

U.S. Department of Education, Financial Value Transparency and Gainful Employment, Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit

May 2023 Notice of Proposed Rulemaking Summary

Background

In 2022, the Department of Education (Department) convened a group of stakeholders to form the Institutional and Programmatic Eligibility Committee (Committee). The Committee was tasked with participating in a negotiated rulemaking process to prepare proposed regulations addressing the following issues: Gainful Employment (GE); Financial Responsibility; Administrative Capability; Certification Procedures; Ability to Benefit; Change in Ownership and Change in Control; and 90/10 for proprietary institutions.

The Department [released](#) a final rule on 90/10 and Change in Ownership and Change in Control in October 2022. This proposed rule, on additional issues considered during the negotiated rulemaking, follows that activity in 2022.

Notice of Proposed Rulemaking Summary

The Department [issued](#) a Notice of Proposed Rulemaking (NPRM) on May 19, 2023, with comments due on June 20. If the Department finalizes the rule by November 1, the final rules would go into effect on July 1, 2024. Under this NPRM, the Department is proposing to amend regulations pertaining to Financial Value Transparency and GE; Financial Responsibility; Administrative Capability; Certification Procedures; and Ability to Benefit.

The American Council on Education (ACE), as well as others, sent a [letter](#) to the Department asking for an additional 30 days of comment period, given the complex nature of the proposed rule. ACE will be working with the larger community to prepare comments.

Financial Value Transparency and Gainful Employment

Final regulations regarding GE were first [issued](#) in October 2010 under the Obama Administration but were [amended](#) in 2014. That rule was established to hold programs accountable that were created to lead to gainful employment, as indicated in the Higher Education Act (HEA). All programs at for-profit institutions and all non-degree programs at public and private nonprofit institutions are considered GE programs. In 2019, the Trump administration [rescinded](#) the GE rule, and now the Department is

proposing to reestablish the rule with modifications. The Department's proposal includes the following indicated below.

- Only programs with a two-year or four-year cohort of at least 30 students who are receiving federal student aid will be counted.
 - Programs, using a six-digit Classification of Instructional Programs code, will only be counted in the GE rule if there is a graduating cohort size of at least 30 students in either a two-year or four-year cohort.
- A debt-to-earnings (D/E) rate will be used to determine the eligibility of programs.
 - All programs at institutions of higher education will be held accountable to a D/E rate. A program will pass if no more than eight percent of annual income is put toward student loan repayments or no more than 20 percent of discretionary income is put toward student loan repayments. A program will fail if more money is put toward student loan repayments for two consecutive years out of a total of three years.
- An earnings premium based on an earnings threshold using data from the Census Bureau is created.
 - Using median earnings from the Census Bureau for working adults aged 25-34, a program passes the earnings premium rate if student loan borrowers, who are three years into the workforce, are making more than the median earnings from the Census data.
- A new section on financial value transparency is created.
 - In an effort to hold all programs at institutions of higher education accountable, every program will be required to report both D/E rates and earnings premiums as long as it has a cohort size of at least 30 students who complete the program in a two- or four-year cohort and data available on earnings for those students from a federal agency.
- The ability of an institution to appeal the data.
 - An institution will be given the opportunity to seek an appeal of the final determination of the Department that a program has failed the D/E rate or earnings premium by either submitting a written statement to a designated Department official or by filing for a hearing through the Office of Hearings and Appeals. Also, an institution is given the opportunity to correct the list of students used to determine the metrics.
- Institutions are required to retroactively report data for all programs.

- Institutions are required to retroactively report certain data on each student that is enrolled in a program to include when a student withdrew, the date the student initially enrolled in the program, and any information as prescribed by the Secretary in the *Federal Register*. If institutions are reporting on non-GE programs, then they can opt to only report data on the previous two award years with the calculation of transitional D/E rates and earnings premiums calculated on each program.
- Institutions are required to certify GE programs.
 - No later than December 2024, if this regulation were to go in effect, the most senior executive officer at each institution must certify that their GE programs are approved by a recognized accrediting agency or are included in the institution's accreditation by its recognized accrediting agency. If it is a vocational institution, it must be recognized by a state agency.
- A disclosure website is created.
 - Institutions of higher education are required to post information about all programs on a website, such as D/E rates, earnings premiums, withdrawal rates, and completion rates. The intended audience for this website will be currently enrolled and prospective students. The exact information to be disclosed on this website will be articulated in a *Federal Register* notice, and an institution must provide a permanent link to the website.
- Institutions are required to warn students when programs fail.
 - Institutions are required to issue an acknowledgement for non-GE programs and a warning for GE programs if the programs are failing. A student enrolled in a program is not allowed to use federal financial aid for a failing program until they signify that they have reviewed the acknowledgement or warning from the institution through the new disclosure website created by the Department.
- Performance measures for approving an institution's program participation agreement are added.
 - Authority is given to the Department to consider the following items when determining the certification, recertification, or provisional status of a program participation agreement (PPA): withdrawal rates; D/E rates on all programs; earnings premium rates on all programs; educational spending; and licensure pass rates.

Financial Responsibility

According to the HEA, institutions must be financially responsible to participate in Title IV, HEA programs. The regulations identify all the ways that public, private nonprofit,

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and proprietary institutions can remain financially responsible. The Department proposes to make the changes below regarding financial responsibility.

- An institution must meet additional requirements to satisfy its financial and administrative obligations.
 - To meet its financial and administrative obligations, institutions must ensure that Title IV credit balances are paid; make all payments regarding undisputed financial obligations; satisfy payroll obligations in accordance with the payroll schedule; and only borrow authorized funds from retirement plans or restricted funds.
- Mandatory triggers and discretionary triggers are added.
 - Mandatory and discretionary triggering events are added to address fraud and abuse by institutions. If an institution triggers a mandatory event, then the institution is automatically deemed not to be financially responsible. If an institution triggers a discretionary event, then the Department has to determine if that event has a material adverse effect. Examples of mandatory triggers include the submission of a teach-out plan or agreement; if 50 percent of Title IV revenue is received from failing GE programs; and if there has been a loss in eligibility to participate in another federal educational assistance program. Examples of discretionary triggers include high annual dropout rates, pending borrower defense claims, and high fluctuations in student aid funding.
- Institutions are required to provide financial protection for each mandatory or discretionary trigger.
 - If an institution is determined to not be financially responsible due to a mandatory or discretionary trigger, it will be required to provide financial protection for each trigger. This financial protection can be released if the institution submits the audited financial statements of the two most recent fiscal years that show the administrative or financial risk caused by the event has ceased or been resolved.
- Requirements are created for institutions that go through changes in ownership.
 - When institutions undergo changes in ownership, the Department establishes requirements for institutions to meet to include items such as the submission of audited financial statements and same day balance sheets.
- Institutions are required to include footnotes on their audited financial statements.

- Institutions are required to include, on their audited financial statements, footnotes detailing funds spent on recruiting activities, advertising, and other preenrollment expenditures.
- Financial responsibility for public institutions is increased.
 - Public institutions are now required to submit a letter confirming that the institution is a public institution backed by the full faith and credit of the government entity at the time of certification, recertification, after a change in ownership, and at any point the Department requests. Also, public institutions cannot be subject to either a mandatory or discretionary trigger.
- The Department is given the authority to override the documentation on audited financial statements.
 - The Department is given the authority to decide that diminished liquidity, ability to continue operations, or ability to continue as a going concern has not been alleviated even if the financial audit indicates otherwise.

Administrative Capability

Institutions must be administratively capable to operate programs in Title IV of the HEA. Identified in the regulations are metrics that institutions must meet in order to be deemed “administratively capable.” The Department proposes to make the changes below regarding administrative capability.

- Place new requirements on institutions regarding administrative capability.
 - Institutions are required to provide adequate financial aid counseling; adequate career services; accessible clinical or externship opportunities that are related to, and required by, the program that the students are enrolled in; ensure that at least half of the Title IV revenue received by an institution is not from programs that fail the GE rule and that at least half of the full-time students that are receiving Title IV funds are not enrolled in failing GE programs; and not lack the ability to administer Title IV aid competently, among others.
- Clarify the requirements for evaluating a high school diploma.
 - The Department proposes to define the procedures that must take place to validate a high school diploma to include obtaining documentation from the high school that confirms the validity of the high school diploma and, if the Department creates a list of invalid high schools, making sure the school is not on the list. A high school diploma is not considered valid by the Department using a number of metrics.

Certification Procedures

Institutions that want to participate in Title IV, HEA programs must receive approval by the Department and have their PPA's certified. An institution's PPA is valid for up to six years and, before this time expires, an institution must submit a materially complete application for recertification. The Department proposes to make the changes below regarding the certification process.

- Additional provisional certification requirements are added.
 - If the institution is not financially responsible or any owner or interest holder also owns another institution with fines or liabilities owed to the Department and is not making payments regarding the liability, an institution's certification becomes provisional.
- Institutions can be provisionally certified for up to three years.
 - Institutions are placed on provisional certification status for no more than one year upon initial certification; no more than two years for reasons related to substantial liabilities owed to the Department due to borrower defense claims, false certification discharges, or other consumer protection concerns; no more than 18 months after an accreditor loses recognition, and no more than three years due to change in ownership, recertification, reinstatement, etc.
- Signatories of the PPA are clarified.
 - An authorized representative of the institution, or any person who is an authorized representative of an entity with direct or indirect ownership of the institution if the entity is able to exercise control over the institution, must sign the PPA.
- Title IV eligibility is limited for GE programs.
 - Any institution with GE programs must limit the number of hours for the program to the greater of the minimum number of hours required in the state for training in the recognized occupation or another state's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student so long as certain requirements are met.
- Institutions are required to meet additional state licensing requirements.
 - An institution is required to meet state licensing requirements in the states where the students initially enrolled in the program as well as in the state where the institution is located.

- Institutions must meet all state consumer protection laws where distance education is offered.
 - Regardless of NC-SARA participation, institutions are required to meet all state consumer protection laws in the states where distance education is offered.
- Transcript withholding is banned in certain situations.
 - Institutions that are provisionally certified cannot withhold transcripts if they are at risk of closure, closing, or not seen as financially responsible or administratively capable. They also cannot withhold transcripts if they made an error in administering a Title IV program that resulted in a student owing the institution funds, any fraud or misconduct on behalf of the institution, or the return of Title IV funds.
- Additional requirements are placed on institutions regarding provisional certification.
 - If an institution is provisionally certified, the Department can require a teach-out plan or agreement; require a records retention plan; place restrictions on the institution providing a teach-out plan; or place limitations on institutions entering into a written arrangement with another institution, among other things.
- Institutions must share with students if certain programs meet state licensing requirements.
 - Institutions are required to share with prospective and current students if their programs that lead to licensure meet, or do not meet, state licensing requirements.

Ability to Benefit

The ability to benefit allows students to showcase that they have the “ability to benefit” from postsecondary education although they did not receive their high school diplomas. Students can either pass an independently administered test that is approved by the Department; participate in a state process approved by the Department; or complete six credit hours, or its equivalent, of college courses to be allowed to qualify for federal financial aid when attending postsecondary education. The Department proposes to make the changes below regarding the ability to benefit.

- The approved state process is further clarified.
 - A state that wants to offer a process as an alternative to passing an approved, independently administered test can do so with the approval of the Department. The state must submit an application to the Department

outlining the details of the process. If a state is applying for the first time, it could receive approval to operate its process for no more than two years. A success rate must be calculated for each institution participating.

- The definition and compliance requirements of an eligible career pathway program are included.
 - The definition of an eligible career pathway program is added, and the proposed regulation articulates how an institution can demonstrate compliance with the eligible career pathway program requirements.