assessing whether certain educational programs lead to gainful employment in recognized occupations, to establish the continued eligibility of these programs to participate in the HEA, Title IV FSA programs, and to establish the eligibility of new programs to participate in HEA, Title IV FSA programs.¹² The performance measures were proposed to be used to assess the repayment of loans borrowed by students who attended applicable programs and the relationship between the student loan debt payments of borrowers who completed these programs and their earnings from employment. Programs were to be deemed successful at preparing students for gainful employment if sufficient percentages of individuals who borrowed student loans were reducing the balance owed on their loans, or the student loan payments of students who successfully completed the programs were low relative to their earnings from employment. By focusing on the repayment of student loans and student loan debt, the measures were designed to shine a spotlight on institutions that have a high percentage of students who borrow to finance their postsecondary expenses—particularly proprietary institutions. ED stated that the proposed rules would ensure “that programs subject to the gainful employment standards actually produce students with sufficient incomes (relative to their debt) to make their debt payments.”¹³

The proposal of new rules on gainful employment was very contentious. Overall, ED received more than 90,000 comments on the proposed rules, with approximately three-quarters opposed to the rules and one-quarter in support. Many were concerned that the new rules would increase the regulatory burden and potential adverse effects from programs losing eligibility to participate in HEA, Title IV federal student aid programs. Others supported the regulation of gainful employment programs, particularly with regard to the student loan debt of students who attend them.

Final Rules

On October 29, 2010, ED published final rules that established requirements for IHEs to report certain information on students who attend or complete gainful employment programs, and that

¹¹ ED, June 18, 2010, NPRM. See proposed rules at 34 C.F.R. §§600.4(a)(4)(iii), 668.6, and 668.8(c)(3).

¹² ED, July 26, 2010, NPRM. See proposed rules at 34 C.F.R. §§668.7, 668.13(c)(1)(i)(F), and 668.90(a)(3)(vii).

¹³ *Ibid.*, p. 43622.

established requirements for IHEs to disclose certain information on completion rates, placement rates, median student loan debt, and program costs for gainful employment programs.¹⁴ These final rules are substantially similar to the proposed rules published in the June 18, 2010, NPRM; however, a number of changes were made to the rules based on comments received by ED. The rules also established a process for IHEs to apply for approval to offer new gainful employment programs. These final rules became effective July 1, 2011, with institutions being required to report information on gainful employment to ED by October 1, 2011. (On August 2, 2011, ED announced that it was extending the deadline for IHEs to report required gainful employment information to November 15, 2011.)¹⁵

On June 13, 2011, ED published final rules establishing gainful employment performance measures and performance thresholds for the measures. The final rules establish three performance measures for gainful employment programs. A *loan repayment rate* (LRR) is designed to measure how effectively students who are borrowers of federal student loans made under the Federal Family Education Loan (FFEL) program or the William D. Ford Federal Direct Loan (DL) program¹⁶ and who attended a gainful employment program repay the loans they borrowed to attend the program. A gainful employment program must have an LRR of 35% or more to pass the measure. Two debt-to-earnings measures—an *earnings rate* (ER) and a *discretionary income rate* (DIR)—are designed to measure the proportion of students who complete a gainful employment program whose combined federal and non-federal student loan debt exceeds certain percentage thresholds of their earnings. To pass the debt-to-earnings measures, a gainful employment program must have an ER of 12% or less, or a DIR of 30% or less, respectively. According to the regulations, a program that fails to meet all three of the performance measures for any three out of the most recently completed four fiscal years will no longer be eligible to participate in HEA, Title IV programs. The effective date for these final rules was July 1, 2012.

Congressional Action

In the 112th Congress, the House of Representatives passed H.R. 1, the Full-Year Continuing Appropriations Act, 2011. Among other things, H.R. 1 would have prohibited ED from using funds made available by the act to implement, administer, or enforce the final rules on gainful employment that were published on October 29, 2010; to issue or implement additional final rules on gainful employment based on the proposed rules published in the July 26, 2010, NPRM; or to promulgate or enforce any new regulations or rules related to the term “gainful employment.”¹⁷ The Senate failed to take action on H.R. 1.

¹⁴ U.S. Department of Education, “Program Integrity Issues; Final Rule,” *75 Federal Register* 209, October 29, 2010, pp. 66831-66975, at <http://www.ifap.ed.gov/fregisters/attachments/FR102910Final.pdf> (hereinafter cited as ED, October 29, 2010, Program Integrity Issues—Final Rule); and U.S. Department of Education, “Final; Program Integrity: Gainful Employment—New Programs,” *75 Federal Register* 209, October 29, 2010, pp. 66665-66677, at <http://www.ifap.ed.gov/fregisters/attachments/FR102910GainfulEmploymentFinal.pdf>.

¹⁵ U.S. Department of Education, “Gainful Employment Reporting Date for the 2010-2011 Award Year and Continued Collection of Gainful Employment Information for Prior Award Years,” *76 Federal Register* 148, August 2, 2011, p. 46282, at <http://www.ifap.ed.gov/fregisters/attachments/FR080211GEReportingDatefor1011AwardYear.pdf>.

¹⁶ For additional information on FFEL and DL program loans, see CRS Report R40122, *Federal Student Loans Made Under the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers*, by (name redacted).

¹⁷ H.R. 1, §4012.

Also in the 112th Congress, a number of hearings were held on issues related to the gainful employment regulations. On March 17, 2011, the House Committee on Education and the Workforce held a hearing that examined potential implications for the regulations to limit student choices in higher education.¹⁸ On July 8, 2011, the House Committee on Education and the Workforce, Subcommittee on Higher Education and Workforce Training; and the House Committee on Oversight and Government Reform, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending held a joint subcommittee hearing to investigate potential implications of the gainful employment regulations on student choice in higher education and on job creation.¹⁹ And, on July 7, 2011, the Senate Committee on Health, Education, Labor, and Pensions (HELP) held a hearing on issues related to for-profit institutions and student loan debt, which addressed issues related to the gainful employment regulations.²⁰

Litigation

In early 2012, the Association of Private Sector Colleges and Universities (APSCU) brought suit against ED challenging the gainful employment regulations; and on June 30, 2012, the U.S. District Court for the District of Columbia issued a decision that vacated many aspects of the regulations and remanded them to ED for further action.²¹ The court upheld ED's authority to regulate gainful employment programs, but determined that ED had not provided a sound rationale for establishing the repayment rate threshold at 35%. Because of the many interdependencies between the repayment rate measure and other aspects of the regulations, the court vacated the repayment rate, both of the debt-to-earnings measures, the reporting requirements, and the requirements pertaining to the addition of new gainful employment programs. However, the court allowed the gainful employment disclosure requirements to remain in effect.

At present, the gainful employment regulations only require the disclosure of information to students. It has been reported that on July 30, 2012, ED asked the court to reinstate the gainful employment reporting requirements.²² ED has also stated that it is consulting with the Department of Justice and evaluating how it will proceed with regard to the gainful employment regulations.²³ ED may but is not required to take any further action regarding the gainful employment regulations.

¹⁸ U.S. Congress, House Committee on Education and the Workforce, *Education Regulations: Roadblocks to Student Choice in Higher Education*, 112th Cong., 1st sess. March 17, 2011, <http://www.edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=228148>.

¹⁹ U.S. Congress, House Committee on Education and the Workforce, *The Gainful Employment Regulation: Limiting Job Growth and Student Choice*, 112th Cong., 1st sess. July 8, 2011, <http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=249467>.

²⁰ U.S. Congress, Senate Committee on Health, Education, Labor, and Pensions, Full Committee Hearing - Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges, 112th Cong., 1st sess. July 7, 2011, <http://help.senate.gov/hearings/hearing/?id=2c199df0-5056-9502-5df0-feb236792b52>;

²¹ *Association of Private Colleges & Universities v. Duncan*, 870 F. Supp. 2d 133, 2012 U.S. Dist. LEXIS 90434 (D.D.C. 2012).

²² "GE Court Decision," *Financial Aid News*, Vo. XV, Issue 3, September 2012, p.1, http://docs.accet.org/downloads/fa_newsletter_sept12.pdf

²³ U.S. Department of Education, Office of Federal Student Aid, Electronic Announcement, "Gainful Employment Electronic Announcement #39—Status of Gainful Employment Regulations," July 6, 2012, <http://www.ifap.ed.gov/eannouncements/070612GE39StatusofGainfulEmploymentRegs.html>

Gainful Employment Requirements for HEA, Title IV Program Eligibility

Institutional and Programmatic Eligibility for Title IV Programs

Institutions must meet many requirements to participate in the FSA programs authorized under HEA, Title IV. These requirements fall into three broad categories. First, the institution must be legally authorized by a state; second, it must be accredited by an agency or organization recognized by ED; and third, it must be deemed eligible and certified by ED to participate in the FSA programs. Part of the requirements for deeming an institution eligible to participate in the FSA programs involves certifying that it offers at least one eligible program.

Institutions are classified into three main categories for purposes of determining their eligibility to participate in the Title IV FSA programs; and these categories are defined in part by the types of programs the institutions offer. The categories are

- *institutions of higher education*, which may be either public or private not-for-profit institutions;
- *proprietary institutions of higher education*, which are private, for-profit institutions; and
- *postsecondary vocational institutions*, which may be either public or private not-for-profit institutions.

A public or private not-for-profit institution may qualify for participation as both an institution of higher education and as a postsecondary vocational institution. Additionally, foreign institutions may qualify as eligible institutions, with participation limited to the William D. Ford Federal Direct Loan (DL) program, if they are comparable to domestic institutions of higher education and they are approved by ED.²⁴ (When referred to collectively, these institutions will be identified herinafter as Title IV institutions.)

An institution's eligibility to participate in Title IV FSA programs does not necessarily extend to all of the programs it offers. Rather, in addition to criteria for establishing institutional eligibility, there are also criteria for establishing program eligibility. At public and private not-for-profit institutions of higher education, for example, eligibility criteria require that programs lead to an associate, baccalaureate, professional, or graduate degree; or that programs are at least one academic year in length, lead to a certificate or other non-degree credential, and prepare students for gainful employment in a recognized occupation. At proprietary institutions of higher education and postsecondary vocational institutions, eligibility criteria include a requirement that

²⁴ Additional special requirements apply to foreign medical, veterinary, and nursing schools. A detailed discussion of eligibility criteria for foreign institutions is beyond the scope of this report. Final rules on foreign institutions were published November 1, 2010, and provide that foreign institutions will be considered eligible to participate in the Direct Loan program if, among other things, the foreign institution provides an eligible education program "that is equivalent to at least a one-academic-year training program in the United States that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation within the meaning of the gainful employment provisions," (34 C.F.R. §600.54(e)(3)(i)). See ED, October 29, 2010, Program Integrity Issues—Final Rule, pp. 67194-67195.

programs are of a certain length, admit students with certain qualifications, and prepare students for gainful employment in a recognized occupation.

Rules on Gainful Employment for Programmatic Eligibility

Whether a program is subject to the regulations in effect on gainful employment depends on the program type and the institution that offers the program. **Table 1** shows how the gainful employment regulations apply to the various categories of programs offered by public and private not-for-profit institutions of higher education, proprietary institutions of higher education, and public and private not-for-profit postsecondary vocational institutions.

Table 1. Applicability of Gainful Employment Requirements, by Institution and Program Type

Title IV Institution and Program Type	Programs Subject to Gainful Employment Requirements
Public and private not-for-profit institutions of higher education	
Programs that lead to an associate, baccalaureate, graduate, or professional degree	No
Programs that are at least two academic years in length, and acceptable for full credit toward a baccalaureate degree	No
Non-degree programs, including all certificate programs ^a	Yes
Preparatory courses of study necessary for enrollment in a Title IV-eligible program	No
Approved “comprehensive transition programs” for students with intellectual disabilities	Yes
Proprietary (for-profit) institutions of higher education, and public or private not-for-profit postsecondary vocational institutions	
Programs that lead to an associate, baccalaureate, graduate, or professional degree	Yes
Programs that lead to a certificate ^a	Yes
Preparatory courses of study necessary for enrollment in a Title IV-eligible program	No
Approved “comprehensive transition programs” for students with intellectual disabilities	Yes
Programs at a proprietary institution that lead to a baccalaureate degree in liberal arts ^b	No

Sources: 34 CFR §668.8, as amended by ED, October 29, 2010, Program Integrity Issues—Final Rule, pp. 66949-66950; and U.S. Department of Education, Office of Postsecondary Education, Dear Colleague Letter GEN-11-10, “Implementation of Regulatory Requirements Related to Gainful Employment Programs,” April 20, 2011, as amended by U.S. Department of Education, Office of Postsecondary Education, “Gainful Employment Electronic Announcement #3 Correction of Dear Colleague Letter GEN-11-10 regarding Teacher Certification Programs,” May 20, 2011.

- a. Includes teacher certification programs that result in a certificate awarded by the institution.
- b. Programs must be offered at a proprietary institution that has been continuously accredited by a regional accrediting agency since at least October 1, 2007, and that has continuously offered the applicable program since January 1, 2009.

In general, at public and private not-for-profit institutions of higher education and postsecondary vocational institutions, the rules on gainful employment apply to programs that do not lead to a degree, while they do not apply to those programs that do lead to a degree, including two-year programs that are fully transferable toward a baccalaureate degree. At proprietary institutions, the rules apply to nearly all programs, including degree programs, with the exceptions of preparatory courses of study and programs that lead to a baccalaureate degree in liberal arts.²⁵ As the rules were being developed, ED estimated that 1,915 public institutions, 1,736 private not-for-profit institutions, and 1,950 proprietary institutions offered programs that would be subject the rules on gainful employment. Overall, ED estimated that programs enrolling 3.5 million students at these institutions would become subject to the rules.²⁶

General Data Collection, Reporting, and Disclosure Requirements

In accordance with the final rule published October 29, 2010, ED established a series of new reporting and disclosure requirements for Title IV institutions that offer programs designed to prepare students for gainful employment in a recognized occupation. Among other things, the information collection was designed to support calculation of the debt-to-earnings ratios for program completers. (The debt-to-earnings measures are described later in this report.)

Reporting Requirements

Beginning October 1, 2011, Title IV institutions offering programs to prepare students for gainful employment were required to annually report the following information:²⁷

- *Identifying information* for each individual student who enrolled in a program that prepares students for gainful employment during the award year; and the *program name* and *Classification of Instructional Programs (CIP) code*²⁸ of each of these students' programs.
- The *program name*, *CIP code*, and *completion date* for each student who completed a program that prepares students for gainful employment.

²⁵ With respect to this exception, additional criteria apply, including that the proprietary institution has been continuously accredited by a regional accrediting agency since at least October 1, 2007; and that the institution has continuously offered the applicable program since January 1, 2009.

²⁶ ED, October 29, 2010, Program Integrity Issues—Final Rule, pp. 66932-66934.

²⁷ Institutions must report information for AY2010-2011 by November 15, 2011. The final rule requires institutions to report information for AY2006-2007 (to the extent information is available), AY2007-2008, AY2008-2009, and AY2009-2010 by October 1, 2011; however, the Secretary will continue to accept the reporting of this information through November 15, 2011. (U.S. Department of Education, "Gainful Employment Reporting Date for the 2010-2011 Award Year and continued Collection of Gainful Employment Information for Prior Award Years," 76 *Federal Register* 148, August 2, 2011.)

²⁸ CIP codes provide a taxonomic scheme to support the accurate tracking, assessment, and reporting of fields of study and program completions activity of programs offered by institutions of higher education. For additional information, see U.S. Department of Education, National Center for Education Statistics, *Classification of Instructional Programs: 2000 Edition*, at <http://nces.ed.gov/pubs2002/cip2000/>.

- The dollar amounts each program completer received from *private educational loans*, and the amount owed upon program completion from *institutional financing plans*.
- Whether students who completed a program that prepares students for gainful employment *matriculated* to a higher credentialed program at the same institution or *transferred* to a higher credentialed program at another institution.
- At the end of the award year, *identifying information* for each individual student enrolled in a program that prepares students for gainful employment; the *program name* and *CIP code* of each of these students' programs; and the total number of students in each program.

As noted earlier, on June 30, 2012, these reporting requirements were vacated by the U.S. District Court for the District of Columbia in *Association of Private Sector Colleges and Universities v. Duncan*. ED is seeking to have these reporting requirements reinstated. Prior to the regulations being vacated, IHEs were required to report gainful employment information for AY2010-2011.

Disclosure Requirements

Effective July 1, 2011, each Title IV institution that offers a program designed to prepare students for gainful employment in a recognized occupation must provide prospective students with the information described below:

- The *occupations* that the program prepares students to enter, by name, Standard Occupational Classification (SOC) code,²⁹ and O*NET³⁰ occupational profile. (If there are more than 10 occupations related to the program, the institution may provide web links to a representative sample of occupations in which graduates typically find employment.)
- The *on-time graduation rate* for students who complete the program, defined as the number of students who completed the program within a normal time as a percentage of all students who completed the program.
- Program costs, including *tuition and fees* charged a student for completing the program within a normal time, typical *costs for books and supplies*, and, if applicable, *room and board*.
- The *placement rate* for students completing the program. If an institution is required by its accrediting agency or state to calculate a program placement rate, this rate—or a rate calculated using the agency or state methodology—must be disclosed beginning July 1, 2011. In future years, program placement rates will be calculated according to a methodology to be determined by the National Center for Education Statistics (NCES).

²⁹ SOC codes are used to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. For additional information, see U.S. Department of Labor, Bureau of Labor Statistics, Standard Occupational Classifications, at <http://www.bls.gov/soc/>.

³⁰ The Occupational Information Network (O*NET) is a job classification system that contains information on job duties, knowledge and skills, education and training, and other occupational characteristics. For additional information, see U.S. Department of Labor, Employment and Training Administration, at <http://www.doleta.gov/programs/onet/>.

- The *median loan debt* incurred by students who completed the program and who do not subsequently complete another higher credentialed program at the same or a different institution, as provided by the Secretary.³¹ Median loan debt must be provided separately for HEA, Title IV loans, private educational loans, and institutional financing plans.

This information must be disclosed in promotional materials provided to prospective students, on the home pages of program websites, and on a disclosure form provided by the Secretary when that form becomes available.

Gainful Employment Performance Measures

The gainful employment performance measures are described below. As noted earlier, on June 30, 2012, these performance measures were vacated by the U.S. District Court for the District of Columbia in *Association of Private Sector Colleges and Universities v. Duncan*.

Loan Repayment Rate

The LRR was designed to measure the proportion of FFEL and DL program loans borrowed by students to finance the costs of attending gainful employment programs that the student borrowers have either repaid in full or on which the borrowers have made qualifying loan payments during the most recent fiscal year. The LRR tracks loans that entered repayment in a two-year or four-year base period, and measures the proportion of those loans, weighted by the original outstanding principal balance (OOPB) at the time the loans entered repayment, that are either paid in full or on which qualifying payments have been made during the measurement period, which is the most recently completed fiscal year.

The denominator of the LRR is the OOPB, which includes capitalized interest of all FFEL and DL program loans borrowed by students for attendance at a particular gainful employment program that entered repayment during the applicable base period. The numerator of the LRR consists of the OOPB of loans that have been paid in full (LPF) and the OOPB of loans on which borrowers have made qualifying loan payments during the measurement year, which are referred to as payments made loans (PML).

In essence, the LRR is a measure of the performing loan ratio for the portfolio of loans borrowed by the cohort of students who are program attendees and who entered repayment in a two-year or four-year base period, weighted by the original outstanding principal balance, at the time the

³¹ In the preamble to the Final Rule, ED describes the complex methodology that will be used to determine median loan debt for program completers. Median loan debt will be compiled for program completers who do not matriculate to and complete a higher credentialed program at the same institution, nor transfer to and complete a higher credentialed program at a different institution. ED will delay including the loan debt incurred by program completers who matriculate or transfer to higher credentialed programs until success at the subsequent program is determined. Thus, median loan debt will be disclosed and used in the proposed debt-to-earnings measures only for the subset of students who (1) borrow to finance the costs of a program that prepares students for gainful employment, (2) complete the program, and (3) do not subsequently complete a higher credentialed program at the same or another institution. If a student subsequently completes a higher credentialed program, median loan debt will be compiled for the higher credentialed program only if it is also a program that prepares students for gainful employment. Debt for the higher credentialed program will include debt for the lower credentialed program only if both programs are at the same institution. For details, see ED, October 29, 2010, Program Integrity Issues—Final Rule, pp. 66839-66942.

loans entered repayment. It was intended that a program would be considered to be providing training that leads to gainful employment in a recognized occupation if the LRR was 35% or more. The formula for the LRR measure is depicted below. It is followed by a detailed description of the components of the LRR measure.

$$LRR = \frac{OOPB_{LPF} + OOPB_{PML}}{OOPB_{Loans}}$$

Denominator

The denominator of the LRR measure is the original outstanding principal balance, including any capitalized interest, on all FFEL and DL program loans borrowed by students to help finance the costs of attending the gainful employment program being measured that entered repayment in the applicable base period. For Consolidation Loans, the OOPB includes only the underlying FFEL and DL program loans that are attributable to a borrower's attendance in the gainful employment program being measured.

One of five base periods may be used in the LRR measure, depending on the type of program, the number of students enrolled in the program who borrowed FFEL or DL program loans, and the particular fiscal years for which the program is being measured. The potential LRR base periods are a two-year period (2YP), an alternative two-year period (2YP-A) for only the first three years the LRR is in effect, a two-year period for programs that have residency requirements (2YP-R), a four-year period for programs with small numbers of borrowers (4YP), and a four-year period for programs with small numbers of borrowers that also have residency requirements (4YP-R).

The 2YP base period consists of the 3rd and 4th fiscal years prior to the measurement year. The 2YP-A base period consists of the 1st and 2nd fiscal years prior to the measurement year, and will only be used for the FY2012, FY2013, and FY2014 measurement years. The 2YP-R base period consists of the 6th and 7th fiscal years prior to the measurement year. The 4YP base period consists of the 3rd, 4th, 5th, and 6th fiscal years prior to the measurement year. The 4YP-R base period consists of the 6th, 7th, 8th, and 9th fiscal years prior to the measurement year. The residency program base periods (2YP-R and 4YP-R) are used only for programs whose students are required to complete a medical or dental internship or residency. The four-year base periods (4YP and 4YP-R) are used only for programs in instances where 30 or fewer borrowers had entered repayment in the corresponding 2YP or 2YP-R base periods. In instances where a program does not have at least 31 borrowers who entered repayment in either of the applicable four-year base periods, the program is deemed to have satisfied the LRR measure. **Table 2**, below, shows how the five base periods align with selected measurement periods for the LRR measure.

Table 2. Alignment Measurement Periods and Base Periods in LRR Measure

Fiscal years during which cohorts of borrowers' loans entered repayment for selected LRR measurement periods

	Base Period Name	Fiscal Years Prior to Repayment Measurement Period	LRR Measurement Period (fiscal year for which loan repayment status is determined)					
			2012	2013	2014	2015	2016	2017
Base Period (fiscal years during which cohorts of borrowers' loans entered repayment)	2YP-A	1 st &	2011	2012	2013	n.a.	n.a.	n.a.
		2 nd	2010	2011	2012			
	2YP	3 rd &	2009	2010	2011	2012	2013	2014
		4 th	2008	2009	2010	2011	2012	2013
	4YP	3 rd	2009	2010	2011	2012	2013	2014
		4 th	2008	2009	2010	2011	2012	2013
		5 th &	2007	2008	2009	2010	2011	2012
		6 th	2006	2007	2008	2009	2010	2011
	2YP-R	6 th &	2006	2007	2008	2009	2010	2011
		7 th	2005	2006	2007	2008	2009	2010
4YP-R	6 th	2006	2007	2008	2009	2010	2011	
	7 th	2005	2006	2007	2008	2009	2010	
	8 th &	2004	2005	2006	2007	2008	2009	
	9 th	2003	2004	2005	2006	2007	2008	

Source: CRS analysis.

Notes: n.a. means not applicable.

How to read **Table 2**. First, select the LRR measurement period (column). Next, select the applicable base period name. The fiscal years in that row identify the cohort of borrowers, based on the year their loans entered repayment, who will be included in the measure. For example, if FY2015 is the measurement period and if the 2YP base period is being used, loan repayment status in FY2015 will be measured for the cohort of borrowers whose loans entered repayment in FY2011 and FY2012.

Numerator

The numerator of the LRR measure includes the original outstanding principal balance of two categories of loans on which payments have been made. The first is the OOPB of loans included in the denominator that have been paid in full (LPF) by the end of the measurement period. The second is the OOPB of loans included in the denominator that are payments made loans (PML). In order for a loan to be included in the numerator, it may not have ever been in default; and, if the loan is a Consolidation Loan, neither the Consolidation Loan nor the underlying loan may have ever been in default.

A loan paid in full is a loan that has been paid in full by the borrower. A loan that has been paid through a Consolidation Loan is not considered paid in full for purposes of the loan repayment rate measure until the Consolidation Loan is paid in full.

A payments made loan is a loan on which qualifying payments have been made during the measurement period—the most recently completed fiscal year. The following types of payments qualify a loan as a PML:

- The borrower made payments during the most recently completed fiscal year that reduced the outstanding balance of the loan (which includes any unpaid accrued interest that has not been capitalized), to an amount that is less than the outstanding balance was at the beginning of the fiscal year.
- For post-baccalaureate certificate, master’s degree, doctoral degree, and first-professional degree programs only: the borrower made payments during the most recently completed fiscal year toward the outstanding balance of a Consolidation Loan (which includes any unpaid accrued interest that has not been capitalized) that resulted in an outstanding loan balance at the end of the fiscal year that is less than or equal to what the outstanding balance was at the beginning of the fiscal year.
- For borrowers who are in the process of qualifying for Public Service Loan Forgiveness and who have submitted an employment certification to the Secretary that demonstrates the borrower is engaging in qualifying employment: the borrower made qualifying payments on the loan during the most recently completed fiscal year.
- For a subset of loans equal to no more than 3% of the OOPB included in the denominator: the borrower made scheduled payments on the loan according to the income-based repayment (IBR) plan, the income-contingent repayment (ICR) plan, or any other repayment plan, for an amount that is equal to or less than the interest that accrues on the loan during the fiscal year, (i.e, the borrower made an interest-only payment on a negative amortization loan).³²

For the first three measurement periods (FY2012, FY2013, and FY2014), the Secretary intended to calculate loan repayment rates using both the 2YP and 2YP-A base periods for all programs that have more than 30 borrowers whose loans entered repayment in the 2YP-A base period. In instances where rates are calculated using both the 2YP and 2YP-A base periods, the Secretary intended to use the higher of the two rates to determine whether the program meets the 35% minimum LRR threshold.

The OOPB of certain loans are excluded from both the numerator and the denominator of the LRR measure. These are loans that were in an in-school deferment during any part of the most recently completed fiscal year; loans that were in a military-related deferment during any part of the most recently completed fiscal year; loans that were discharged due to the death of the borrower; and loans that were assigned or transferred to the Secretary, or discharged due to the total and permanent disability of the borrower.

³² The percentage threshold for this category may be adjusted to an amount within the range of no less than 3%, and no more than the estimated percentage of all outstanding federal student loan dollars that are interest-only or negative amortization loans. (34 C.F.R. §668.7(b)(3)).

Debt-to-Earnings Measures

The final regulations established two debt-to-earnings measures. The Earnings Rate was designed to measure the percentage of average earnings that students who completed a gainful employment program devote to payments on student loans. The Discretionary Income Rate was designed to measure the percentage of average discretionary income that program completers devote to payments on student loans. Both measures compare the relationship between two program-specific data elements: (1) the median amount of combined federal student loan and private education loan debt incurred by program completers; and (2) the greater of the mean or median annual earnings of program completers. Both measures include adjustments that take into account the greater debt typically being incurred by students who enroll in higher credentialed programs. The ER and DIR measures are both described below.

Earnings Rate

The basic formula for the earnings rate measure is presented below.

$$ER = \frac{\text{Annual Loan Payment}}{[\max(\text{mean Annual Earnings}, \text{median Annual Earnings})]}$$

The ER is a measure of the annual loan payment amount attributable to the median student loan debt borrowed by individuals who completed the gainful employment program during a base period, as a percentage of either the mean or median annual amount earned by those individuals during the most recent calendar year for which data are available. The greater of either the mean or median annual earnings of program completers is used in the denominator of the ER measure. In essence, the ER is a proxy for the proportion of annual earnings that a borrower with the median amount of student loan debt must devote toward making payments on student loans borrowed to finance enrollment in the program. A program would be considered to provide training that leads to gainful employment in a recognized occupation if the ER was 12% or less.

Discretionary Income Rate

The basic formula for the discretionary income rate measure is presented below.

$$DIR = \frac{\text{Annual Loan Payment}}{[(\max(\text{mean Annual Earnings}, \text{median Annual Earnings})) - (1.5 * \text{Poverty Guideline})]}$$

The DIR is a measure of the annual loan payment amount attributable to the median student loan debt borrowed by individuals who completed the gainful employment program during a base period, as a percentage of a measure of discretionary income for the most recent calendar year for which data are available. Discretionary income is the difference between mean or median annual earnings of program completers, and 150% of the U.S. Department of Health and Human Services (HHS) poverty guideline income for a one-person family in the continental United States.³³ The greater of either the mean or median annual earnings of program completers is used

³³ The 2012 HHS Poverty Guideline income for a one-person family is \$11,170. For additional information on poverty (continued...)

in determining discretionary income in the denominator of the DIR measure. The DIR is essentially a proxy for the proportion of discretionary income that a borrower with the median amount of student loan debt must devote toward making payments on student loans borrowed to finance enrollment in the program. A program would be considered to provide training that leads to gainful employment in a recognized occupation if the DIR was 30% or less. Descriptions of the procedures for calculating annual loan payment amounts, and mean and median annual earnings amounts used in both the ER and DIR rate measures are provided below.

Procedures for Calculating Annual Loan Payments and Annual Earnings

According to the final rule, Title IV institutions with programs that prepare students for gainful employment would have been required to provide ED with certain information for use in the calculation of the debt-to-earnings measure.³⁴ This includes the following: information to identify students; the program name, the Classification of Instructional Programs (CIP) code,³⁵ and completion date of program completers; the amounts program completers received from private education loans and institutional financing plans; and whether program completers matriculated or transferred to a higher credentialed program at the same or a different institution. In addition, ED would have obtained information on the FFEL and DL program loans of program completers from the National Student Loan Data System (NSLDS). ED would have used this information in calculating the ER and DIR measures for each gainful employment program.

Institutions would have also been permitted to elect to provide ED with additional information on program completers. They would have been able to provide ED with information on the total amount of tuition and fees the institution charged each student for enrollment for all programs at the institution for use as an alternative to individual total student loan debt in the calculation of the mean or median student loan debt of program completers.

Students would have been excluded from the debt-to-earnings measures if at any time during the fiscal year of the measurement period (i.e., the year for which annual earnings were obtained), any of the following conditions applied:

- one or more of the student's loans were in a military-related deferment;
- the student died;
- one or more of the student's loans were assigned or transferred to the Secretary, or discharged due to the total and permanent disability of the borrower; or
- the student was enrolled in a gainful employment program at any institution.

(...continued)

guidelines, see U.S. Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, "The 2012 HHS Poverty Guidelines." January 2012, at <http://aspe.hhs.gov/poverty/12poverty.shtml>.

³⁴ 34 C.F.R. §668.6(a).

³⁵ CIP codes provide a taxonomic scheme to support the accurate tracking, assessment, and reporting of fields of study and program completions activity of programs offered by institutions of higher education. For additional information, see U.S. Department of Education, National Center for Education Statistics, Classification of Instructional Programs: 2000 Edition, at <http://nces.ed.gov/pubs2002/cip2000/>.

Cohorts Included in the Debt-to-Earnings Measures

One of four base periods would have been used to identify the cohort of program completers included in the debt-to-earnings measures. For both the ER and DIR measures, the applicable base period would have depended on the type of program and the number of students who complete the program in a consecutive two-year period. In contrast to the LRR measure, in which the base periods identified the fiscal years in which borrowers’ loans entered repayment, the base periods for the debt-to-earnings measures would have been the fiscal years in which students were identified by the institution as having completed a gainful employment program. The base periods for the debt-to-earnings measures share the same designations as those for the LRR measure, with the exception that there is no 2YP-A base period. The four-year base periods (4YP and 4YP-R) are used for smaller programs in instances where there are 30 or fewer individuals who completed the program during the respective two-year base period (2YP or 2YP-R) after accounting for the exclusion of students for any of the reasons mentioned above. The four base periods and selected corresponding measurement periods used in calculating the debt-to-earnings measures are presented below in **Table 3**.

Table 3. Alignment of Measurement Periods and Base Periods in the Two Debt-to-Earnings Measures

Fiscal years during which cohorts of students completed gainful employment programs and calendar years for which earnings are obtained for selected ER & DIR measurement periods

	Base Period Name	Fiscal Years Prior to Earnings Measurement Period	ER & DIR Measurement Period (fiscal year)					
			2012	2013	2014	2015	2016	2017
			Calendar Year for Which Earnings Are Obtained from SSA					
			2011	2012	2013	2014	2015	2016
Base Period (fiscal years during which cohorts of students completed the program)	2YP	3 rd &	2009	2010	2011	2012	2013	2014
		4 th	2008	2009	2010	2011	2012	2013
	4YP	3 rd	2009	2010	2011	2012	2013	2014
		4 th	2008	2009	2010	2011	2012	2013
		5 th &	2007	2008	2009	2010	2011	2012
		6 th	2006	2007	2008	2009	2010	2011
	2YP-R	6 th &	2006	2007	2008	2009	2010	2011
		7 th	2005	2006	2007	2008	2009	2010
	4YP-R	6 th	2006	2007	2008	2009	2010	2011
		7 th	2005	2006	2007	2008	2009	2010
		8 th &	2004	2005	2006	2007	2008	2009
		9 th	2003	2004	2005	2006	2007	2008

Source: CRS analysis.

Note: How to read **Table 3**. First, select the ER & DIR measurement period (column). Next, select the applicable base period name. The fiscal years in that row identify the cohort of students, based on their year of program completion, who will be included in the measure. For example, if FY2015 is the measurement period and if the 2YP base period is being used, mean and median earnings in calendar year 2014 would have been provided by SSA for the cohort of students who completed the program in FY2011 and FY2012.

Annual Loan Payment Attributable to Median Student Loan Debt

For both debt-to-earnings measures, the annual loan payment amount for a program would have been determined by calculating an approximation of the annual loan payment that would be owed on the median individual student loan debt of students who completed the program during the applicable base period. The process for determining this amount involves two major steps, as outlined below.

In the first step, ED would have calculated the median amount of student loan debt for a program based on the lesser of either of the following two amounts for each individual program completer:

(1) the combined amount of debt from the following sources:

- FFEL and DL program loans (except for parent PLUS Loans or TEACH Grant-related loans) owed by the student for attendance in a program;³⁶
- the amount the student received from private education loans;³⁷ and
- the amount from institutional financing plans that the student owes the institution upon completing the program; or

(2) if the institution elected to provide the following information to ED:

- the total amount of tuition and fees the institution charged the student for enrollment in all programs at the institution.

If a student enrolled in multiple programs at an institution, all of the student's loan debt incurred for programs at that institution would have been attributed to the highest credentialed program subsequently completed by the student at that institution. If a student incurred debt for attendance in programs at another institution, that debt would have only been attributed to the gainful employment program being measured if both institutions were under common ownership or control.

In the second step, ED would have calculated the annual loan payment required of the program completer who owed the median student loan debt amount (from step 1) using the interest rate applicable to Unsubsidized Stafford Loans (currently 6.8%), and a repayment schedule corresponding to the length of the program being measured. A 10-year repayment schedule would have been used for certificate and associate's degree programs, a 15-year repayment schedule for bachelor's and master's degree programs, and a 20-year repayment schedule for doctoral and first-professional degree programs. These calculations would have resulted in an approximation of the annual loan payment attributable to the median amount of student loan debt owed by program completers.

³⁶ Federal Perkins Loans would not have been included in the determination of median student loan debt.

³⁷ The term "private education loan" is defined in ED regulations at 34 C.F.R §601.2. Private education loans may include loans made by financial institutions, credit unions, IHEs, states, or localities for purposes of financing educational expenses.

Mean and Median Annual Earnings

In both the debt-to-earnings measures, the denominator contains the greater of either the mean or median annual amount earned, during the most recent calendar year for which data are available, of students who completed the program during the applicable base year period (2YP, 2YP-R, 4YP, or 4YP-R). Both the mean and median annual earnings of program completers would have been calculated by the Social Security Administration (SSA), on a program-by-program basis, based on lists of individuals compiled by ED from information on program completers provided by institutions. Social security earnings data would have been obtained for all program completers, irrespective of whether they participated in HEA, Title IV federal student aid programs. In order to comply with SSA privacy requirements, SSA would have provided ED with only the mean and median annual earnings amounts for individual programs and would not have provided ED with earnings data for any individual program completers.

SSA records on individual annual earnings contain data on pay for services as an employee and net earnings from self-employment. Specifically, SSA earnings data includes the following:

- most wages from employment covered by Social Security;
- all cash pay for agricultural and domestic work, even if it is not considered “wages”;
- cash tips that equal or exceed \$20 a month from work for an employer;
- all pay for work not covered by Social Security if the work is done in the United States, including work for federal, state, and local units of government; and
- all net earnings from self-employment, including those not covered by Social Security.³⁸

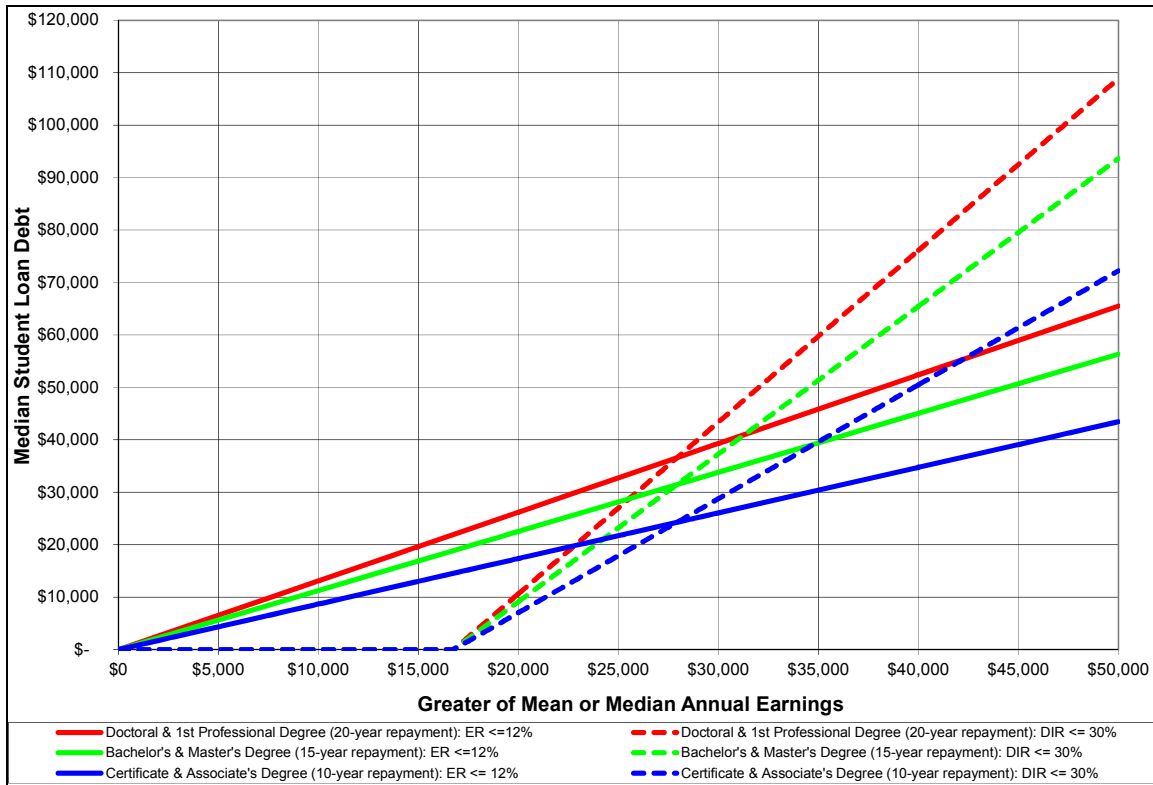
Should SSA be unable to provide data on mean and median earnings for program completers, the program would have been deemed to have satisfied both the ER and DIR measures.

Performance Thresholds for the ER and DIR Measures

For both the ER and DIR measures, maximum thresholds were established for the percentage of annual earnings that program completers with median student loan debt would be expected to devote to payments on their student loans. These threshold percentages are shown in **Figure 1** for both the ER and DIR measures for a range of annual earnings levels and amounts of median student loan debt for the three categories of program levels.

³⁸ U.S. Department of Education, “Program Integrity: Gainful Employment—Debt Measures,” 75 *Federal Register* 113, June 13, 2011, p. 34423, at <http://www.ifap.ed.gov/fregisters/attachments/FR061311GEDebtMeasures.pdf>.

Figure I. Maximum Allowable Median Student Loan Debt to Pass Thresholds for Debt-to-Earnings Measures, by Annual Earnings and Program Level
Earnings Rate (12% threshold) and Discretionary Income Rate (30% threshold)



Source: CRS analysis.

Notes: How to read **Figure I**. First, select either the ER or the DIR measure and the applicable program degree level. Next, identify the greater of the mean or median annual earnings (horizontal axis) and the median student loan debt (vertical axis) for the gainful employment program, and find the intersection of these two amounts. If the intersection falls on or below the applicable solid or dashed line, the program passes the measure. If the intersection occurs above the line, the program fails the measure.

DIR performance thresholds are calculated using 150% of the 2012 HHS poverty guideline of \$11,170.

A gainful employment program would have passed the ER measure if the annual loan payment on median student loan debt was less than or equal to 12% of the greater of either the mean or median annual earnings of program completers. In **Figure 1**, the three solid lines represent the 12% ER threshold for each of the three categories of programs. Thus, a gainful employment program would have passed the ER measure if the intersection between the greater of mean or median annual earnings and median student loan debt fell on or below the solid line for the applicable program level. It would have failed the measure if the intersection occurred above the solid line. For example, for a bachelor’s degree programs, the 12% threshold is shown by the solid green line. If the mean (or median) annual earnings of program completers of a bachelor’s degree program was \$40,000, and the median student loan debt was \$60,000, the program would have failed to pass the measure, as the ER would have been greater than the 12% threshold.

For the DIR measure, a gainful employment program would have passed if the annual loan payment on median student loan debt was less than or equal to 30% of the discretionary income of program completers. The 30% DIR threshold for each of the three categories of programs is

shown by the dashed lines in **Figure 1**. For the DIR measure, the calculation of discretionary income is based on the greater of the mean or median annual earnings of program completers. A gainful employment program would have passed the DIR measure if the intersection between the greater of mean and median student loan debt fell on or below the dashed line for the applicable program level; and it would have failed the measure if the intersection occurred above that line. To continue the example from above, for bachelor degree programs, the 30% threshold is shown by the dashed green line. If the mean (or median) annual earnings of program completers of a bachelor degree program is \$40,000, and the median student loan debt is \$60,000, the program would have passed the measure, as the DIR would have been less than or equal to 30%.

An important distinction between the two earnings measures is their differential treatment of the relationship between student loan debt and annual earnings. This is indicated by the slope of the lines in **Figure 1**. (Passing programs are those that fall on or below the line.) The DIR measure was designed in a manner such that for a program to be considered successful, completers of the program must devote no more than 30% of their discretionary income (i.e., income in excess of 150% of the poverty guideline) to student loan debt service. However, according to this framework, a program would automatically fail the measure if the mean or median income was less than 150% of the poverty guideline. The ER measure is designed to provide an alternative path for programs whose completers have lower annual earnings to pass one of the debt-to-earnings measures. Under this measure, a program is considered successful if its completers devote no more than 12% of their annual earnings to student loan debt service. Overall, for programs whose completers have lower annual earnings, the ER measure is comparatively easier to pass than the DIR measure; whereas for programs whose completers have higher annual earnings, the DIR measure is comparatively easier to pass.

Figure 1 also shows the effect that using different loan repayment schedules has on the calculation of the annual loan payment amount for the three categories of program types, based on a range of median student loan debt amounts. The use of different amortization periods to calculate annual student loan payment amounts for different types of programs is designed to recognize that students who attend higher level degree programs tend to have larger amounts of student loan debt that they typically repay over longer repayment schedules. For example, consider a case using the DIR measure in which mean or median annual earnings is \$40,000. The maximum median student loan debt of a passing certificate or associate's degree program would be \$50,497, the maximum student loan debt of a passing bachelor's or master's degree program would be \$65,465, and the maximum student loan debt of a passing doctoral or professional degree program would be \$76,129.

Calculating the Performance Measures, Corrections and Adjustments, and Alternative Earnings Data

The final regulations provided that as part of the process of calculating the three gainful employment measures, institutions would have had several opportunities to review and correct the data used by ED in their calculation. The final regulations also provided that in instances where a program was been identified as failing all three of the measures, the opportunity would have been available to the institution to have both of the debt-to-earnings measures recalculated using alternative earnings data.

Pre-draft Corrections for Debt-to-Earnings Measures

Institutions would have been provided with the opportunity to review a list of the students who would be included in the applicable two-year and four-year base periods for calculating the ER and DIR measures. Institutions would have had 30 days to review the list and provide ED with any evidence showing that a student should be added to or removed from the list, or that identifying information about a student should be corrected (e.g., name, social security number, date of birth). After 30 days, ED would have provided the updated list to SSA to be used in calculating the mean and median annual earnings for each gainful employment program at the institution. ED would then have used the mean and median earnings data provided by SSA to calculate draft ER and DIR measures for the gainful employment programs. Institutions would not have been able to challenge the accuracy of the mean and median annual earnings data provided by SSA.

Post-draft Corrections and Adjustments

After ED released draft results for the performance measures, institutions would have had 45 days to challenge the accuracy of certain data used in their calculation. Institutions would have been able to challenge the accuracy of a borrower's loan data used to calculate the draft LRR by submitting evidence that the borrower loan data was inaccurate. They would also have been able to challenge the median loan debt used in the numerator of the draft ER and DIR measures by submitting evidence that the median loan debt was inaccurate. In addition, institutions would have been able to challenge the accuracy of the list of borrowers included in the applicable base period for the LRR measure by submitting evidence showing that a borrower should be added to or removed from the list, or by correcting the identifying information for a borrower.

For the two debt-to-earnings measures, if a program was initially identified as failing and SSA was unable to include one or more of the program completers on the finalized list in its calculation of the mean and median annual earnings for the program, ED would have calculated a revised median student loan debt for that program by removing loan debt associated with a number of borrowers commensurate with the number that SSA was unable to include in its calculation, starting with those borrowers who had incurred the most debt. Thus, if SSA was unable to include three students in the calculation of mean or median annual earnings, ED would have removed the three students with the highest amounts of loan debt from its calculation of median loan debt. ED would have provided institutions with final results of the three measures, after making any necessary corrections or adjustments.

Alternative Earnings Data

The final regulations provided institutions with a program identified as having failed to meet all three of the performance measures with the opportunity to demonstrate that the program would have met either the ER or DIR measure by recalculating those measures with alternative earnings data. Under this option, institutions would have been able to recalculate the ER and DIR measures using the median loan debt used by ED in calculating the measures and alternative mean or median earnings data from one of the following sources:

- **State data:** Earnings data would have been required to be obtained from a state-sponsored data system for more than 50% of the students who completed the program in the applicable base period, or a comparable two-year or four-year

period, and would have been required to be available for more than 30 students. The actual, state-derived mean or median for students in the applicable base period would have been required to be used; and the institution would have been required to demonstrate that it accurately used the state-derived mean or median earnings in recalculating the measures.

- **Survey data:** Earnings data would have been required to be obtained from an institutional survey conducted in accordance with National Center for Education Statistics (NCES) statistical standards and procedures. Survey data would have been required to be obtained for more than 30 students who completed the program in the applicable base period, or a comparable two-year or four-year period. The mean or median earnings derived from the survey data could have been used in recalculating the measures.
- **BLS data:** The most current Bureau of Labor Statistics (BLS) earnings data would have been required to be obtained for the occupation, identified by Standardized Occupation Classification (SOC) code, or combinations of SOC codes, in which more than 50% of students who completed the program during the applicable base period, and more than 30 students in total, were placed or found employment. BLS earnings data at no higher than the 25th percentile of earnings could have been used as the mean or median annual earnings data in recalculating the measures. BLS earnings data could have only been used as an alternative to SSA earnings data for the FY2012, FY2013, and FY2014 measurement periods.

In order for an institution to use alternative earnings data to recalculate the debt-to-earnings measures for a failing program, the institution would have been required to notify ED of its intent to do so within 14 days of being provided with the final performance measures. The institution then would have had 60 days to provide ED with all supporting documentation relating to the recalculation of the debt-to-earnings measures using the alternative earnings data. ED would then review the institution's submission and notify it whether the recalculated debt-to-earnings ratios are approved. If approved, the recalculated ratios would have become final.

Performance Standards, Consequences for Program Eligibility, and Dissemination of Performance Information

Under the final rules, a program would have been designated as a passing program, a failing program, or an ineligible program based on its performance as assessed according to the performance measures. The criteria for programs to be designated as passing, failing, or ineligible, and associated consequences are described below.

Passing Programs

According to the final rule, a program would have been considered to be providing training that leads to gainful employment in a recognized occupation if it satisfied the required performance standard for at least one of the three performance measures in a fiscal year. Passing programs would have remained fully eligible to continue to participate in HEA, Title IV federal student aid programs. Performance standards for each of the three measures are shown below.

- **Loan Repayment Rate:** A program would have satisfied the measure with an LRR of at least 35%. In addition, a program would have satisfied the LRR measures if the program had less than 31 student borrowers who entered repayment in the applicable four-year base period for the program.
- **Earnings Rate:** A program would have satisfied the ER measure if the annual loan payment attributable to median student loan debt was less than or equal to 12% of the greater of either the mean or median annual earnings of program completers. In addition, a program also would have satisfied the ER measure if any of the following occurred: (1) the program had less than 31 students who completed the program in the applicable four-year base period, (2) SSA did not provide the mean or median annual earnings for the program, or (3) the median student loan debt for the program was \$0.
- **Discretionary Income Rate:** A program would have satisfied the DIR measure if the annual loan payment attributable to median student loan debt was less than or equal to 30% of the discretionary income of program completers. In addition, a program also would have satisfied the DIR measure if any of the following occurred: (1) the program had less than 31 students who completed the program in the applicable four-year base period, (2) SSA did not provide the mean or median annual earnings for the program for use in determining discretionary income, or (3) the median student loan debt for the program was \$0.

Failing Programs

A program would have been identified as a failing program for a fiscal year if it failed to pass at least one of the three performance measures.

First Year Failing Program

Upon a program being identified as a failing program for a first year, the institution that offers the program would have been required to provide each currently enrolled and prospective student with a written or oral warning that explained the debt measures and showed the amount by which the program failed to meet the minimum standards, and that explained the actions the institution would take to improve program performance. The institution would have been required to continue to provide this warning to current and prospective students until it met the minimum standards for at least one of the performance measures.

Second Year Failing Program

If a program was identified as a failing program for any two of the most recently completed three fiscal years, the institution that offered the program would have been required to provide to each currently enrolled and prospective student the same debt warning as required for first year failing programs; however, it would have been required to be provided in written form and also be prominently displayed on the home page of the program's website and in all promotional materials. In addition, the institution would have been required to provide an explanation of its plans in response to the second year failure; an explanation of the risks associated with a student enrolling in or continuing in the program, including the program's potential loss of eligibility to continue participating in HEA, Title IV federal student aid programs; an explanation of resources available to the student to compare other educational options, including

<http://www.collegenavigator.gov>; and a clear and conspicuous statement that students who continue with or enroll in the program should expect to experience difficulty in repaying their student loans. If the institution planned to discontinue the program, it would have been required to provide a timeline for doing so and information on other options that are available to the student. The institution would have been required to continue to provide this second year warning to current and prospective students until it met the minimum standards for at least one of the performance measures for two of the most recent three fiscal years.

For both first year and second year failing programs, the debt warnings would have been required to be provided to enrolled students within 30 days of the institution being notified that it failed all three of the performance measures. The debt warnings would have been required to be provided to prospective students at the time a student first contacted the institution about the failing program. If the student intended to use federal student aid made available through HEA, Title IV, the institution would not have been permitted to enroll the student until at least three days after the student received the debt warning; and if more than 30 days had passed, the debt warnings would have been required to be provided again to the student and another three-day waiting period must have passed prior to enrolling the student. Finally, the debt warnings would have been required to be provided in alternative languages other than English, to the extent practicable.

Ineligible Programs

A program would have been identified by ED as ineligible to participate in the HEA, Title IV federal student aid programs if it failed to meet all three of the performance measures for any three out of the most recently completed four fiscal years. However, for the set of programs that failed to meet all three of the performance measures for the first three fiscal years the regulations were to have been in effect (FY2012, FY2013, and FY2014), only a limited number of programs would have been identified as ineligible. For this first round transition year, ineligible programs would have been limited to the programs in each category of institutional control (i.e., public, private not-for-profit, and private for-profit) that had the lowest LRRs, and that represented no more than 5% of the students in that institutional category who completed gainful employment programs during FY2014. Thus, initially, ineligible programs would have been limited to the lowest performing 5% of programs in each category of institutional control, weighted by the number of students who were program completers in FY2014.

An institution would not have been able to reestablish the eligibility of an ineligible program or of a new program substantially similar to an ineligible program until the end of the 3rd fiscal year following the fiscal year that the program became ineligible. An institution would not have been able to reestablish the eligibility of a first year failing program that it voluntarily discontinued until the end of the 2nd fiscal year following the fiscal year that the program was voluntarily discontinued. And, an institution would not have been able to reestablish the eligibility of a second year failing program that it voluntarily discontinued until the end of the 3rd fiscal year following the fiscal year that the program was voluntarily discontinued.

Dissemination of Program Performance Information

Upon an institution being provided by ED with information on the performance of its programs, it would have been required to disclose the results of the LRR, ER, and DIR for each gainful employment program. In addition, ED would have published the results of the performance

measures for each gainful employment program to ensure that this information was available to the public.

The Addition of New Gainful Employment Programs

New final rules applicable to the addition of new gainful employment programs were also vacated by the court as part of its ruling in *Association of Private Sector Colleges and Universities v. Duncan* prior to their going into effect. This section provides a brief description of the final rules and the rules that are currently in effect due to the gainful employment rules being vacated.

Final Rules for Adding New Gainful Employment Programs

The final rules for gainful employment programs would have required IHEs that intended to add a new gainful employment program to notify ED at least 90 days before the first day of class for that program. Unless the IHE was notified by ED at least 30 days before the first day of class that the program required approval, the institution would have been able to proceed with offering the program.

If ED were to determine that the program required approval, the institution's notice would have been treated as an application for that program. ED would have taken the following factors into account in determining whether to approve the program:

1. The institution's demonstrated financial responsibility and administrative performance in operating its existing programs.
2. Whether the additional program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.
3. Whether the number of additional programs being added is inconsistent with the institution's historic program offerings, growth, and operations.
4. Whether the process and determination by the institution to offer the additional program is sufficient.³⁹

ED would be authorized to deny an IHE's application on the basis of factors (2), (3), or (4). Upon denial, ED would have offered an explanation of how the institution failed to demonstrate that the program was likely to lead to gainful employment in a recognized occupation. The IHE would have been permitted to respond to the reasons for the denial, and request a reconsideration of ED's determination.

On September 27, 2011, prior to the gainful employment rules being challenged in court, ED proposed amending the provisions applicable to the addition of new gainful employment programs.⁴⁰ The proposed revision would have eliminated the requirements for IHEs to provide ED with notice of their intent to offer new gainful employment programs with a more streamlined

³⁹ 34 C.F.R. §600.20(d)(1)(ii)(E).

⁴⁰ U.S. Department of Education, "Application and Approval Process for New Programs: Notice of Proposed Rulemaking," 76 *Federal Register* 187, Sep. 27, 2011, pp. 59864-59877, <http://www.ifap.ed.gov/fregisters/attachments/FR092711NPRMAddingNewEducationalPrograms.pdf>.

approach under which an institution would simply apply to establish the eligibility of a gainful employment program.

Rules Currently in Effect for Adding New Gainful Employment Programs

Different rules apply regarding the addition of new gainful employment programs depending on whether IHEs are permitted to self-determine a program's eligibility or whether they must obtain the Secretary's approval.

Programs for Which Institutions are Permitted to Self-Determine Eligibility

At present, IHEs are permitted to self-determine a new program's Title IV eligibility in two cases. In either case, the program must have obtained all applicable state and accrediting agency approvals.

- In the first case, an IHE may offer a new program without obtaining separate approval from the Secretary when the program leads to an associate, bachelor's, professional, or graduate degree and the institution has already been approved to offer programs at that level and the institution has not been notified of the need to obtain approval before adding any new programs.
- In the second case, a fully certified IHE may add a new program if it is a non-degree program that is at least 10-weeks of instructional time in length; is comprised of at least 8 semester hours, 12 quarter hours, or 600 clock hours; and prepares students for gainful employment in the same or a related recognized occupation as an educational program that the ED has already recognized as an eligible program at the institution.

Programs that Require the Secretary's Approval

At present, institutions must obtain approval from the Secretary prior to offering new Title IV programs in certain instances, including the following:

- The institution has provisional certification.
- The program does not lead to an associate, baccalaureate, professional, or graduate degree; and the program does not prepare students for gainful employment in the same or related recognized occupation as an education program that has previously been recognized as an eligible program by the Secretary.
- The program is a short-term program of at least 10 weeks of instructional time and between 300 and 599 clock hours in length and is required to meet additional eligibility requirements for completion and placement rates.
- The program will be offered by an IHE that ED has notified must apply for approval of an additional educational program or a location.
- The program will lead to a higher, previously unapproved, level. For example, a bachelor's degree program at an institution that previously offered only certificates and associates degrees.

- The program is a direct assessment program.
- The program is a comprehensive transition and postsecondary (CTP) program.⁴¹

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⁴¹ U.S. Department of Education, Office of Federal Student Aid, “Gainful Employment Electronic Announcement #41—Requirements for Adding New Educational Programs,” November 21, 2012, <http://www.ifap.ed.gov/eannouncements/111912GEEA41RequiredforAddingNewEDProg.html>.

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