



Docket ID ED–2018–OPE–0042

Comments on Notice of Proposed Rulemaking on Gainful Employment

September 13, 2018

The National Association of Student Financial Aid Administrators (NASFAA) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) addressing the proposed removal of the Gainful Employment (GE) regulations. NASFAA represents nearly 20,000 financial aid professionals who serve 16 million students each year at approximately 3,000 colleges and universities in all sectors throughout the country. NASFAA member institutions serve nine out of every ten undergraduates in the U.S.

Students use billions of taxpayer dollars to attend postsecondary institutions each year in exchange for an education that will enrich their lives and provide them with the skills they need to be successful. It stands to reason that students and taxpayers deserve protections from entering and subsidizing low-quality programs that should clearly lead to gainful employment. Well-targeted measures that hold programs accountable for their students' outcomes are an essential safeguard not only for students, but for taxpayers whose hard-earned dollars support these programs.

The Role of Congress

If the last eight years of regulating and re-regulating GE have taught us anything, it is that Congress has a much-needed role to play. The proposed elimination of the GE rule exemplifies the dangers of the executive branch developing complex policies without clear guidance from Congress. We are now witnessing in real-time the consequences when Congress leaves large-scale policymaking to the executive branch, without clear direction or intent. While changes in the executive branch will always lead to regulatory changes, the time and effort to implement GE has been unprecedented in higher education regulation. The fact that this single issue has been regulated, implemented, and litigated for nearly a decade, with conceivably several more years ahead, creates an unsustainable amount of uncertainty on campuses and, ultimately, for students.

“Gainful employment” is a mere two words in the law and, yet, over the past eight years, ED has devoted hundreds of pages and countless hours to a patchwork of complicated and inconsistent rules that have left schools buried in paperwork, with no real measure of whether students have benefitted. The turbulent history of the GE regulations, along with the changing political winds, begs for Congressional intervention, to make clear their intent for the meaning and measurement of gainful employment before any further administrative attempts are made to regulate in this area.

The gatekeeping function for eligibility for the federal student aid programs falls squarely under the purview of Congress, and gatekeeping is best done before bad actors even enter the gate. It

should be Congress, not ED, who articulates which programs should be subject to regulation and sanctions and, further, who should be working to keep bad actors from entering the higher education domain in the first place. While sanctions eventually penalize programs that do not deliver on their educational promises, they come too late for the students who must suffer harm in order to demonstrate that program's failure, while significant taxpayer dollars are wasted in the process. Solving how we measure whether a student is gainfully employed would be easier if the gates to Title IV eligibility were stronger upfront, which necessitates a more definitive eligibility standard for institutions.

Balancing Current GE Shortcomings with GE Elimination

The Department of Education (ED) cites as its basis for rescinding the GE rules– swapping institutional accountability for student outcomes with a disclosure-only, transparency model– its concerns about the validity of the debt-to-earnings (D/E) metric, job placement rate misreporting, institutional burden, and disparate impact of the GE regulations on some academic programs. We recognize and agree with many of the challenges outlined by the Department, but do not believe all of these challenges are insurmountable and should necessarily lead to a complete rescission of gainful employment sanctions for low performing programs.

Past attempts at regulation have shown that it is difficult to cast an appropriately-sized net to capture only bad actors. Too wide a net imposes unnecessary burden on institutions and ED; one that is too narrow misses some poor performers. Separate, but related to, the challenge of establishing the proper scope of regulation is the question of the appropriate level of institutional and ED burden necessary to distinguish not only truly poor-performing programs from those that regularly pass accountability metrics, but also from those that serve students well but do not fit some single metric of student success. Once it is determined which programs should be subject to scrutiny, appropriate metrics that accurately serve as a proxy for program quality should be applied. Establishing the proper metric or group of metrics to draw the line between good and bad programs has also proven problematic over the course of GE's history. Participants in last winter's negotiated rulemaking sessions generally agreed that the debt-to-earnings (D/E) measure alone cannot serve as an indicator of program quality, for many of the reasons ED cited in the NPRM. Some programs are simply expensive to deliver because of the need for specialized equipment. Some fields are simply low-paying despite their valuable contributions to our economy and society. Geography, demographics, personal choice, and self-employment represent just a few factors that impact a student's future earnings, and which fall beyond the scope of a program's quality or its ability to prepare students for employment in a given field.

But the lack of a single metric to establish whether a program delivers on its promises to students does not mean that it is impossible to identify bad actors and that any attempts to do so should be abandoned. Surely, there is some combination of factors that, when taken as a whole, strongly correlate to program quality. Recognizing the flaws in the current GE rule should lead to a search for better methods to identify and eliminate bad actors, not as a justification to allow them to continue operating.

Students and taxpayers deserve protection from programs that waste public funds while saddling students with high debt and little to show for the money, time, and effort they invested in their education. While we applaud ED's efforts to enhance transparency, those efforts should be in addition to, not in place of, sanctions for low-performing programs. In its proposal and in negotiated rulemaking sessions, ED argued that requirements imposed upon only some types of programs (in this case, career and vocational programs) were inappropriate, and cited its lack of statutory authority to impose sanctions on non-GE programs as justification for removing them and moving to a disclosure-only regime for all programs. We disagree with this approach and urge the Department to reconsider eliminating all sanctions currently associated with gainful employment.

Transparency and Disclosures

NASFAA supports more sunshine and transparency in all forms, not just those associated with gainful employment, with the following caveats. First, sunshine and transparency must be balanced against the administrative costs and burden associated with data collection and publication. Second, any use of data should be stated upfront, with emphasis placed on policy analysis over consumer disclosure. In other words, the value of collecting and analyzing significant amounts of program level data comes in our ability to better understand from a policy-making standpoint what is happening on campuses, rather than bundling and publishing that data in hopes that it will drive consumer behavior. With that in mind, we urge ED to consider the following regarding the use of the College Scorecard and proposed institutional disclosures.

College Scorecard: Understanding ED's direction that this NPRM is not intended to address the College Scorecard, it does merit some attention here, since ED proposes replacing GE regulations in favor of more consumer information to be provided via the Scorecard.

We have several concerns about using the College Scorecard to achieve ED's stated goal, to "inform student enrollment decisions through a market-based accountability system". First, the idea that publishing more student outcomes data will lead to more educated college decision-making is not supported by evidence. In cases where it has been observed that some Scorecard data elements appear to drive behavior, the effect is minimal and is observed only for higher-resourced students¹. Second, most college students are not shopping at all. As ED notes in the NPRM, research indicates that geography is a significant driver of enrollment decisions, especially among underrepresented groups². Simply put, if it is ED's intention to weed out bad

¹ Hurwitz, Michael and Smith, Jonathan, Student Responsiveness to Earnings Data in the College Scorecard (September 1, 2017). Available at SSRN: <https://ssrn.com/abstract=2768157> or <http://dx.doi.org/10.2139/ssrn.2768157>

² Hillman, N. (2016). Geography of College Opportunity: The Case of Education Deserts. *American Educational Research Journal*, 53(4), 977-1021.

actors by arming prospective students with data to allow them to vote with their feet, it is unlikely that enhancements to the College Scorecard will achieve that goal.

Further, we question how earnings and debt data can be incorporated into the Scorecard Data meaningfully, given that different sets of student data will appear in one place. For instance, how will ED address the fact that all other Scorecard data is at the institutional level, while debt and earnings data will be presented at the program level? Or, is it ED's intention to disaggregate all Scorecard data by program? Even with explanatory language, it will be difficult for prospective students to distill and interpret data when it is based on different populations. Further, will the Scorecard be expanded to include certificate programs, and graduate and professional programs? While ED appeared to support the exclusion of graduate and professional programs during negotiated rulemaking, there is no mention of this population in the NPRM.

Institutional Disclosures: Regarding ED's question as to whether, as a condition of the Program Participation Agreement, institutions should be required to disclose on individual program websites data that is currently part of the GE disclosure template, such as withdrawal rates, completion rates, and whether a program prepares students for state licensure, we are opposed. One of ED's stated rationales for rescinding the GE regulations is to reduce institutional burden. ED specifically notes that, in the 2014 rules, they underestimated the time required for institutions to meet certain GE disclosure requirements, which included an estimate of five hours per program, per year to collect the data for the GE template and to update program websites. We have doubts that these new program disclosure requirements can be implemented in a way that minimizes burden on schools while providing an actionable and measurable benefit to students.

In response to ED's related question as to whether institutions should be required to include a link to the College Scorecard from their program web pages, it is not clear whether the link would be to <https://collegescorecard.ed.gov> (or its successor site), or if the link would need to direct visitors to the individual program pages within the Scorecard site. If this became a requirement, the link should be required only to the main Scorecard page, from which visitors could navigate to individual programs. Requiring institutions to provide a different, specific link, from each of its program's web pages would cause undue burden and introduce the possibility of error and inadvertent noncompliance. Scorecard navigation is simple; students should not encounter difficulty finding programs from the site's main landing page.

Burden Estimates

With respect to ED's request on the accuracy of burden estimates, we do wish to point out an issue with the reduction of all of the 3,118,160 burden hours associated with Section 668.412 (disclosure requirements for GE programs) to zero on the basis that, because the GE regulations are proposed to be eliminated, there would be no burden related to institutional disclosures. This would only be the case, of course, if ED did not add the institutional website disclosures

discussed in the previous paragraphs. Almost 200,000 of the aforementioned 3 million burden hours related specifically to the institutional burden of collecting and publishing GE disclosure template data (separately from individual distribution, which is not being considered in this NPRM). Those burden hours were based on just over 37,500 GE programs. The issue on which ED seeks comment would require all programs, not just GE programs, to report program-level data on their websites. While considering that, if less data were included in the institutional disclosures than on the current GE template, burden could be less than the estimated five hours per year³, its expansion from only GE programs to include all programs would almost certainly increase the total institutional burden hours, and must be considered if ED does decide to add those institutional disclosures.

In closing, we encourage efforts to make student outcomes more transparent. Transparency is a commendable goal; programs with good outcomes should be proud to make that data publicly available. That said, since ED began collecting Classification of Instructional Programs (CIP) codes in 2014, they have amassed significant amounts of program-level student outcomes data and should not require institutions to disclose additional data on their program websites, given the significant burden this would impose and balanced against its questionable usefulness. However, transparency alone is not enough to protect students and taxpayers from low-performing programs designed to lead to gainful employment. Holding such programs accountable for their students' outcomes is necessary, but GE's long and complicated history shows that ED cannot tackle the issue on its own. Congress must act to provide ED a framework from which to design an accountability regime that identifies low-performing programs and, when necessary, removes eligibility for the federal student aid programs in the interest of protecting students and taxpayers.

Thank you for your consideration of our comments.

Sincerely,



Justin Draeger, President & CEO

³ Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Gainful Employment Disclosure Template, 81 Fed. Reg. 84563 (proposed November 23, 2016).