DISCUSSION:

General Background

Do the gainful employment requirements apply to nonprofit and public institutions?

Yes, the gainful employment requirements apply to all institutions that participate in the federal student financial aid programs under Title IV of the Higher Education Act of 1965, as amended. The requirements apply only to certain programs at nonprofit and public institutions, whereas they apply to all programs at for-profit institutions, with limited exceptions. [8]

Do the gainful employment requirements apply to foreign institutions?

Yes, the requirements apply to foreign institutions. With respect to foreign public and non-profit institutions, programs that are gainful employment programs (“GE Programs”) are the same programs that are GE Programs when offered by domestic non-profit and public institutions. With
respect to for-profit foreign institutions, only degree programs in medicine, nursing, and veterinary science are GE Programs subject to gainful employment requirements. [9]

Definition of “Gainful Employment Programs”

Nondegree programs at public or nonprofit institutions must lead to gainful employment in a recognized occupation to be Title IV eligible. [10] With limited exceptions, all degree and nondegree programs at proprietary institutions must lead to gainful employment in a recognized occupation to be eligible for Title IV aid. [11] For purposes of calculating the metrics for a program, ED will identify a gainful employment program with a combination of the institution’s six-digit Office of Postsecondary Education identification number, the program’s six-digit CIP code,[12] and the program’s credential level. [13]

What types of nondegree programs at nonprofit and public institutions are gainful employment programs?

The two types of nondegree programs at public institutions and nonprofit institutions that are subject to ED’s gainful employment requirements are: (1) programs that are at least one academic year in length and lead to a certificate or other non-degree recognized credential; and (2) programs that are less than one academic year in length and meet one of the following ED requirements applicable to vocational programs:

- Programs that provide at least 600 clock hours, 16 semester or trimester hours, or 24 quarter hours of undergraduate instruction offered during a minimum of 15 weeks of instruction. The program may admit only persons who have not completed the equivalent of an associate degree.
- Programs that provide at least 200 clock hours, 8 semester or trimester hours, or 12 quarter hours of instruction offered during a minimum of 10 weeks of instruction. The program must be a graduate or professional program and must admit only persons who have completed the equivalent of an associate degree.
- Programs that provide at least 300 but less than 600 clock hours of undergraduate instruction offered during a minimum of 10 weeks of instruction. The program must admit some persons who have not completed the equivalent of an associate degree. Additional rules apply to such short-term programs. [14]

Are there other programs that are GE Programs when offered by a nonprofit or public institution?

ED-approved “comprehensive transition programs” for students with intellectual disabilities are also GE Programs. [15] Such programs are degree, certificate, nondegree, or noncertificate programs that are offered by an institution and are designed to support students with intellectual disabilities who are seeking to continue academic, career and technical, and independent living education at an institution in order to prepare for gainful employment. [16]

Are non-Title IV-eligible programs GE Programs?

Non-Title IV-eligible programs are not GE Programs, and therefore are not subject to the gainful employment requirements. [17]

Are teacher certification programs GE Programs?

A teacher certification program that results in a certificate awarded by the institution is a GE
Program, assuming the program is otherwise a Title IV-eligible program. A teacher certification program that does not result in a certificate awarded by the institution itself but which consists of a collection of course work that is necessary for the student to receive a state professional teaching credential or certification is not a GE Program. [18] The distinction is based on the fact that the former must meet Title IV program eligibility requirements in order for students in the program to receive federal student financial aid, while the latter are not Title IV-eligible programs and, thus are not GE Programs. [19] Students enrolled in the latter type of teacher certification program are able to receive federal student financial aid based on Title IV regulations related to student eligibility, which contain no requirement that the program lead to gainful employment in a recognized occupation. [20]

**What other types of programs are not GE Programs when offered by a non-profit or public institution?**

In addition to teacher certification programs that result in no certificate awarded by the institution, three other types of programs are not GE Programs when offered by a nonprofit or public institution: (1) degree programs; (2) programs that are at least two academic years in length and are fully transferrable to a bachelor’s degree program; and (3) preparatory courses of study that provide course work that is necessary for enrollment in a Title IV-eligible program. Types (1) and (2) are not GE Programs because the HEA and ED’s program eligibility requirements do not require such programs to lead to gainful employment in a recognized occupation in order to be Title IV-eligible. [21] The third type of program is similar to teacher certification programs that result in no certificate being awarded by the institution, because such programs do not meet Title IV program eligibility criteria but students are nevertheless able to receive Title IV aid for such programs under Title IV student eligibility requirements. [22]

**Can an institution end a program’s status as a gainful employment program?**

An institution can end a program’s status as a gainful employment program by ending the program’s Title IV eligibility. An institution may do so through the Electronic Application for Approval to Participate in the Federal Student Financial Aid Programs (“E-App”) and must supply a Title IV eligibility end date and certain other information. If the end date is on or after July 1, 2011, the institution must provide required gainful employment disclosures from July 1, 2011 until at least the program’s Title IV eligibility end date. With respect to the October 1, 2011 deadline for institutions to report certain information to ED, if the end date is on or after October 1, the institution is required to report the information. [23]

**Gainful Employment Disclosure Requirements**

The program integrity regulations require institutions to disclose to prospective students by July 1, 2011, certain information with respect to their gainful employment programs.

**What information concerning gainful employment programs must an institution disclose to prospective students?**

An institution must provide the following information for each program that leads to gainful employment:

- The occupations (by names and SOC codes) that the program prepares students to enter, along with a link to the occupational profiles on O*NET or its successor site;
- The on-time graduation rate for students entering the program (calculated using a new formula introduced in the final rule that compares the number of students who completed the program within “normal time” to the total number of students who completed the program
during the most recently completed award year [24];

- The cost of the program, including tuition and fees, books and supplies, and room and board;
- The placement rate for students completing the program. This rate will be determined under a methodology to be developed by the National Center for Education Statistics, but, until that method is developed, an institution must disclose its placement rate only if its accreditor or state authorizing agency requires it to calculate such a rate; and
- The median loan debt incurred by students who completed the program as provided by the Secretary (disaggregating median loan debt from (1) federal education loans, (2) private education loans, and (3) institutional financing plans) [25].

ED has provided guidance concerning a number of these elements in its Gainful Employment Frequently Asked Questions. [26]

How are institutions to disclose this information?

The institution must display this information prominently on certain pages of its website and in its promotional materials. [27] ED is developing a disclosure form that institutions will be required to use when it becomes available. [28]

By when must institutions make such disclosures to prospective students?

An institution must make such disclosures by July 1, 2011, for the most recently completed award year. ED has explained that institutions may use information from the 2009-2010 award year for the disclosures that are required by that date. The institution must update such information within a reasonable period of time after the 2010-2011 information becomes available. Institutions must follow the same approach for future award years. [29]

Gainful Employment Reporting Requirements

The program integrity regulations require institutions to report to ED by November 15, 2011, certain information with respect to their gainful employment programs.

What information concerning gainful employment programs must an institution report to ED?

Each year, an institution must submit the following information to ED:

- For each student enrolled in a program that leads to gainful employment:
  - Identifying information about each student enrolled in the program;
  - If the student began the program during the award year, the ED Classification of Instructional Program ("CIP") code of that program;
  - If the student completed the program during the award year, the name and CIP code of that program; the date the student completed the program; the amount that the student borrowed through private educational loans; [30] the amount owed under institutional financing plans as of the date of completion; and information on whether the student matriculated to a higher credentialed program at the institution or transferred to a higher credentialed program at another institution.
- For each applicable program, by name and CIP code, the total number of students enrolled in the program at the end of each award year and identifying information about each student. [31]

When and how often must institutions report gainful employment information to ED?
Institutions must report information related to award year 2010-2011 (the most recently completed award year) by November 15, 2011. Information for prior award years (2006-07 through 2009-2010) is technically due by October 1, 2011, but ED has indicated that it will continue to accept information for prior award years until November 15, 2011, as well. Institutions must report information for subsequent award years no earlier than September 30 of the calendar year in which the award year ends (e.g. September 30, 2012 for the award year July 1, 2011 to June 30, 2012) but no later than the date established by ED through notice in the Federal Register. If an institution is unable to supply all or some required information, it must provide an explanation to ED.

**How does an institution report the information to ED?**

Institutions must use the existing Enrollment Reporting Process, which is the system currently used by institutions to report student enrollment information to the National Student Loan Data System (“NSLDS”). ED will soon release the NSLDS Gainful Employment Submittal Template and instructions. This notice will allow institutions to begin the process of preparing spreadsheets that can be uploaded to NSLDS on September 26, 2011. As of August 4, 2011, ED has also issued an updated NSLDS Gainful Employment User Guide to help institutions to prepare their systems to submit required information, including step-by-step instructions. If the individual responsible for reporting gainful employment data to ED needs an online user ID, the institution can request a user ID at www.fsawebenroll.ed.gov. If an institution has technical questions about the reporting process, it can direct the inquiries to NSLDSGE@ed.gov.

**Addition of New Gainful Employment Programs**

The program integrity regulations require institutions to notify ED, and in some cases obtain approval from ED, in order to provide Title IV funds to students enrolled in new educational programs that prepare students for gainful employment in a recognized occupation.

**What is a “new” gainful employment program?**

ED defines a “new” gainful employment program as:

- A program with a CIP code different from any other program offered by the institution;
- A program that has the same CIP code as another program offered by the institution, but leads to a different degree or certificate; or
- A program that the institution’s accrediting agency determines to be a new educational program.

**When must institutions notify ED of new gainful employment programs?**

This requirement became effective on July 1, 2011. For a gainful employment program for which the first day of class will begin on or after July 1, 2011, and before October 1, 2011, an institution must have provided notice to ED no later than July 1, 2011. If an institution intends to provide Title IV aid to students enrolled in a gainful employment program where the first day of classes will begin on or after October 1, 2011, the institution must notify ED of that intent at least 90 days before the first day of class of the proposed program.

**What information must the notice contain?**

The institution must include sufficient information to demonstrate that the program meets the requirements for an eligible program. In addition, the institution must provide information to
support its determination of the need for the program. At a minimum, the institution must:

- Describe in the notice how the institution determined the need for the program and how the program was designed to meet local market needs, or for an online program, regional or national market needs. This description must contain any wage analysis the institution may have performed, including any consideration of Bureau of Labor Statistics data related to the program;
- Describe in the notice how the program was reviewed or approved by, or developed in conjunction with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program;
- Submit documentation that the program has been approved by its accrediting agency or is otherwise included in the institution’s accreditation by its accrediting agency; [48]
- Provide the date of the first day of class of the new program. [49]

**How does the institution submit the notice?**

The institution submits the notice through the E-App, with supporting documentation by mail. [50]

**Does the institution have to wait for ED approval to award Title IV aid to students in the new program?**

The institution may offer Title IV aid for the program described in its notice unless ED advises the institution at least 30 days before the first day of class that the program must be approved. [51]

**How does ED respond to the notice?**

Based on the notice that the institution supplies, ED may require the institution to obtain ED approval for the new program. [52] If approval is required, ED will take the following considerations into account:

- The institution’s demonstrated financial responsibility and administrative capability in operating its existing programs;
- Whether the additional educational 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;
- Whether the number of additional programs being added is inconsistent with the institution’s historic program offerings, growth, and operations; and
- Whether the process and determination by the institution to offer an additional gainful employment program is sufficient. [53]

If ED disapproves the new gainful employment program, the denial will be based on bullet points 2-4, and ED will explain how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation. [54] The institution may respond to those reasons and request reconsideration. [55]

**What happens if my institution fails to comply with the rules for new gainful employment programs?**

If the institution does not provide timely notice to ED, the institution must wait for ED approval before disbursing Title IV funds to students in the program and must inform students that the program has not been ED-approved to be eligible for federal student financial aid. [56] If the institution fails to obtain required ED approval to provide Title IV aid for a new gainful employment program or incorrectly determines that a new gainful employment program is eligible for Title IV assistance, the
institution must repay to ED all Title IV funds received by the institution for the educational program and all the Title IV aid received by or on behalf of students enrolled in that program. [57]

Metrics for Gainful Employment Programs

The program integrity regulations impose for the first time measures for determining whether a program leads to gainful employment in a recognized occupation for Title IV purposes. [58]

**What are the metrics that ED will use to determine whether a program leads to gainful employment in a recognized occupation?**

ED will utilize three metrics for determining whether a program leads to gainful employment in a recognized occupation: (1) an annual loan repayment rate; (2) a ratio that measures debt in relation to discretionary income; and (3) a ratio that measures debt in relation to annual earnings. [59] Metrics (2) and (3) are independent measures of gainful employment, but are often collectively referred to as the debt-to-income ratios.

**What are the minimum standards that a gainful employment program must meet in order to be deemed a program that leads to gainful employment in a recognized occupation and therefore Title IV-eligible?**

A gainful employment program will be Title IV-eligible if, starting with the measures calculated for federal fiscal year ("FY") 2012, it has a loan repayment rate of 35% or more, a debt-to-earnings ratio of 12% or less, or a debt-to-discretionary-income ratio of 30% or less. The program must meet only one of these three criteria in order to “pass” the gainful employment test. [60]

**What will be the time period and student cohort measured?**

Starting in 2012, ED will calculate the metrics for each gainful employment program for each federal fiscal year. The federal fiscal year runs from October 1 to September 30. [61] For most programs, ED will calculate the metrics based on the cohort of students who entered repayment or completed the program in the third and fourth FYs prior to the most recently completed FY. ED labels this a "two year period" ("2YP"). [62] For programs that require medical internships or residencies, as defined by ED, ED will calculate the metrics based on the cohort of students who entered repayment or completed the program in the sixth and seventh FYs ("2YP-R") prior to the most recently completed FY. [63]

During FYs 2012 through 2014 only, ED will calculate a program’s loan repayment rate using data from the first and second years prior to the most recently completed FY ("2YP-A") in addition to the 2YP or 2YP-R. [64] ED will use the better score to encourage programs to improve performance quickly and to reward those programs that do. [65]

**How is the loan repayment rate calculated?**

The loan repayment rate measures whether students who borrowed federal student loans to attend the program (regardless of whether they finished) are satisfactorily repaying those loans. ED will calculate the rate by dividing total original federal student loan amounts for loans that are repaid or that are in the process of being repaid by the total original amount of federal student loans borrowed. [66] The metric is expressed as follows:
OOPB is “Original Outstanding Principal Balance.” OOPB equals the total amount of the outstanding balance (including capitalized interest) on Federal Family Education Loans Program (“FFELP”) loans or Direct Loan Program loans that was owed by students for attendance in the program on the date the loans first entered repayment. [67] For consolidation loans, only the loans attributable to the program are included in the calculation. [68] Private loans, parent PLUS loans, and TEACH Grant-related unsubsidized loans are excluded from OOPB. [69]

The ratio’s numerator is the sum of two components: (1) the OOPB of Loans Paid-in-Full (“OOPB/LPF”), plus (2) the OOPB of Payments-Made Loans (“OOPB/PML”). OOPB/LPF includes the OOPB of all loans that have never been in default and have been completely repaid. [70] In order for consolidation loans to be treated as OOPB/LPF, neither the consolidation loan nor the underlying loans may have ever been in default, and the entire consolidation loan must have been completely repaid. [71] OOPB/PML is the sum of the OOPB of loans that have never been in default and are in successful repayment. [72] In general, ED will treat a loan as a Payments-Made Loan in three circumstances: (1) the borrower reduced the outstanding balance of the loan; (2) the borrower is on track for public service forgiveness of the loan; or (3) up to certain limits, the borrower is making payments of less than or equal to the interest that accrues on the loan. [73] The third category is designed to give programs some credit for borrowers making repayments under income-contingent or income-based repayment plans. To prevent abuse, however, the third category may not exceed 3% of the total amount of OOPB. [74]

**How are the debt-to-income metrics calculated?**

Unlike the loan repayment rate, the debt-to-income ratios will relate only to students who complete the program (as opposed to all students who were enrolled in the program) and will include all debt incurred by the student for the program (as opposed to only FFELP and Federal Direct Loan Program loans).

The debt-to-discretionary-income metric approximates the percentage of a student’s annual discretionary income that must be devoted each year to servicing the debt incurred for the program. In mathematical terms, the ratio equals the program’s “annual loan payment” divided by the “mean or median annual earnings” less one-and-a-half times the U.S. Health and Human Services’ poverty guideline for a single individual. The debt-to-income measure is basically the same, except that no adjustment is made to the “mean or median annual earnings.” The metrics are expressed as follows [75]:

<table>
<thead>
<tr>
<th>Debt-Service-to-Discretionary-Income Ratio</th>
<th>Debt-Service-to-Income Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Loan Payment</td>
<td>Annual Loan Payment</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>-----------------------------</td>
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<tr>
<td>[Greater of Mean or Median Annual Earnings] – (1.5 * HHS Poverty Level for 1 Individual)]</td>
<td>Greater of Mean or Median Annual Earnings</td>
</tr>
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</table>

**How will ED calculate “annual loan payment” for purposes of the debt-to-income ratios?**
Three variables will determine a program’s annual loan payment: (1) the median student loan debt; (2) the current annual interest rate on Federal Direct Unsubsidized Loans; and (3) a 10-year, 15-year, or 20-year repayment period, depending on credential level.

ED will calculate the median student loan debt for all students who completed the program during the relevant 2YP or 2YP-R. ED will determine first the amount of loans that each individual student borrowed to attend the program, including all federal (excluding loans to parents and loans that convert from TEACH Grants), private education loans, and institutional financing plans. ED will then compare that amount to the total amount of tuition and fees that the institution charged the student for all programs (provided the institution submits that information). Using the lesser of the two, ED will calculate the median student loan debt for the program.

ED will calculate the annual loan payment for the median student loan debt based on the current interest rate for Federal Direct Unsubsidized Loans and the appropriate loan repayment period. For non-profit and public institutions, the relevant loan repayment period is 10 years, the period established for undergraduate and graduate certificate programs. The loan repayment periods for associate’s degree programs, bachelor’s and master’s degree programs, and doctoral and first professional degree programs are 10 years, 15 years, and 20 years, respectively.

How will ED calculate mean or median annual earnings for purposes of the debt-to-income ratio?

ED will obtain the most recently available mean and median annual earnings from the Social Security Administration (“SSA”), which will perform the calculations using actual earnings data in its records. ED will use the greater of the mean or median when calculating the debt-to-income metrics. Institutions will be unable to challenge the SSA’s data because such data will not be disclosed due to privacy concerns.

If a program fails the debt-to-income metrics and the SSA was unable to include earnings data for one or more students in the calculation, ED will automatically adjust the median loan debt and recalculate the metrics. Specifically, for each student that SSA excludes, ED will exclude the student with the highest loan debt when recalculating the annual loan payment. In addition, if a program fails either debt-to-income metric, the institution may provide alternative earnings data, for purposes of calculating the metrics so long as the data comes from a state agency or is the product of a private survey that meets National Center for Education Statistics (“NCES”) standards. For FYs 2012–2014, failing programs will also be able to use Bureau of Labor Statistics data for purposes of calculating the debt-to-income metrics.

Do the metrics calculations make any accommodations for small programs?

The regulations make some accommodations for small programs. If the standard 2YP or 2YP-R includes 30 or fewer borrowers, ED will extend the two year periods back by two years. If the resulting four year period (“4YP” or “4YP-R”) still includes 30 or fewer borrowers, then the program will be deemed to satisfy the metrics. Likewise, if the SSA does not provide earnings data for the program because the data set is so small that SSA is unable to provide the earnings data, or if the median student loan debt is zero, the program will be deemed to satisfy the metrics.

Sanctions for Noncompliance with Gainful Employment Metrics

The final rule on gainful employment explains ED’s procedures for monitoring gainful employment and the steps that ED will take if a program does not comply.
What happens if a gainful employment program fails the test?

If a program does not meet any of the three minimum standards, ED will notify the institution that the program has not complied with the gainful employment rule. The consequences of such a notification depend on whether the program was in compliance with the gainful employment rule in previous federal fiscal years. Specifically:

- **Debt warnings - single failure:** After one failure, the institution must explain to each enrolled and prospective student how the debt measures are calculated, the amount by which the program did not meet the minimum standards, and any actions the institution plans to take to improve the program's performance on the debt measures.

- **Debt warnings - second failure in three federal fiscal years or less:** If a program fails to meet any of the minimum standards for two consecutive federal fiscal years or for two out of the three most recently completed federal fiscal years, the institution must provide to each student or prospective student a debt warning that includes:
  - A "plain language" explanation of the actions the institution plans to take in response to the second failure. If the institution plans to discontinue the program, it must provide the timeline for doing so and the options available to the student;
  - A "plain language" explanation of the risks associated with enrolling or continuing in the program, including the potential consequences for, and options available to, the student if the program loses Title IV eligibility;
  - A "plain language" explanation of the resources available to the student to research other educational options and compare program costs, including [www.collegenavigator.gov](http://www.collegenavigator.gov); and
  - A clear and conspicuous statement that a student who enrolls or continues in the program should expect to have difficulty repaying his or her student loans.

The institution must continue to provide the relevant debt warning until the program has met one of the three minimum standards for two of the last three federal fiscal years.

- **Ineligibility – third failure in four federal fiscal years or less:** A program becomes ineligible, and an institution cannot disburse Title IV aid for the program, if it fails to meet any of the minimum standards for three consecutive federal fiscal years or three out of four consecutive federal fiscal years.

If an institution must give a debt warning, how does the institution implement that requirement?

The institution must give a debt warning in an "easy to understand" format. The institution must establish procedures for delivery of debt warnings in accordance with the regulations. To the extent practicable, the institution must provide alternatives to English-language warnings for students whose first language is not English. In addition, the institution must prominently display the debt warning on the program home page of its website and include the debt warning in all promotional materials that the institution makes available to prospective students.

When must the institution give the debt warning?

The institution must provide a debt warning to: (a) enrolled students, as soon as possible, but no later than 30 days after the date ED notifies the institution that the program failed; and (b) prospective students, at the time the prospective student first contacts the institution requesting information about the program. If a prospective student intends to use Title IV funds to attend the program, the institution may not enroll the student until three days after providing the debt warning. If 30 days elapse between the time of the original debt warning and the date on which
If a program becomes ineligible, can the institution ever offer Title IV aid for the program again?

Yes. If a program becomes ineligible, an institution may not seek to reestablish the eligibility of the program, or to establish the eligibility of a program that is substantially similar to the ineligible program, until the end of the third federal fiscal year following the federal fiscal year in which the program became ineligible. (A “substantially similar program” is a program that has the same credential level and the same first four digits of the CIP code as that of the ineligible program.)

If an institution elects to terminate a program after a second failure in two consecutive federal fiscal years or two out of three federal fiscal years, the institution must: (a) if it voluntarily terminated the program within 90 days after ED notified the institution that it must issue the second year debt warnings, wait until the end of the second federal fiscal year following the federal fiscal year in which the institution voluntarily terminated the program; or (b) if the institution voluntarily terminated the program more than 90 days after receiving notification from ED that the institution must issue the second year debt warnings, wait until the end of the third federal fiscal year following the federal fiscal year in which the institution voluntarily terminated the program.

CONCLUSION:

ED’s final rules on program integrity have extensive implications for institutional operations, as evidenced by the issues raised in this series. ED is frequently issuing new interpretive guidance concerning these rules, and institutions should check for updates on an ongoing basis.

Beyond these program integrity regulations, ED has also announced a new rulemaking proceeding that will address teacher preparation programs, federal student loans, institutional reporting requirements, college completion, and President Obama’s proposed “First in World” grant competition. Institutions should therefore monitor that proceeding for relevant legal developments as well.
FOOTNOTES:

FN1.

FN2.

FN3.

FN4.

FN5.
In addition to the APSCU lawsuit challenging the gainful employment regulations noted above, the House of Representatives has held a hearing on the new gainful employment rules. See The Gainful Employment Regulation: Limiting Job Growth and Student Choice: Hearing Before the Subcomm. on Higher Education and Workforce Training of the H. Comm. on Education and the Workforce, 112th Cong. (2011).

FN6.

FN7.
76 Fed. Reg. at 34,386.

FN8.

FN9.
See id. at 3-4.

FN10.
34 C.F.R. §§ 668.8(c).

FN11.
id. § 668.8(d).

FN12.
The Classification of Instructional Programs ("CIP") code refers to ED’s taxonomic scheme that
supports the accurate tracking and reporting of fields of study and program completion.

**FN13.**
76 Fed. Reg. 34,386, 34,448 (June 13, 2011) (to be codified at 34 C.F.R. § 668.7(a)(2)(i)(A)). The credential levels for identifying a program are: undergraduate certificate, associate’s degree, bachelor’s degree, post-baccalaureate certificate, master’s degree, doctoral degree, and first-professional degree. See 76 Fed. Reg. 34,449 (June 13, 2011) (to be codified at 34 C.F.R. § 668 (a)(2)(i)(C)).

**FN14.**
34 C.F.R. §§ 668.8(c), 668.8(d); see generally ED, Dear Colleague Letter GEN-11-10 (Apr. 20, 2011); Gainful Employment Electronic Announcement #3 (correcting Dear Colleague Letter GEN-11-10 with respect to teacher certification programs) (hereinafter “ED, Announcement #3”); Gainful Employment Electronic Announcement #11: Determining Whether an Educational Program is a Gainful Employment Program (June 24, 2011) (hereinafter “ED, Announcement #11”); Gainful Employment Electronic Announcement #12: Certificates Awarded as Part of a Degree Program (July 8, 2011) (hereinafter “ED, Announcement #12”).

**FN15.**

**FN16.**
34 C.F.R. § 668.231(a).

**FN17.**
ED, Announcement #11; ED, Gainful Employment Frequently Asked Questions, [Question G-Q2](#).

**FN18.**
ED, Announcement #3; ED, Announcement #11; ED, Gainful Employment Frequently Asked Questions, [Question G-Q3](#).

**FN19.**
ED, Announcement #11.

**FN20.**
34 C.F.R. § 668.32(a)(1)(iii).

**FN21.**
20 U.S.C. § 1001; id. § 668.8(c)(1), (2).

**FN22.**
Id. § 668.32(a)(1)(ii).

**FN23.**
ED, Gainful Employment Frequently Asked Questions, [Question G-Q6](#).

**FN24.**
34 C.F.R. § 668.6(c).

**FN25.**
Id. § 668.6(b)(1). ED has explained that if there were less than 10 students in a program in an award year, the institution should not disclose median debt amounts or on-time completion rates. ED, Gainful Employment Frequently Asked Questions, [Question G-Q7](#).
FN26. 

FN27. 
34 C.F.R. § 668.6(b)(2). The institution must provide this information for each program in promotional materials and on the home page of its web site, and must provide a link to the information on any other web page containing academic or admissions information about the program. Id.

FN28. 
Id. § 668.6(b)(2)(iv). ED submitted a gainful employment disclosure template to the Office of Management and Budget (“OMB”) for public comment in April 2011, and that comment period has now closed. After ED has considered the comments, it will submit the package for OMB approval. At that time, there will be an additional 30-day comment period. See 44 U.S.C. § 4507(a)(1)(D).

FN29. 

FN30. 
ED defines “private education loans” by reference to the Federal Reserve Board’s definition under the Truth in Lending Act, 12 C.F.R. § 226.46(b)(5). See Gainful Employment Webinar # 2, Reporting GE Data to NSLDS, Slide 51 (June 28 and 29, 2011) (hereinafter “GE Webinar”).

FN31. 
34 C.F.R. § 668.6(a)(1). ED has published a draft list of the data elements that institutions will have to report. The list includes data elements not explicitly required by the regulations. See Attachment to Dear Colleague Letter GEN-11-10, Gainful Employment Reporting, Draft Data Elements List (April 20, 2011); see also GE Webinar, supra at n. 30, at slides 51-53.

FN32. 

FN33. 
Id.; see also ED, Announcement #17.

FN34. 
34 C.F.R. § 668.6(a)(2).

FN35. 
Id. § 668.6(a)(2)(ii). ED has created the following e-mail address to receive information about missing data: GE-Missing-Data@ed.gov. See GE Webinar, supra at n. 30, Slide 20.

FN36. 
ED, Gainful Employment Electronic Announcement #14: NSLDS Gainful Employment Submittal Template (July 28, 2011) (hereinafter “ED, Announcement #14”); see also ED, Announcement #17 (noting that the updated NSLDS user guide provides information about the option to upload and submit gainful employment data using the template).

FN37. 
GE Webinar, supra at n. 30, Slide 19.

FN38. 
ED published the most recent version of the User Guide on August 4, 2011. ED, Announcement #17.
FN39. GE Webinar, supra at n. 30, Slide 24.

FN40. Id. at Slide 72.

FN41. See 75 Fed. Reg. 66,665 (Oct. 29, 2010); ED, Dear Colleague Letter GEN-11-10 at 7 (April 20, 2011); ED, Gainful Employment Electronic Announcement #5: Procedures for Reporting New Educational Programs That Prepare Students for Gainful Employment in a Recognized Occupation (June 1, 2011) (hereinafter “ED, Announcement #5”). An institution that is provisionally certified must obtain ED approval before offering Title IV aid for any new program, as must an institution that has been notified by ED that it must wait for approval before disbursing Title IV funds to students enrolled in a new program. ED, Dear Colleague Letter GEN-11-10 at 7; ED, Announcement #5.

FN42. 34 C.F.R. § 600.10(c)(2).


FN44. ED, Dear Colleague Letter GEN-11-10 at 7; ED, Gainful Employment Electronic Announcement #5.

FN45. 34 C.F.R. § 600.10(c)(1); ED, Dear Colleague Letter GEN-11-10 at 7; ED, Announcement #5.

FN46. ED, Announcement #5; see 34 C.F.R. § 668.8 (2010), as amended by 75 Fed. Reg. at 66,949-50.

FN47. ED, Announcement #5.

FN48. The institution may provide comparable documentation if the institution is a public postsecondary vocational institution approved by a recognized state agency for the approval of public postsecondary vocational education in lieu of accreditation. 34 C.F.R. § 600.20(d)(2)(iii).

FN49. 34 C.F.R. § 600.20(d)(2); ED, Announcement #5 & Attachment – Notice Format for Intent to Offer an Educational Program. The institution’s descriptions and documentation can cover more than one new program if the institution used the same or a similar process to determine the need for the programs. ED, Announcement #5 & Attachment – Notice Format for Intent to Offer an Educational Program.

FN50. ED, Announcement #5. Attachment – Procedures for Institutional Notification to the Department of New GE Programs; ED, Gainful Employment Electronic Announcement #16: Updated Procedures for Reporting New Educational Programs (hereinafter “ED, Announcement #16”).

FN51. 34 C.F.R. §§ 600.10(c)(1), 600.20(c)(1)(v), 600.20(d)(1)(ii)(B). Until the 30-day mark, ED’s silence does not indicate tacit approval. As a practical matter, this provision leaves institutions and students in limbo as to whether the program qualifies for federal student financial aid until 30 days before classes are set to begin.
FN52.  
Id.

FN53.  
Id. § 600.20(d)(1)(ii)(E).

FN54.  
Id. § 600.20(d)(1)(ii)(F)(1).

FN55.  
Id. § 600.20(d)(1)(ii)(F)(2).

FN56.  
Id. § 600.20(d)(1)(ii)(C); ED, Announcement #5; FAQs NP-Q2.

FN57.  
Id. § 600.10(c)(3).

FN58.  

FN59.  
Id. at 34,448 (to be codified at 34 C.F.R. § 668.7(a), (h)).

FN60.  
Id. at 34,452 (to be codified at 34 C.F.R. § 668.7(a)).

FN61.  
Id. at 34,449 (to be codified at 34 C.F.R. § 668.7(a)(2)(iii).

FN62.  
Id. at 34,449-50 (to be codified at 34 C.F.R. § 668.7(a)(2)(iv), (b), (c)).

FN63.  
Id.

FN64.  
Id. at 34,449 (to be codified at 34 C.F.R. § 668.7(b)(1)(iv)).

FN65.  
Id. at 34,403.

FN66.  
Id. at 34,449 (to be codified at 34 C.F.R. § 668.7(b)).

FN67.  
Id. (to be codified at 34 C.F.R. § 668.7(b)(1)).

FN68.  
Id. (to be codified at 34 C.R.R. § 668.7(b)(1)(iii)).

FN69.  
Id. (to be codified at 34 C.F.R. § 668.7(b)(1)(ii)).
FN70.  
Id. (to be codified at 34 C.F.R. § 668.7(b)(2)).

FN71.  
Id.

FN72.  
Id. (to be codified at 34 C.F.R. § 668.7(b)(3)).

FN73.  
Id. at 34,449-50 (to be codified at 34 C.F.R. § 668.7(b)(3)(A), (B), and (C)).

FN74.  
Id. at 34,450 (to be codified at 34 C.F.R. § 668.7(b)(3)(C)).

FN75.  
Id. (to be codified at 34 C.F.R. § 668.7(c)).

FN76.  
Institutions will supply to ED the data regarding private education loans and institutional financing plans through the new gainful employment reporting requirements. When a student completes multiple programs at a given institution, ED will attribute all loan debt to the highest credentialed program subsequently completed by the student at that institution. Unless the institutions are under common ownership and control, ED will not include debt incurred at a different institution. 76 Fed. Reg. at 34,417.

FN77.  
76 Fed. Reg. at 34,450 (to be codified at 34 C.F.R. § 668.7(c)(4)).

FN78.  
Id. (to be codified at 34 C.F.R. § 668.7(c)(2)).

FN79.  
Id. (to be codified at 34 C.F.R. § 668.7(c)(3)).

FN80.  
Id. at 34,451 (to be codified at 34 C.F.R. § 668.7(e)(3)(ii)).

FN81.  
Id. (to be codified at 34 C.F.R. § 668.7(g)).

FN82.  
Id. at 34,450-51 (to be codified at 34 C.F.R. § 668.7(d)).

FN83.  
Id. at 34,451 (to be codified at 34 C.F.R. § 668.7(d)(2)(ii)).

FN84.  
Id. (to be codified at 34 C.F.R. § 668.7(j)).

FN85.  
Id. (to be codified at 34 C.F.R. § 668.7(j)(1)).
FN86.  
*Id.* (to be codified at 34 C.F.R. § 668.7(j)(2)).

FN87.  
*Id.* (to be codified at 34 C.F.R. §§ 668.7(j)(1)(iv), 668.7(j)(2)(ii)).

FN88.  
*Id.* (to be codified at 34 C.F.R. § 668.7(i)).

FN89.  
*Id.* (to be codified at 34 C.F.R. §§ 668.7(j)(1)(i), 668.7(j)(2)(i)).

FN90.  
*Id.* (to be codified at 34 C.F.R. § 668.7(j)(1)(ii)).

FN91.  
*Id.* (to be codified at 34 C.F.R. § 668.7(j)(6)).

FN92.  
*Id.* (to be codified at 34 C.F.R. § 668.7(j)(4)).

FN93.  
*Id.* at 34453 (to be codified at 34 C.F.R. § 668.7(i)(3)).

FN94.  
*Id.* (to be codified at 34 C.F.R. § 668.7(i)(3)(ii)(A)).

FN95.  
*Id.* (to be codified at 34 C.F.R. § 668.7(i)(3)(ii)(B)).

FN96.  
*Id.* (to be codified at 34 C.F.R. §§ 668.7(j)(5), 668.7(l)(i)).

FN97.  
*See id.* (to be codified at 34 C.F.R. § 668.7(h)).

FN98.  
*See id.* (to be codified at 34 C.F.R. § 668.7(i)).

FN99.  
*Id.* (to be codified at 34 C.F.R. § 668.7(k)).

FN100.  
*Id.* (to be codified at 34 C.F.R. § 668.7(l)(2)(ii)).

FN101.  
*Id.* (to be codified at 34 C.F.R. § 668.7(l)(2)(i)).

FN102.  

FN103.  
Christopher Lott, an associate in the education practice at Hogan Lovells US LLP, contributed to this Note.
RESOURCES:

- 76 Fed. Reg. 25,650 (May 5, 2011) (initiating rulemaking on teacher preparation programs, federal student loans, institutional reporting requirements, college completion, and President Obama’s proposed “First in World” grant competition)
- 76 Fed. Reg. 34,386 (June 13, 2011) (final rule on gainful employment programs)
- ED, Gainful Employment Information Page (including all Electronic Announcements)
- ED, Dear Colleague Letter GEN-11-10
- ED, Gainful Employment Frequently Asked Questions
- ED, Gainful Employment Webinar # 2, Reporting GE Data to NSLDS (June 28 and 29, 2011)
- American Council on Education, Summary Paper on Gainful Employment Regulations