

**NAVIGATING THE REGULATORY HIGHWAY:
A PRACTICAL GUIDE TO INTERPRETING, IMPLEMENTING AND COMPLYING
WITH DOE'S PROGRAM INTEGRITY RULES**

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Introduction

In 2010, the U.S. Department of Education (“Department” or “DOE”) proposed a host of new regulations for higher education program integrity and student aid (“Program Integrity Rules”) intended to curb perceived abuses of taxpayer money and protect unwary students. The publication of these rules followed a contentious round of negotiated rulemaking—during which the federal government consulted with constituents to draft or revise new rules—held by the Department from late 2009 to early 2010. Since their publication, the Program Integrity Rules have generated unprecedented public comment and have elicited a lawsuit from the Association of Private Sector Colleges and Universities seeking to block portions of the regulations. Despite the controversy, however, all but one of the Program Integrity Rules were finalized in the fall of 2010, and colleges and universities must comply with the new requirements beginning July 1, 2011.

In all, there are fourteen areas of program integrity addressed by the Department’s new regulations. Outlined below are the five rules with greatest significance for NACUA’s public and nonprofit institutional members: (1) credit hours; (2) gainful employment; (3) incentive

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² The views expressed are those of the author and do not necessarily reflect the views of the Tennessee Board of Regents, its individual institutions, or the Office of the General Counsel.

compensation; (4) misrepresentation; and (5) state authorization.³ Additional resources on the Program Integrity Rules are available on NACUA's website, www.nacua.org.

Credit Hour Requirements

I. Background and Purpose

- A) **Introduction** – On October 29, 2010, the Department of Education published in the Federal Register final regulations on program integrity issues (75 FR 66832). The regulations address several areas affecting institutions of higher education, including the definition of a credit hour and requirements for accrediting agencies to follow in examining an institution's credit hour policies. In addition, the regulations revised paragraph (I) of the title IV program clock-to-credit-hour requirements in 34 C.F.R. §§ 668.8(k) and (I) that may be applicable to a non-degree, undergraduate program. Before the DOE's new regulations, there was no definition of "credit hour."
- B) **Reasons for Creation of Credit Hour Definition** – According to the DOE, an institution is responsible for determining the credit hours awarded for coursework in its programs in accordance with the DOE's definition of a credit hour for Federal program purposes. Credit hours are used to determine the eligibility of the institution and its educational programs for participation in Federal programs, including measuring eligibility for federal funding.⁴ As required under the Higher Education Act of 1965, as amended ("HEA"), they are also a measure of student work used by an institution to determine the eligibility of a student for Federal student assistance and the amount of the student's assistance.
- C) **Regulations Affected** - Credit Hour Definition 34 C.F.R. §§ 600.2 (Definitions); 602.24 (Accrediting Agency credit hour requirements); 603.24 (State Agency review of Credit Hours); and 668.8 (Student Assistance General Provisions).

II. Definitions and Guidance

- A) **Credit Hour Definition** - In 34 C.F.R. § 600.2 of the final regulations, the DOE defines a credit hour for Federal programs, including the Federal student financial assistance programs, as-

An amount of work represented in intended learning outcomes and verified by evidence of student achievement that is an institutionally established equivalency that reasonably approximates not less than:

³ The remaining Program Integrity Rules implement a host of procedural changes to student aid eligibility and disbursement, as well as establish disclosure requirements for institutions that outsource portions of their educational programs to other institutions via written agreement. For time and space purposes, these rules have been excluded from this analysis. NACUA members seeking information on these rules should consult other resources.

⁴ Most of the references to the DOE throughout this section reflect language contained in the DOE's Dear Colleague Letter," U.S. Department of Education, Office of Postsecondary Education, "Guidance to Institutions and Accrediting Agencies Regarding a Credit Hour as Defined in the Final Regulations Published on October 29, 2010." (March 18, 2011).

1. One hour of classroom or direct faculty instruction and a minimum of two hours of out-of-class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different amount of time; OR
2. At least an equivalent amount of work as required in paragraph (I) of this definition for other academic activities as established by the institution, including laboratory work, internships, practica, studio work, and other academic work leading to the award of credit hours.

B) DOE Guidance Regarding Credit Hour Definition – On March 18, 2011, the DOE issued a “Dear Colleague letter⁵” in an attempt to provide guidance to institutions regarding its regulations governing the credit hour definition, including guidance addressing accrediting agencies’ assessment of institutions’ determinations of credit hours. The Letter addresses several issues:

1. **Purpose for Measurement** – At its most basic, a credit hour is a proxy measure of a quantity of student learning. According to the DOE, this standard measure will provide increased assurance that a credit hour has the necessary educational content to warrant the amounts of Federal funds that are awarded to participants in Federal funding programs, and that students at different institutions are treated equitably in the awarding of those funds.
2. **Focus on Key Phrases within Credit Hour Definition** – A credit hour for Federal purposes is an institutionally established equivalency that reasonably approximates some minimum amount of student work reflective of the amount of work expected in a Carnegie unit: According to the DOE, the key phrases to focus on are: "institutionally established," "equivalency," "reasonably approximates," and "minimum amount."
3. **No Limit on Methods for Measuring Student’s Work** – The DOE recognizes that other measures of educational content are being developed by institutions, and does not intend to limit the methods by which an institution may measure a student's work in his or her educational activities. The DOE, therefore, is seeking to provide institutions the flexibility to demonstrate alternative methods of measuring student learning, so long as they result in institutional equivalencies that reasonably approximate the definition of a credit hour for Federal purposes.
4. **Flexibilities within Credit Hour Definition** - The credit hour definition provides several critical flexibilities for institutions in determining the appropriate amount of credit hours for student coursework:

⁵ U.S. Department of Education, Office of Postsecondary Education, “Guidance to Institutions and Accrediting Agencies Regarding a Credit Hour as Defined in the Final Regulations Published on October 29, 2010.” (March 18, 2011).

- a.) **Reasonable Approximation** - A credit hour is expected to be a reasonable approximation of a minimum amount of student work in a Carnegie unit in accordance with commonly accepted practice in higher education. It is important to note that there is no requirement that a credit hour exactly duplicate the amount of work in paragraph (I) of the definition, as is highlighted by the provisions of paragraph (2). The requirement is that a credit hour *reasonably approximates* that minimum amount of work in paragraph (1).
 - b.) **Minimum Standard** - The credit hour definition is a minimum standard that does not restrict an institution from setting a higher standard that requires more student work per credit hour.
 - c.) **Learning Outcomes** - In determining the amount of work the institution's learning outcomes will entail, as under current practice, the institution may take into consideration alternative delivery methods, measurements of student work, academic calendars, disciplines, and degree levels.
 - d.) **Discretion with respect to other institutional contexts** - To the extent an institution believes that complying with the Federal definition of a credit hour would not be appropriate for academic and other institutional needs, it may adopt a separate measure for those purposes.
 - e.) **Time in class vs. other work in assessing student work** - The credit hour definition does not emphasize the concept of "seat time" (time in class) as the primary metric for determining the amount of student work for Federal purposes. Institutions may assign credit hours to courses for an amount of work represented by verifiable student achievement of institutionally established learning outcomes. Credits may be awarded on the basis of documentation of the amount of work a typical student is expected to complete within a specified amount of academically engaged time, or on the basis of documented student learning calibrated to that amount of academically engaged time for a typical student. This principle would apply when determining the credit hours assigned to asynchronous online courses.
5. **Intent of Flexibilities** – According to the OCR, the intent of these flexibilities is to recognize the differences across institutions, fields of study, types of coursework, and delivery methods, while providing a consistent measure of student work for purposes of Federal programs.
6. **Clock-to-Credit-Hour Conversion Requirements** – The credit hour definition in § 600.2 does not directly apply to non-degree undergraduate programs measured in clock hours as defined in 34 C.F.R. § 668.8(k). These programs are subject to the formula to convert clock hours to credit hours in § 668.8(1), which requires 37.5 clock hours of instruction for each semester credit hour and 25 clock hours of instruction for each quarter credit hour. An institution may set a minimum of 30 clock hours of instruction per semester hour or 20 clock hours of instruction per quarter hour if those hours, combined with work outside of class, equal the minimum amount

of work required in § 668.8(1). However, if an institution chooses to combine a minimum number of clock hours of instruction with work outside of class in order to equal the required credit hours in § 668.8(1), they can do so only if an accrediting agency has not found any deficiencies with the institution's policies for determining credit hours under the § 600.2 credit hour definition.

As an example, under current regulations, an institution may have a 720 clock-hour program with no out-of-class student work to which it assigns 24 semester hours. That institution may restructure the program to 900 clock hours to maintain the 24 semester hour designation in accordance with the new regulations (900 clock hours ÷ 37.5 hours of in-class instruction = 24 semester hours). The accrediting agency will be responsible for determining whether the inclusion of any amount of work outside of the classroom is compliant with the credit hour definition in § 600.2. In addition, the accrediting agency will review any restructuring that includes a substantial increase in the number of clock hours awarded for successful completion of the program (ex: from 720 to 900).

III. Role of Accreditors and States

- A) **Accreditor Responsibilities and Requirements Related to Credit Hours** – While not a part of the definition of a credit hour, the final regulations also require an accrediting agency to conduct an effective review and evaluation of the reliability and accuracy of the institution's assignment of credit hours used for Federal program purposes. The accrediting agency-
1. Must review the institution's policies and procedures for determining the credit hours and the application of the institution's policies and procedures to its programs and coursework;
 2. Must make a reasonable determination of whether the institution's assignment of credit hours conforms to commonly accepted practice in higher education;
 3. May review and evaluate an institution's policies and procedures for determining credit hour assignments through use of sampling or other methods in the evaluation; and
 4. Must take such actions that it deems appropriate to address any deficiencies that it identifies at an institution, as it does in relation to other deficiencies it may identify, subject to the requirements of 34 C.F.R. part 602.
 5. An agency must promptly notify the Secretary if it finds systemic noncompliance with the agency's policies, or significant noncompliance regarding one or more programs at the institution.
 6. These same responsibilities apply to the State agencies --currently New York, Pennsylvania, Oklahoma, and Puerto Rico --that are recognized by the Secretary

under 34 C.F.R. part 603 as reliable authorities regarding the quality of public postsecondary vocational education in their States

- B) **Role of States** - The regulations do not regulate States, and they do not require that a State review and evaluate every institution's assignment of credit hours. Only for those public postsecondary vocational institutions in New York, Pennsylvania, Oklahoma, and Puerto Rico that participate in the Federal student assistance programs based on State approval in lieu of accreditation by a nationally recognized accrediting agency, will the recognized State agency be required to perform such an assessment of those institutions' assignment of credit hours. (See 34 C.F.R. § 603.24(c) of the October 29 regulations.)

IV. Implementation

- A) **Institutions and accrediting agencies are responsible for properly implementing the credit hour regulatory requirements that are effective July 1, 2011. For the 2011-2012 award year, as long as an institution or accrediting agency is in the process of complying with the credit hour regulations, the DOE will consider the institution or accrediting agency to be making a good-faith effort to comply**, and DOE staff will take such efforts into consideration when reviewing implementation of the regulations. Accrediting agencies and State approval agencies whose written policies, procedures, criteria, and materials are not finalized prior to July 1, 2011, may make reasonable allowances in their review of institutions during the 2011-2012 award year.
- B) **Possible Implications** – Implementation of and compliance with the credit hour regulations is a serious matter. The implications for non-compliance are significant and include: 1) The amount of federal student financial aid awarded under incorrect assignment of credit hours may be recalculated to establish a repayment liability owed by the institution; 2) Where the amount of credit hours assigned to a program is significantly overstated, the Secretary may fine the institution or limit, suspend or terminate its participation in federal programs.
- C) **Practical Tips and Best Practices for Compliance** – In moving toward compliance with the credit hour provisions, the following measures are recommended:
1. Identify a point person or persons to assist in implementation and compliance;
 2. Review current credit-hour assignments;
 3. Develop policies and procedures for credit-hour assignment;
 4. Develop systems to review administration of such policies and procedures; and
 5. Monitor accreditor policies and procedures and its reviews of the institution.

Gainful Employment Requirements

I. Background and Purpose

In order to be eligible for funding under Title IV of the HEA, an educational program must lead to a degree (associate, bachelor's, graduate, or professional) or prepare students for "gainful employment in a recognized occupation." In addition, virtually all programs—degree and nondegree—offered by proprietary institutions must prepare students for "gainful employment in a recognized occupation." 34 C.F.R. §§ 668.8(c)(3)-(d). Collectively, these programs are referred to as "GE Programs." More than 5,000 out of approximately 6,000 institutions participating in Title IV programs have GE Programs.

Concerned about schools that provide no value for the money, the Department of Education in the summer of 2010 proposed new regulations which would define "gainful employment" for the first time and require schools to publicize information about programs required to lead to gainful employment. These gainful employment regulations have been the subject of a long discussion and enormous amount of public comment that has caused significant delays in the rules' release.

The first set of final gainful employment regulations was published on October 29, 2010 and establishes reporting and disclosure requirements for current programs, as well as the need for prior Department approval of new programs (see First Set of Gainful Employment Regulations below—Reporting, Disclosures, and New Program Approvals below). On April 20, 2011, the Department issued a Dear Colleague Letter providing additional guidance on how to implement these new regulations ("DCL GEN-11-10"). The second set of final gainful employment regulations were published on June 2, 2011 and establish performance-based measures of "gainful employment" and federal aid restrictions for programs that perform poorly (see Second Set of Gainful Employment Regulations—Debt Measures below). The American Council on Education ("ACE") has released extremely helpful guidance on interpreting all of the gainful employment regulations that is attached to this outline and can also be located at http://www.acenet.edu/AM/Template.cfm?Section=Papers_Publications&CONTENTID=41448&TEMPLATE=/CM/ContentDisplay.cfm. Content from this guidance has been included, with permission, below.

II. Eligibility and Impact

- A) For both domestic and foreign public and nonprofit institutions, GE Programs include the following:
1. Nearly all non-degree programs regardless of length. These include undergraduate, post-baccalaureate, graduate, and postgraduate certificate programs, but do not include certificates received as part of a degree program.
 2. Teacher certification programs that result in a certificate awarded by the institution.
 3. Approved "Comprehensive Transition Programs" for students with intellectual disabilities. DCL GEN-11-10, pp. 2-4.

- B) For both domestic and foreign public and nonprofit institutions, the following are not considered GE Programs:
1. Programs that lead to a degree, including associate's, bachelor's, graduate, and professional degrees.
 2. Programs that are at least two years in length that are fully transferable to a bachelor's degree program.
 3. Teacher certificate programs where the institution provides a collection of coursework necessary for the student to receive a state professional teaching credential or certification. GE Electronic Announcement #3 Correction of Dear Colleague Letter GEN-11-10 regarding Teacher Certification Programs (May 20, 2011), <http://ifap.ed.gov/eannouncements/05202011GETeacherCertProgram.html>.
 4. Preparatory courses of study that provide coursework necessary for enrollment in an eligible program. DCL GEN-11-10, pp. 2-4.
- C) Overall, the gainful employment regulations will likely have a significant impact, affecting 53,000 programs across the nation, 40,000 of which are at traditional colleges and universities.
- D) A helpful decision tree for determining whether non-profit and public institutional programs are GE programs is attached to this outline and available on ACE's website at http://www.acenet.edu/AM/Template.cfm?Section=Papers_Publications&CONTENTID=41446&TEMPLATE=/CM/ContentDisplay.cfm.

III. First Set of Gainful Employment Regulations—Reporting, Disclosures, and New Program Approvals

The first set of final gainful employment regulations were published in two separate documents on October 29, 2010, and are effective July 1, 2011. 75 Fed. Reg. 66832 and 75 Fed. Reg. 66665 (Oct. 29, 2010). These deal with reporting and disclosure requirements required for all current GE programs and the need for “prior approval” of new gainful employment programs. 34 C.F.R. § 600.10(c) and § 600.20(c)-(d).

A) Reporting Requirements for Current GE Programs

1. Institutions must report certain information about all students who were enrolled in each GE program during an award year, regardless of whether a student received Title IV student aid (with the exception that institutions should not report students for whom they do not have a Social Security Number). 34 C.F.R. § 668.6(a). The Department is still finalizing the complete list of GE program data items that must be reported; a preliminary list is available in the April 20, 2011 Dear Colleague Letter. The information will include the following:

- a.) The name and Classification of Instructional Programs (CIP) code (developed by the U.S. Department of Education’s National Center for Education Statistics) of the GE program;
 - b.) The total number of students enrolled in a program, information needed to identify the students (presumably name and Social Security Number), and the date(s) the students completed the program;
 - c.) Whether the students matriculated to a higher credentialed program; and
 - d.) The amounts the students received from private education loans and the amounts from institutional financing plans that the students owe the institution upon completing the program.
2. Institutions will use the existing Enrollment Reporting Process to submit the GE program information to the Department. This is the reporting system currently used by schools to submit enrollment information to the National Student Loan Data System (NSLDS). DCL GEN-11-10, p. 4.
 3. Under the regulations, the first reports must be submitted to the Department no later than October 1, 2011, and must include information on students who were enrolled in a GE program during each award year from 2006-07 through 2009-10, to the extent it is available. If an institution is unable to provide some of the information, it must explain why it is not available. 34 C.F.R. § 668.6(a)(2).

B) Disclosure Requirements for Current GE Programs

1. Institutions must also disclose certain information about each of their GE programs to prospective students, including in promotional materials available to prospective students and on institutional websites. These disclosures must begin no later than July 1, 2011. 34 C.F.R. § 668.6(b).
 - a.) If the promotional material mentions or refers to a specific GE program, the disclosure information must be included whenever feasible. If providing the information is not feasible because of the size or structure of the promotional material, an institution may include either the printed URL or a live link to the website where the required information is located, with a clear explanation of the information that is available at that website. Federal Student Aid Gainful Employment FAQs (“GE FAQs”) D-Q3, available at www.ifap.ed.gov/GainfulEmploymentInfo/2011GEFAQ.html
 - b.) An example of a compliant disclosure under this guidance could include the following text: “For more information about our graduation rates, the median debt of students who completed the program, and other important information please visit our website at [insert website address].” GE FAQs D-Q3.

2. Institutions are responsible for meeting these requirements using their own form, until the Department releases its form, which will operate as a web application that produces a web page containing the requisite data disclosures. For further information on the Department's form, see GE FAQs D-Q2.
3. The information to be disclosed is as follows, 34 C.F.R. § 668.6(b):
 - a.) The name and U.S. Department of Labor's Standard Occupational Classification (SOC) code of the occupations that the program prepares students to enter, along with links to occupational profiles on the U.S. Department of Labor's O*NET Website or its successor site (note that if the number of occupations exceeds ten, the institution may provide web links to a representative sample);
 - b.) The on-time graduation rate for students completing the program (instructions for calculating appear in 34 C.F.R. § 668.6(c));
 - c.) The tuition and fees the institution charges a student for completing the program in normal time;
 - d.) The typical costs for books and supplies (unless included as part of tuition and fees) and the cost of room and board, if applicable;
 - e.) The job placement rate for students completing the program (instructions for calculating appear in 34 C.F.R. § 668.6(b)(iv)); and
 - f.) The median loan debt incurred by students who completed the program (separately by Title IV loans and by other educational debt to include both private educational loans and institutional financing), as provided by the Department. Institutions will be initially responsible for calculating median loan debt until such time as the Department provides it. DCL GEN-11-10, p. 6. For further instruction on how to independently calculate median loan debt, see GE FAQs D-Q5 and Q6.

C) Prior Approval for New GE Programs

1. An eligible institution must notify the Department at least 90 days before the first day of class when it intends to add an educational program that prepares students for gainful employment in a recognized occupation. 34 C.F.R. § 600.10(c). Because the provisions go into effect on July 1, 2011, institutions must therefore notify the Department by July 1 of any new GE program where the first day of class will be on or after July 1, 2011, and before October 1, 2011. DCL GEN-11-10, p. 7.
2. The rules define an additional education program as follows:

- a.) A program with a CIP code that is different from any other program offered by the institution; or
 - b.) A program that has the same CIP code as another program offered by the institution but leads to a different degree or certificate; or
 - c.) A program that the institution's accrediting agency determines to be an additional program. 34 C.F.R. § 600.10(c)(2); for further information, see GE FAQs D-Q1.
- 3.** At a minimum, the notice must include the following:
- a.) Description of how the institution determined the need for the program;
 - b.) Description of how the program was designed to meet local market needs (or for an online program, regional or national market needs);
 - c.) Description of any wage analysis the institution may have performed, including any consideration of Bureau of Labor Statistics data;
 - d.) Description of how the program was reviewed or approved by, or developed with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program;
 - e.) Documentation that the program has been approved by an appropriate accrediting agency or is otherwise included in the institution's accreditation by its accrediting agency, or comparable documentation if the institution is a public postsecondary vocational institution; and
 - f.) Identification of the date of the first day of class for the new program. 34 C.F.R. § 600.20(d)(2).
- 4.** When reviewing an application for approval of a new GE program, the Department will consider the following:
- a.) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs;
 - b.) Whether the program is one of several new programs that will replace similar programs, as opposed to supplementing or expanding current programs;
 - c.) Whether the number of additional programs is consistent with the institution's historic program offerings, growth, and operations; and
 - d.) Whether the process and determination to offer the program is sufficient. 34 C.F.R. § 600.20(d)(1)(ii)(E).

5. An institution may proceed to offer the program unless advised otherwise by the Department. 34 C.F.R. § 600.10(c)(1). If the Department denies an application, it will explain how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation. An institution receiving such denial will be permitted to respond to the reasons for denial and to request reconsideration. 34 C.F.R. §§ 600.20(d)(1)(ii)(F)(1)-(2).
6. If an institution fails to obtain the Department's approval, it must repay to the Department all HEA program funds received for the program and all title IV program funds received by students who enrolled in that program. 34 C.F.R. § 600.10(c)(3).
7. Language in the preamble to the final rules suggests that the Department may eventually limit this requirement to seek approval for new GE programs to those institutions whose existing GE programs demonstrate poor performance in whatever performance-based standards are established in later rulemaking (particularly those whose poor performance results in restricted or ineligible federal aid status). The Department has expressed an unwillingness to impose this limitation until the performance-based standards for gainful employment are finalized. 75 Fed. Reg. 66669 (October 29, 2010).

IV. Second Set of Gainful Employment Regulations—Debt Measures

The second set of gainful employment regulations were published on June 2, 2011, and are effective July 1, 2012. Until published in the Federal Register, the rules are available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/ge-unofficial-06032011.pdf> (June 2, 2011) (hereinafter "GE Debt Measure Rules"). These regulations establish detailed "debt measures" that GE programs will be required to meet in order to remain eligible for Title IV aid. 34 C.F.R. § 668.7. The regulations take effect July 1, 2012, but the first year a program could lose Title IV eligibility would be 2015.

A) **Debt Measures**: The regulations establish debt-related measures of gainful employment, as outlined below:

1. Debt-to-Income Ratios

- a.) These ratios measure the relationship between the debt GE program students incur and their incomes after program completion. Using data reported by schools and federal agencies, the rules create debt-to-income ratios for both (i) total earnings and (ii) discretionary income. For complete information on this calculation, see GE Debt Measure Rules, pp. 291-94; 34 C.F.R. § 668.7(c).
 - i) Debt-to-income ratio based on total earnings: This is calculated as the annual loan payment / mean or median annual earnings. 34 C.F.R. § 668.7(c)(1)(ii).

ii) Debt-to-income ratio based on discretionary income: This is the difference between the mean or median annual earnings and 150 percent of the most current Poverty Guideline for a single person in the United States (available at <http://aspe.hhs.gov/poverty>), and is calculated as annual loan payment / (mean or median annual earnings – (1.5 x Poverty Guideline)). 34 C.F.R. §§ 668.7(a)(2)(vi) and (c)(1)(i).

b.) Debt-to-income ratios are developed under the following parameters:

i) Annual loan payments: These are determined by calculating the median loan debt of the program and using it with the current annual interest rate on Federal Direct Unsubsidized Loans to calculate the annual loan payment based on a 10-year repayment schedule for undergraduate or post-baccalaureate 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 programs that lead to a doctoral or first-professional degree. 34 C.F.R. § 668.7(c)(2).

ii) Excess borrowing excluded: Debt calculations will be limited to tuition and fees and other educational expenses, so institutions are not responsible for students who borrow more than strictly necessary to cover rent or other expenses while enrolled. GE Debt Measure Rules, p. 21; 34 C.F.R. § 668.7(c)(2)(i)(A)-(B).

iii) Annual earnings: These are obtained by DOE from the Social Security Administration or another federal agency, using the higher of the mean or median annual earnings. 34 C.F.R. § 668.7(c)(3).

iv) Loan debt: Loan debt includes Federal Family Education Loans ("FFEL") and direct loans (except for parent PLUS or TEACH grant-related loans) owed by the student for attendance in a program and any private education loans or debt obligations arising from institutional financing plans. Loan debt is attributed to the highest credentialed program subsequently completed by the student at an institution, and does not include any loan debt incurred by the student for attendance in programs at other institutions. 34 C.F.R. § 668.7(c)(4).

v) Student exclusions: Excluded from the debt-to-earnings ratios are students whose loans were in a military-related deferment status, who died or became totally and permanently disabled, or who enrolled in any other eligible program at the institution or another institution during the calendar year. 34 C.F.R. § 668.7(c)(5).

vi) Measurement period: The period for which performance is measured will be GE program students' third and fourth fiscal years after graduation (starting October 1st and ending September 30th). Where necessary to ensure that more than 30 borrowers or completers are included in the measurement, the

Department will measure performance in years three through six. Finally, additional adjustments will be made for improving programs, and medical and dental programs. GE Debt Measure Rules, pp. 20-21; 34 C.F.R. §§ 668.7(a)(2)(iii)-(v) and (d).

2. Loan Repayment Rate

- a.) This measures the rate at which all GE program enrollees, regardless of completion, repay their loans on time.
- b.) Ratio: The Department calculates the loan repayment rate using the complex ratio provided below. For complete information on this calculation, see GE Debt Measure Rules, pp. 287-91; 34 C.F.R. §§ 668.7(b).

OOPB of LPF plus OOPB of PML

OOPB

- i) OOPB: The Original Outstanding Principal Balance (“OOPB”) is the amount of the outstanding balance, including capitalized interest, on FFEL or Direct Loans owed by students for attendance in the program on the date those loans first entered repayment. This does not include PLUS loans made to parent borrowers or TEACH grant-related unsubsidized loans. For consolidated loans, the OOPB is that attributable to a borrower’s attendance in the program only. 34 C.F.R. § 668.7(b)(1).
 - ii) LPF: Loans Paid in Full (“LPF”) are loans that have never been in default and that have been paid in full by a borrower. 34 C.F.R. § 668.7(b)(2).
 - iii) PML: Payments-Made Loans (“PML”) are loans that have never been in default where (1) payments made by a borrower during the most recently completed fiscal year reduce the outstanding balance of a loan, including any unpaid accrued interest; or (2) for graduate programs, the total outstanding balance at the end of the most recently completed fiscal year is less than or equal to the total outstanding balance of the loan at the beginning of the fiscal year. Under certain conditions, PML may also include loans that have never been in default where a borrower is in a public loan forgiveness program or income-based repayment plan. 34 C.F.R. § 668.7(b)(3).
- c.) Loan repayment rates are developed under the following parameters:
- i) Interest payments count: Repayment rates will be based on loan principal and interest, so students who make interest-only payments are considered current. Borrowers who meet their obligations under income-sensitive repayment plans are also considered to be successfully repaying their loans, even if their payments are smaller than accrued interest, so long as the program at issue

does not have unusually large numbers of students in those categories. GE Debt Measure Rules, p. 21; 34 C.F.R. § 668.7(b)(3).

- ii) Exclusions: The OOPB of loans that were in an in-school or military-related deferment status during any part of the fiscal year and loans that were discharged as a result of the death or permanent disability of the borrower are excluded from the calculation. 34 C.F.R. § 668.7(b)(4).
- iii) Measurement period: The period for which performance is measured will be GE program students' third and fourth fiscal years after graduation (starting October 1st and ending September 30th). Where necessary to ensure that more than 30 borrowers or completers are included in the measurement, the Department will measure performance in years three through six. Finally, additional adjustments will be made for improving programs, and medical and dental programs. GE Debt Measure Rules, pp. 20-21; 34 C.F.R. §§ 668.7(a)(2)(iii)-(v) and (d).

B) Aid Restrictions for Poor Performance

1. Debt Measure Minimums:

- a.) Using these calculations, a GE program must meet one of three benchmarks to remain eligible for federal financial aid:
 - i) A loan repayment rate of *at least 35 percent*;
 - ii) A debt-to-income ratio of *less than or equal to 12 percent of annual earnings*; or
 - iii) A debt-to-income ratio of *less than or equal to 30 percent of discretionary income*. 34 C.F.R. §§ 668.7(a)(1), (h), and (i).
- b.) A program is considered to satisfy these debt measures if the number of students who completed the program or the number of borrowers whose loans entered repayment during the relevant four-year period is 30 or fewer. GE Debt Measure Rules, p. 21; 34 C.F.R. § 668.7(d)(2)(i)(A).

2. Correction opportunities:

- a.) Draft debt measures: For each fiscal year beginning in 2012, the DOE will issue draft results of the debt measures for each program, and institution may correct the data used to calculate the results before DOE issues final debt measures. 34 C.F.R. § 668.7(e).
- i) Pre-draft corrections: Before issuing the draft results, DOE will provide to an institution a list of students to be included in the calculations and schools can

provide evidence that a student should be included or removed from the list or correct the identity information of students on the list within a 30-day correction period. 34 C.F.R. § 668.7(e)(1).

ii) Post-draft corrections: Within 45 days after the Department issues the draft results, schools may make the same corrections above, as well as challenge the accuracy of the loan data for a borrower, or the median loan debt for the program. 34 C.F.R. § 668.7(e)(2).

b.) Alternative earnings data: An institution may demonstrate that a failing program would meet a debt-to-earnings standard by recalculating the ratios using alternative earnings from a state-sponsored data system, an institutional survey conducted in accordance with NCES standards; or, for fiscal years 2012-2014, the Bureau of Labor Statistics. Methods for such demonstration are outlined in the GE Debt Measure Rules, p. 298-301; 34 C.F.R. § 668.7(g).

3. Dissemination of final debt measures: After receiving final debt-to-earnings ratios and loan repayment rates from the Department, an institution must disclose them for each of its programs, per the terms and process outlined in 34 C.F.R. § 668.6(b)(1)(v) (which requires publication on the program's website and in promotional materials). The Department may also disseminate the final debt measures to the public. 34 C.F.R. § 668.7(g)(6).

4. Debt warnings for yearly failures, 34 C.F.R. § 668.7(j):

a.) First year: The first year a GE program fails to meet the benchmarks, it must provide to each enrolled and prospective student a warning that explains the debt measures and shows the amount by which the program did not meet the minimum standards and describes any actions the institution plans to take to improve its performance under the debt measures. If an institution delivers the warning orally, it must maintain documentation of such communication. The school must continue to provide the warning until notified by DOE that it satisfies one of the three minimum standards. 34 C.F.R. § 668.7(j)(1).

b.) Second year: The second year a GE program fails to meet the benchmarks, it must provide the same debt warning noted above and include in the warning an explanation of the risks, available resources, and a statement that a student enrolled in the program should expect to have difficulty repaying his or her student loans. The debt warning must be prominently displayed on the program home page of the school's website and included in all promotional materials for prospective students. Again, the school must continue to provide the warning until notified by DOE that it satisfies one of the three minimum standards. 34 C.F.R. § 668.7(j)(2).

c.) Timely warnings: The above debt warnings must be provided to an enrolled student no later than 30 days after the DOE notifies the institution of a program

failure and must be provided to a prospective student at the time the student first contacts the school to request information about the program. If more than 30 days pass between the time a debt warning is originally provided and the time a student seeks to enroll, in the program, the institution must provide the debt warning again. Schools may not enroll a student until three days have passed since the most recently provided debt warning. To the extent practicable, schools must provide alternatives to English-language warnings for students for whom English is not their first language. 34 C.F.R. § 668.7(j)(3).

5. “Three strikes” rule: Schools must get “three strikes” before losing aid eligibility, in that programs must fail to meet all of these three benchmarks in three out of four years before they are ineligible for federal aid. Schools cannot therefore be ineligible for federal aid until 2015 at the earliest. 34 C.F.R. § 668.7(i).
6. Transition year: For the year 2015 only, the Department will limit the number of programs that will lose eligibility to the worst performing 5 percent of programs (weighted by enrollment). GE Debt Measure Rules, p. 19; 34 C.F.R. § 668.7(k).
7. Reestablishing eligibility: An institution may not seek to reestablish the Title IV eligibility of an ineligible program under these rules until the end of the third fiscal year following the year the program became ineligible. 34 C.F.R. § 668.7(l)(2)(ii).
8. Estimated impact: The Department has estimated that approximately two percent of all GE programs and five percent of for-profit GE programs would be ineligible under the new rules. The Department predicts that eight percent of all GE programs, and 18 percent of for-profit GE programs, will fail all measures at least once, but recover before accumulating the “three strikes” (i.e. failure on three of four years) necessary to disqualify their aid eligibility.

V. Questions and Concerns

- A) Prior approval for a program – i.e. letting a federal agency decide if an academic program can be offered – is an unprecedented change in federal powers. Some public commentary has argued that the review and approval of an application offering a new program is prohibited by 20 U.S.C. 1232a, which prevents the Department from exercising control over the content of institutional curriculum, programs, or personnel. The Department has responded that it is not exercising control over curriculum, but is instead reviewing an institution and its decision to offer a particular program. The Department has also emphasized that institutions are free to continue to offer new programs for which students are not eligible for title IV aid.
- B) For the second set of GE regulations, there is concern that the Department does not yet have the data to implement either test (loan repayment and debt-to-income ratio), and so they have no ability to simulate what the impact will be. This means that a high-stakes test will be imposed (a school could lose eligibility for federal student aid), without knowing how it will affect individual schools and programs. Other concerns include the

suggestion that the GE regulations may violate the Higher Education Opportunity Act of 2008's proscription against creating a federal student data record and the criticism that compiling job placement rates for GE program students will prove difficult.

VI. Practical Tips and Best Practices for Compliance

- A)** Work with operational and academic units to identify what existing programs, if any, at your institution will be GE programs under the new regulations.
- B)** For existing GE programs:
 - 1.** Collect required GE data and report to Department via NSLDS beginning July 1, 2011. Consult with GE program departments and the office responsible for submitting data to NSLDS to determine and anticipate any data unavailability since 2006 and prepare an explanation accordingly.
 - 2.** Collect and disclose required data on existing GE programs in promotional materials and on institutional website by July 1, 2011.
- C)** Work with operational and academic units to identify any new GE programs for which you will need to seek Department approval. Prepare a notice of the program containing the requisite descriptions and information to be submitted to the Department at least 90 days prior to the start of program classes.
- D)** Beginning in 2012, expect to receive the Department's annual release of GE program students' debt-to-income ratios and loan repayment rates. To the extent permitted and necessary, work with the Department to correct any errors or misinformation in the underlying data or provide alternative earnings data. Upon receipt of final debt measures from DOE, disclose them via promotional materials and program websites.
- E)** Educate the institutional community regarding the substance and purpose of these GE regulations and encourage operational units to anticipate and plan for future public focus on program outcomes, debt management, and accountability. Ensure that academic units are aware of these new requirements when developing potential GE programs, so that they may obtain and document information necessary to apply for approval during the development process (for example, consulting with employers likely to employ graduates).
- F)** For further information, utilize the following resources:
 - 1.** ACE guidance on GE regulations, attached and available at http://www.acenet.edu/AM/Template.cfm?Section=Papers_Publications&CONTENTID=41448&TEMPLATE=/CM/ContentDisplay.cfm
 - 2.** DOE's Gainful Employment Information website, available at <http://ifap.ed.gov/GainfulEmploymentInfo/>

3. DOE’s National Student Loan Data System (NSLDS) Gainful Employment User Guide, available at <http://ifap.ed.gov/nsldsmaterials/NSLDSGainfulEmploymentUserGuideUpdate060311.html>

Prohibition on Incentive Compensation

I. Background

Under the current rule, an institution must agree, as a condition of participation in any title IV, HEA program, that it “will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the awarding of title IV, HEA program funds” 34 C.F.R. § 668.14(b)(22)(i). However, twelve “safe harbor” provisions identify specific conduct exempt from the incentive compensation ban. *See id.* at (b)(22)(ii).

As of July 1, 2011, however, the safe harbors will be eliminated and the regulations will prohibit “any commission, bonus, or other incentive payment based *in any part*, directly or indirectly, upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of title IV, HEA program funds.” 75 Fed. Reg. at 66950 (emphasis added).

II. Analysis

The Department of Education has suggested a two-step analysis for determining whether a payment or compensation is permissible:

- (1) Whether it is a commission, bonus, or other incentive payment, defined as an award of a sum of money or something of value paid to or given to a person or entity for services rendered; and

- (2) Whether the commission, bonus, or other incentive payment is provided to any person or entity based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, which are defined as activities engaged in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid.

If the answer to each of these questions is yes, the commission, bonus, or incentive payment would not be permitted under the statute. 75 Fed. Reg. at 66873.

A) Key Definitions

The new regulations set forth broad definitions for the following key elements:

1. Commission, Bonus, or Other Incentive Payments

Section 668.14(b)(22)(iii)(A) defines this element as “a sum of money or something of value, other than a fixed salary or wages, paid to or given to a person or an entity for services rendered.”

2. Securing Enrollments or the Award of Financial Aid

This element is broadly defined as “activities that a person or entity engages in at any point in time through completion of an educational program for the purpose of the admission or matriculation of students for any period of time or the award of financial aid to students.” 34 C.F.R. § 668.14(b)(22)(iii)(B). More specifically, the regulations state that such activities include “contact in any form with a prospective student,” including “preadmission or advising activities, scheduling an appointment to visit the enrollment office or any other office of the institution, attendance at such an appointment, or involvement in a prospective student’s signing of an enrollment agreement or financial aid application.” *Id.*

Payments to third parties for the provision of prospective student contact information are not subject to the ban, so long as the payments are not based on “additional conduct or action by the third party or the prospective students, such as participation in preadmission or advising activities, scheduling an appointment to visit the enrollment office or any other office of the institution or attendance at such an appointment, or the signing, or being involved in the signing, of a prospective student’s enrollment agreement or financial aid application” or the “number of students (calculated at any point in time of an educational program) who apply for enrollment, are awarded financial aid, or are enrolled for any period of time, including through completion of an educational program.” *Id.*

3. Person or Entity Engaged in a Covered Activity

a.) Person

Person means any employee “who undertakes recruiting or admitting of students or who makes decisions about and awards title IV, HEA program funds, and any higher level employee with responsibility for recruitment or admission of students, or making decisions about awarding title IV, HEA program funds.” 34 C.F.R. § 668.14(b)(22)(iii)(C).

b.) Entity

Entity means “any institution or organization that undertakes the recruiting or the admitting of students or that makes decisions about and awards title IV, HEA

program funds.” *Id.* This includes third party companies hired by an institution to provide services related to student recruitment and securing financial aid.

B) Additional Revisions

The new rule expressly states that employees engaged in covered activities who receive multiple compensation adjustments in a calendar year “are considered to have received such adjustments based upon success in securing enrollments or the award of financial aid if those adjustments create compensation that is based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid.” 34 C.F.R. § 668.14(b)(22)(i)(B).

Entities, including eligible institutions and contractors to eligible institutions, may make merit-based adjustments to employee compensation, again, so long as the adjustment is not based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid. 34 C.F.R. § 668.14(b)(22)(ii)(A). Similarly, entities may make profit-sharing payments so long as such payments are not provided to any person or entity engaged in a covered activity.⁶ *Id.* at (ii)(B).

C) Enforcement

No change has been made to the enforcement procedures found in Subpart G of 34 C.F.R. Part 668. Violations of the revised § 668.14(b)(22) may still result in fines or limitation, suspension or termination from participation in title IV, HEA programs. The Department noted in the preamble that it “does not intend to provide private guidance regarding particular compensation structures in the future and will enforce the regulations as written.” 75 Fed. Reg. at 66879.

III. March 17, 2011 Dear Colleague Letter—Incentive Compensation

On March 17, 2011, the Department of Education published a Dear Colleague Letter providing guidance for the new incentive compensation regulations and clarifying its intentions with respect to certain provisions. *See* Dear Colleague Letter, GEN-11-05 (Mar. 17, 2011).

A) What Activities are Subject to the Incentive Compensation Ban?

The Department notes that only two activities, securing enrollment (recruitment) and securing financial aid, are subject to the incentive compensation ban. However, when persons or entities engage in both covered and exempt activities, institutions must carefully evaluate how these persons and entities are compensated.

Covered Activities (ALWAYS subject to the ban)

⁶ However, as discussed *infra*, the March 17, 2011 Dear Colleague Letter suggests that profit sharing payments may be made to employees engaged in covered activities so long as the distributions are “neutral with respect to the role the recipient plays in student recruitment or the securing of financial aid.” Dear Colleague Letter, GEN-11-05, 10 (Mar. 17, 2011).

- Recruitment Activities, including:
 - Targeted information dissemination to individuals⁷
 - Solicitations to individuals⁸
 - Contacting potential enrollment applicants
 - Aiding students in filling out enrollment application information
- Services Related to Securing Financial Aid, including:
 - Completing financial aid applications on behalf of prospective applicants (including activities which are authorized by the Department, such as the FAA Access tool, which can be used to enter, correct, verify or analyze financial aid application data)

Exempt Activities (not subject to the ban **unless** the employee or entity is also involved in a covered activity)

- Marketing Activities, including:
 - Broad information dissemination
 - Advertising programs that disseminate information to groups of potential students
 - Collecting contact information
 - Screening pre-enrollment information to determine whether a prospective student meets the requirements that an institution has established for enrollment in a particular program
 - Determining whether an enrollment application is materially complete, as long as the enrollment decision remains with the institution
- Student Support Services (offered after the point at which financial aid is allowed to be disbursed for a payment period), including:
 - General student counseling
 - Career counseling
 - Financial aid counseling, including loan management
 - Online course support, both professional services and computer hardware and software
 - Academic support services, including tutoring, aimed at student retention, whether that support is provided prior to attendance in classes or after attendance has begun

⁷ “Individuals” is not defined by the Dear Colleague Letter. Because the Letter specifically refers to prospective or potential “applicants” under the same set of covered activities, “individuals” likely applies more broadly. It may include parents, guidance or college counselors, or other similar persons.

⁸ See *supra* note 7.

- Policy decisions made by senior executives and managers related to the manner in which recruitment, enrollment, or financial aid will be pursued or provided, such as decisions to admit only high school graduates

DCL, GEN-11-05 at 8–9.

B) What Constitutes Direct and Indirect Payment of Incentive Compensation?

Direct or Indirect Payment of Incentive Compensation

- “Tuition sharing” as a measure of compensation when based on a formula that relates the amount payable to the entity to the number of students enrolled as a result of the activity of the entity
- Profit sharing plans from which distributions are made to individuals based on the number of students enrolled by virtue of covered activities by the recipient
- Salary adjustments that take the form of incentive payments based directly or indirectly on success in securing enrollments or financial aid
- Payments based on the application of an admissions policy
- Bonus or other payments based on success in securing enrollments or financial aid

Not Direct or Indirect Payment of Incentive Compensation

- Tuition as a source of revenue from which compensation is paid to an unrelated third party for a variety of bundled services
- Profit sharing plans, including 401(k) type plans, from which distributions are made to individuals on a basis that is neutral with respect to the role the recipient plays in student recruitment or the securing of financial aid
- Cost of living adjustments (COLAs)
- Compensation adjustments based upon seniority
- Payments to faculty based upon student class size or academic achievement
- Payments to senior executives with responsibility for the development of policies that affect recruitment, enrollment, or financial aid
- Payments based upon securing student housing or other student services, including career counseling
- Volume driven arrangements based on services that are not recruitment or securing of financial aid

Id. at 10–11.

Institutions remain free, however, “to promote and demote recruitment personnel, as long as these decisions are consistent with the HEA’s prohibition on the payment of incentive compensation.” 75 Fed. Reg. at 66876. Accordingly, an institution may develop any system of compensation so long as that system is consistent with the prohibition. For example, the Department specifically recognized in the preamble to the final rule that salary scales for recruitment personnel reflecting added amounts of responsibility are permitted, so long as not inappropriately based upon success in

enrollment or the award of financial aid (*i.e.*, based upon the number of students recruited or receiving financial aid).

C) What About Third Party Entities?

Third party services such as student counseling, verification of student aid application information, advertising, and collection of contact information about enrollment applicants do not constitute student recruitment or awarding of financial aid. *Id.* at 12 Accordingly, entities and their employees providing such services are not subject to the incentive compensation ban. Also, volume-driven arrangements or payments to aggregators are not automatically prohibited, so long as not based in any part, directly or indirectly, on success in securing enrollment or financial aid. 75 Fed. Reg. at 66875.

Typically, the Department views “tuition sharing,” payments based on the amount of tuition generated, as an indirect payment of compensation based on success in recruiting. However, it does not consider such payments to violate the incentive compensation ban when paid to unaffiliated third parties that provide bundled services that may include recruitment services. DCL, GEN-11-05 at 11. Therefore, a third party entity not affiliated with the institution it serves or any other institution providing educational services may be paid on a tuition sharing basis for services provided by the third party entity that may include recruitment services. For example, a third party may provide a bundle of services including marketing, enrollment application assistance, recruitment services, course support for online delivery courses, provision of technology, placement services for internships and student career counseling. The institution may pay the third party under a tuition sharing plan, so long as the entity does not make prohibited incentive compensation payments to its employees and the institution does not pay the entity separately for its student recruitment services. *Id.* at 12.

The Department further notes that an institution receiving title IV, HEA program funds remains responsible for the actions of any entity that performs functions and tasks on the institution’s behalf, including ensuring that the third-party entity employees are not paid for covered activities in violation of the incentive compensation ban. *Id.*

Third parties may:

- Be paid for the provision of prospective student contact information;
- Pay their own employees based on the number of files processed when verifying financial aid applications;
- Post information about available programs and enrollment application procedures to a website for a particular school, answer general questions regarding completion of the enrollment application and forward the completed application to the school; or
- Collect financial aid information, contact a financial aid applicant and assist the applicant in locating other publicly available information about programs and resources for submitting information that could lead to an award of financial aid, so long as no additional contact is made by the third party.

Third parties may not:

- Be paid for recruiting (unless part of a bundled set of services, as discussed above), making admission decisions, or awarding title IV funds;
- Be paid for prospective student participation in preadmission or advising activities; scheduling an appointment to visit the enrollment or other office at an institution or prospective student attendance at such a meeting; or involvement in a prospective student's signing of an enrollment agreement or financial aid application;
- Be paid based on the number of students (calculated at any time) who apply for enrollment, are awarded financial aid or are enrolled for any period of time;
- Identify missing information on a financial aid application for the prospective student and then continue to counsel the applicant on receiving financial aid; or
- Encourage enrollment in an educational program before the purported enrollment deadline.

Id. at 9–12.

D) To Whom do the Rules Apply?

The Department considers payments to persons or entities “that *undertake or have responsibility for* recruitment and decisions related to securing financial aid as subject to the incentive compensation ban even if their work also includes other activities.” *Id.* at 8 (emphasis added). However, senior managers and executive level employees only involved in policy development, who do not otherwise engage in individual student contact or other covered activities will not generally be subject to the incentive compensation ban. Neither will a college president or dean who attends an open house or speaks with prospective students about the benefits of a particular institution.

E) What Factors May Form the Basis of Compensation?

In addition to factors such as seniority and length of employment, a variety of qualitative factors, so long as they do not relate to the employee's success in securing student enrollment or the award of financial aid, may form the basis of compensation for employees covered by the ban. For example, the Department notes that permissible factors may include: job knowledge and professionalism, skills such as analytic ability, initiative in work improvement, clarity in communications, and use and understanding of technology, and traits such as accuracy, thoroughness, dependability, punctuality, adaptability, peer rankings, student evaluations, and interpersonal relations. *Id.* at 13.

However, recruiters may not be compensated based on the academic performance of the students recruited.

The Department further explained that payment of bonuses to athletic personnel is common and is not typically viewed as compensation based on the recruitment of individuals as students. Instead, such payments reward the recruitment of individuals whose enrollment benefits an institution's athletic program. Accordingly, payments

rewarding coaches and staff for successful athletic seasons or team academic performance are allowed. *Id.*

F) When is Profit Sharing Allowed?

The Department also clarified that the “profit sharing” provision is meant to address compensation plans at for-profit corporations, not revenue generated at nonprofit corporations. The Department does not view eligible retirement plans as prohibited incentive compensation. Profit sharing within the confines of traditional pension plans is permitted so long as payments are not a substitute for otherwise impermissible compensation to individuals engaged in covered activities. *Id.* at 14.

Profit sharing with employees is permitted when shared in a way that is neutral to the type of work performed by an employee. Further, profit sharing payments must not be designed to benefit recruitment and financial aid personnel distinct from all other institutional employees. *Id.*

IV. Practical Tips and Best Practices for Compliance

- A) An institution should ensure that every job description appropriately and clearly defines employee responsibilities so that there is no question that an employee does not engage in a covered activity and therefore may be rewarded for success in enrollment or the award of financial aid.

The institution must keep in mind that the regulations give broad definitions of person and entity, and a broad description of a covered activity. Involvement in a covered activity can taint an employee or entity’s involvement in an otherwise exempt activity, if there is not a clear basis on which evaluations of exempt activities are made.

- B) As stated in the March 17, 2011 Dear Colleague Letter, the Department expects that employees with titles such as enrollment counselor, recruitment specialist, recruiter, and enrollment manager are subject to the incentive compensation ban. *Id.* at 13. However, a variety of other employees, including higher level employees deemed to have “responsibility for” recruitment and financial aid are likely also subject to the incentive compensation ban. Although the preamble states that some individuals, such as the college president, may be subject to the incentive compensation ban, individuals removed from the daily recruitment process but who attend open houses or speak with prospective students about the benefits of attending a particular institution would not violate the incentive compensation prohibition. *See* 75 Fed. Reg. at 66874; DCL, GEN-11-05 at 13.
- C) Communicate with employees regarding the new compensation system. Employees who engage in covered activities should be informed that they will no longer receive commission, bonus or other incentive compensation based in any part, directly or indirectly, upon their success in securing enrollment or financial aid. Employees responsible for evaluating recruiters and other employees engaging in covered

activities must receive specific training to implement the new, merit-based evaluation system. It is not enough for an institution to create a proper compensation system on paper; the institution must actually implement the system.

- D)** The Department has specifically identified permissible compensation and evaluative factors, including: seniority, length of employment, job knowledge and professionalism, skills such as analytic ability, initiative in work improvement, clarity in communications, and use and understanding of technology, and traits such as accuracy, thoroughness, dependability, punctuality, adaptability, peer rankings, student evaluations, and interpersonal relations. Prohibited factors include academic performance, retention, completion, graduation or job placement of students recruited. Despite the fact that many of the permissive factors seem correlative to success in securing enrollment or the award of financial aid (*e.g.*, employees that communicate clearly and effectively are likely to return a higher number of enrollments), the preamble and the Dear Colleague Letter do not suggest that such correlative factors are inherently suspicious or will cause added scrutiny by the Department.

Although the preamble to the final rules states that “recruitment of student athletes is no different than recruitment of other students” (meaning that compensation cannot be based on completion or graduation rates of student athletes), 75 Fed. Reg. at 66874–75, payments rewarding coaching staff and athletic department personnel for a successful athletic season, team academic performance, and other measures of a successful team are permitted.

- E)** When engaging third party entities to perform services that may include recruitment, the institution should be sure to receive assurances that the entity will abide by the incentive compensation ban or obtain an indemnification agreement from the third party. The institution should distribute the incentive compensation rules and a summary of dos and don'ts to the third party entity. Further, before entering into a tuition sharing arrangement with a third party, ensure that the entity is not affiliated with your institution or any other institution providing educational services.
- F)** Institutions can develop performance levels for recruitment personnel (such as junior, senior, manager and director) to effect promotion and termination based upon permitted performance factors.
- G)** In the preamble to the final rules, the Department expressed its preference for fixed salary compensation plans, stating, “as a general matter, recruitment personnel should be compensated with a fixed salary to ensure that their ability to focus on what is in a student's best interest is not compromised.” 75 Fed. Reg. at 66877. In its March 17 Dear Colleague letter the Department clearly indicates that it considers salary adjustments that take the form of incentive payments based directly or indirectly on success in securing enrollments or financial aid to be a type of payment that constitutes direct or indirect payment of incentive compensation. DCL GEN-11-05 at 10. *See also* 75 Fed. Reg. at 66876.

The text of the regulation reads in pertinent part:

(b)* * *

(22)(i) It will not provide any commission bonus, or other incentive payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of title IV, HEA program funds.

* * * * *

(B) For the purpose of paragraph (b)(22) of this section, an employee who receives multiple adjustments to compensation in a calendar year and is engaged in any student enrollment or admission activity or in making decisions regarding the award of title IV, HEA program funds is considered to have received such adjustments based upon success in securing enrollments or the award of financial aid if those adjustments create compensation that is based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid.

(ii) Notwithstanding paragraph (b)(22)(i) of this section, eligible institutions, organizations that are contractors to eligible institutions, and other entities may make—

(A) Merit-based adjustments to employee compensation provided that such adjustments are not based in any part, directly or indirectly, upon success in securing enrollments or financial aid....”

Despite the Department’s apparent interpretation as reflected in the Dear Colleague Letter and the preamble to the rules, an argument can be made that the language of the regulation only prohibits *multiple* salary adjustments per year that take the form of incentive compensation based upon success in securing enrollments or the award of financial aid, based on two factors. That argument is as follows:

First, (ii)(A) (what is allowed notwithstanding (i) is the counterpart to (i)(B) (what is barred in (i)) and allows for *merit-based* adjustments, regardless of (i)(B)’s prohibition on multiple adjustments, at any time and in any number throughout the year. Subsection (i)(B) only prohibits *multiple* adjustments per year if the adjustments create compensation based upon success in securing enrollments or the award of financial aid. It does not bar a *single* adjustment based upon success in securing enrollments or the award of financial aid. Notwithstanding the prohibition on multiple adjustments in (i)(B), (ii)(A) allows for multiple *merit-based* adjustments per year and reiterates that these adjustments cannot be based upon success in securing enrollments or the award of financial aid. There is no bar on single adjustments in (i)(B) and the "notwithstanding" language in (ii) only refers to the prohibitions in (i).

Second, if (ii)(A) is read to prohibit anything other than a merit-based adjustment, then it makes (i)(B) completely superfluous – subsumed under an overall bar in (ii)(A) – which is contrary to the tenets of regulatory construction.

As noted above, the Department almost certainly does not agree with this argument so counsel considering adopting this interpretation should be prepared for a serious disagreement with the Department and the consequences that could follow.

Prohibition on Misrepresentation

I. Introduction and Background

- A) For more than 25 years, the HEA and implementing regulations have prohibited all institutions participating in Title IV Financial Aid programs from making “substantial misrepresentations” in three broad areas: (1) the nature of their educational programs; (2) the nature of their financial charges; or (3) the employability of their graduates. (HEA Section 487; Subpart F, section 668.)
- B) In August 2010, the U.S. Government Accountability Office (GAO) conducted undercover testing of 15 for-profit colleges and allegedly found that the colleges engaged in deceptive or otherwise questionable marketing practices, including encouraging applicants to falsify FAFSA information; exaggerating applicants’ potential salary after graduation; and failing to provide clear information about program costs, duration, and graduation rates. (<http://www.gao.gov/products/GAO-10-948T>.)
- C) As a result, modified regulations on misrepresentation were a topic of discussion in the program integrity negotiated rulemaking between DOE and educational stakeholders in 2009-10. The negotiations included consideration and ultimately rejection of adopting existing FTC guidelines prohibiting misrepresentations which already apply to for-profit institutions. (75 Fed. Reg. 66913.)
- D) According to DOE, the resulting program integrity rules strengthen its regulatory enforcement authority against institutions that engage in substantial misrepresentation and clarify what constitutes misrepresentation. DOE reports that the rules enhance its ability to address deceptive practices that compromise the ability of students to make informed choices about institutions and the expenditure of their resources on higher education. (75 Fed. Reg. 66913-14.)

II. Definition of “Substantial Misrepresentation”

- A) **Definition of misrepresentation:** Under the new rules, a “*misrepresentation*” is any false, erroneous or misleading statement made directly or indirectly to a student, prospective student, member of the public, accrediting agency, state agency, or DOE. A “*prospective student*” is any individual who has contacted the institution for the purpose of requesting information about enrolling or who has been contacted directly by the institution or indirectly through advertising about enrolling at the institution. (34 C.F.R. § 668.71(c).) A misrepresentation may be made in writing, visually, orally, or through other means. (34 C.F.R. § 668.71(c).)

1. Misrepresentations may include the following:
 - a.) A statement that “has the likelihood or tendency to deceive or confuse” (note that under this definition, a misrepresentation does not require a specific intent to deceive);
 - b.) The dissemination of student endorsements/testimonials given under duress or as a requirement for program participation; and
 - c.) Misrepresentations made in states in which programs are offered (not only in the state where the institution is physically located). (75 Fed. Reg. 66919.)
2. Misrepresentations will not include the following:
 - a.) Predictions not based on false or misleading information; or
 - b.) General statements and opinions; or
 - c.) Information provided by state and federal governments. (75 Fed. Reg. 66917-19.)

B) Definition of substantial misrepresentation: A “*substantial misrepresentation*” is any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment. (34 C.F.R. § 668.71(c))

III. Scope and Categories of “Substantial Misrepresentations”

- A) Sources of a substantial misrepresentation:** A substantial representation may be made by the institution itself, the institution’s representative, or an ineligible institution, organization, or person with whom the institution has an agreement to provide educational programs, marketing, advertising, recruiting, or admissions services. (34 C.F.R. § 668.71(c).) Routine vendors that provide services other than those outlined above and statements made by students through social media will not be sources of a substantial misrepresentation. (75 Fed. Reg. 66916.)
- B) Categories of Substantial Misrepresentation:** There are four categories of prohibited substantial misrepresentations, identified below. “The Department will not evaluate, nor potentially sanction, institutions for their substantial misrepresentations that do not fall within one of these [] categories.” (March 17, 2011 Dear Colleague Letter Re: Implementation of Program Integrity Regulations, “DCL GEN 11-05” p. 15).
1. **Misrepresentations regarding the nature of an institution’s educational program(s)** are prohibited (34 C.F.R. § 668.72), including those regarding:
 - a.) The type, source, nature and extent of accreditation;

- b.) The process and conditions for transferring or accepting transfer credits;
 - c.) Whether successful program completion qualifies a student for:
 - i) Acceptance to a labor union or similar organization;
 - ii) Licensing, examination, certification, or other conditions known or reasonably known as necessary to secure employment in a recognized occupation;
 - d.) The requirements for completion;
 - e.) Grounds for termination;
 - f.) Course recommendations/endorsements;
 - g.) Institutional size, location, facilities, or equipment;
 - h.) The appropriateness of program objectives;
 - i.) Characteristics of faculty and personnel;
 - j.) The availability of employment or financial assistance;
 - k.) The availability of teaching and counseling assistance;
 - l.) The nature and extent of prerequisites;
 - m.) Subject matter and degree completion; and
 - n.) Whether a degree is authorized by an appropriate state educational agency.
2. **Misrepresentations regarding the nature of an institution's financial charges** are prohibited (34 C.F.R. § 668.73), including those regarding:
- a.) Scholarship offers;
 - b.) Customary charges;
 - c.) Program costs and refunds;
 - d.) The availability and application for financial assistance, including responsibility to repay loans; and
 - e.) The right to reject financial aid or assistance.

3. **Misrepresentations regarding the employability of an institution's graduates** are prohibited (34 C.F.R. § 668.74), including those regarding:
 - a.) An institution's relationship with an agency providing training leading directly to employment;
 - b.) Plans to maintain a placement service;
 - c.) Knowledge about current or likely future conditions, compensation, or employment opportunities in program's industry/occupation;
 - d.) Whether employment is offered by an institution or whether use of a talent contest is employed;
 - e.) Government job market statistics for placement of graduates;
 - f.) Other requirements generally needed to be employed in a field; and
 - g.) The failure to disclose factors that would prevent an applicant from qualifying for job requirements.
4. **Misrepresentations regarding an institution's relationship with DOE** are prohibited (34 C.F.R. § 668.75) as follows: An institution, its representatives, and anyone with whom it has an agreement "may not describe the eligible institution's participation in the title IV, HEA programs in a manner that suggests approval or endorsement by the U.S. Department of Education of the quality of its educational programs."

IV. Enforcement

A) Factors influencing DOE's evaluation of potential violations will include:

1. In response to concerns that the definition of "misrepresentation" is broad and that schools will be responsible for the acts of third parties, DOE has declared that it will govern and enforce this rule with a "Rule of Reasonableness." (75 Fed. Reg. 66914.) "The Department has also always operated within a rule of reasonableness and has not pursued sanctions without evaluating the available evidence in extenuation and mitigation as well as in aggravation. The Department intends to continue to properly consider the circumstance surrounding any misrepresentation before determining an appropriate response."
2. DOE has communicated that it will consider various factors when enforcing this rule (75 Fed. Reg. 66915), including (1) the magnitude of the violation; (2) whether the misrepresentation was intentional or inadvertent; and (3) whether there was a single, isolated occurrence.

3. Note that the new rules remove from the regulations an existing mechanism for informal disposal by DOE of minor, readily corrected complaints (Former 34 C.F.R. 668.75)

- B) Institutional exposure to sanctions or suit:** Should the Secretary determine that an institution has engaged in substantial misrepresentation (34 C.F.R. § 668.71), sanctions may include (a) revoking the institution’s program participation agreement; (b) imposing limitations on the institution’s participation in title IV programs; (c) denying participation applications made on behalf of the institution; and/or (d) initiating a proceeding against the institution. Private rights of action under the statute/regulations are not authorized, though nothing precludes an individual’s ability to pursue claims of substantial misrepresentation pursuant to state law. (75 Fed. Reg. 66916; DCL GEN-11-05 p. 15.)
- C) Objection process for findings of violation(s):** Institutions will be entitled to receive the full benefit of the process that existing law provides for the type of action initiated by DOE. (DCL GEN-11-05 p. 14; 34 C.F.R. § 668.71.) Under the HEA, that process would include reasonable notice and opportunity for a hearing before DOE suspends, terminates, or fines an institution. (20 U.S.C. 1094(c), HEA Section 487(c)(3).)

V. Questions and Concerns

- A)** Defining misrepresentation to include statements with a “likelihood or tendency to [] confuse” will no doubt broaden institutional exposure under this rule, despite the fact that confusing communications may be inevitable in the context of increasingly complex higher education operations. (34 C.F.R. § 668.71(c).) “Institutions routinely provide—and are often required to provide—information on a variety of complex and confusing subjects such as financial aid, ‘net-price,’ graduation rates, degree requirements, and state licensing requirements. Providing accurate information should not be the basis of a misrepresentation claim simply because an individual is confused about the information conveyed.” (Aug. 2, 2010 Correspondence from the American Council on Education to the Department of Education Re: Comments on the Notice of Proposed Rulemaking for the Program Integrity Rules, pp. 8-9.) As noted above, though the rules do not create a private right of action, they do not preclude individuals from pursuing claims pursuant to state law.
- B)** It is unclear to what extent, if any, affirmative omissions may be considered substantial misrepresentations. The commentary to the rules acknowledges “the failure of the proposed regulations to address affirmative omissions” and states that these “are more logically covered within the context of [mandatory] disclosures” required elsewhere. (75 Fed. Reg. 66917-18.) However, the rules themselves categorize the failure to disclose factors that would prevent an applicant from qualifying for job requirements as misrepresentation (34 C.F.R. § 668.74), suggesting that certain information may be so fundamental to a program that its affirmative omission is for all practical purposes a misrepresentation.

- C) The regulations make institutions responsible for the representations of their third-party vendors. (34 C.F.R. §§ 668.71(b) and (c).)

VI. Practical Tips and Best Practices for Compliance

- A) Establish training and education on the definition, scope, and sanctions for substantial misrepresentations and the importance of avoiding them. Prioritize those employees working in admissions, financial aid, and career services, and prioritize third-party vendors who provide services in educational programs, marketing, advertising, recruiting, and admissions.
- B) Implement protections in vendor contracts for the provision of services in educational programs, marketing, advertising, recruiting, and admissions, including the following:
 - 1. Language requiring a vendor to comply with the program integrity rules;
 - 2. Language permitting an institution to audit a vendor's records with reasonable notice; and
 - 3. Language requiring indemnification for a vendor's substantial misrepresentations.
- C) If possible, establish a process for routinely monitoring institutional representations to verify their accuracy. One option might be an audit sampling relevant communications made by an institution's representatives, particularly in areas of admissions, financial aid, and career services.
- D) Upon discovering the existence of a substantial misrepresentation, take immediate action to correct and/or mitigate its effects. Document the action(s) taken and any resulting effects, and take proactive measures to prevent future occurrences.

State Authorization Requirements

I. Background

Effective July 1, 2011, state authorization is required for public or private nonprofit, proprietary or postsecondary vocational institutions of higher education seeking to participate in federal student aid and other federal funding programs. Under the new rule, an institution is legally authorized "if the State has a process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws, and the institution meets the provisions of" the categories identified below. 34 C.F.R. § 600.9.

In-state institutions must be established by name as an educational institution either through a charter, statute, constitutional provision or other appropriate action, and/or (depending on the circumstances) be approved or licensed by the state to operate as an educational institution. These institutions must also abide by all applicable state approval or license requirements.

Public institutions are considered compliant to the extent they are operating in their “home” state. A state may also exempt an institution from any applicable approvals or licenses based upon an institution’s accreditation from an approved accreditation agency or the institution’s existence of 20-plus years.

Out-of-state institutions not physically present in a state⁹ must meet any state requirements for it to legally offer postsecondary education in that state.

The Department determines whether an institution has an acceptable state authorization for participation in HEA programs. 75 Fed. Reg. at 66863. “If a state declines to provide an institution with legal authorization to offer postsecondary education in accordance with these regulations, the institution will not be eligible to participate in Federal [student financial aid] programs.” 75 Fed. Reg. at 66859. Similarly, if a state is unwilling to comply with the new rules (either by establishing a complaint process or other required state authorizations, approvals or licensures), there is no requirement that it do so. 75 Fed. Reg. at 66860. However, if an institution ceases to qualify as an eligible institution because its home state is not compliant with amended § 600.9, the institution and its students will lose eligibility to participate in title IV, HEA programs. 75 Fed. Reg. at 66863. The Department may thereafter limit or terminate the institution’s ability to participate in the programs. *See* 34 C.F.R. Part 600, Subpart D; 34 C.F.R. § 668.26.

II. Authorization Requirements

A) Institutions Established By Name as an Educational Institution by a State

(A) The institution *is established by name as an educational institution* by a State through a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity *and is authorized to operate educational programs beyond secondary education*, including programs leading to a degree or certificate.

[and]

(B) The institution complies with any applicable State approval or licensure requirements, except that the State may exempt the institution from any State approval or licensure requirements based on the institution’s accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.

34 C.F.R. § 600.9(a)(1)(i) (emphasis added).

Institutions in this category are authorized for title IV purposes, provided they comply with any applicable state approval or licensure requirements. As is noted in the preamble, a state is not required to create an approval or licensure agency. 75 Fed. Reg.

⁹ “Physically located” in a state means that an institution “has a campus or other institutional site in that state.” 34 C.F.R. §§ 600.4(b), 600.5(c), 600.6(c).

at 66858. Institutions that are accredited by an approved accreditation agency or have been in operation for at least 20 years may be exempted by the State from approval or licensure requirements, if any.

Note that, to the extent a public (state) institution is operating in its “home” state, it is considered compliant with § 600.9 for its home state operations. 75 Fed. Reg. at 66867.

B) Institutions Authorized to Conduct Business in the State or to Operate as a Charitable Organization

If an institution is established by a State on the basis of an authorization to conduct business in the State or to operate as a nonprofit charitable organization, but not established by name as an educational institution under paragraph (a)(1)(i) of this section, the institution (A) *by name, must be approved or licensed by the State to offer programs beyond secondary education, including programs leading to a degree or certificate; and (B) may not be exempt from the State’s approval or licensure requirements based upon accreditation, years in operation, or other comparable exemption.*

34 C.F.R. § 600.9(a)(1)(ii) (emphasis added).

Institutions in this category must be approved or licensed by the state to offer postsecondary education programs. Exemptions for accreditation or years in operation are not applicable to this category of institutions.

As noted above, however, a state is not required to create an approval or licensure agency or process and some states do not currently have such a process. Accordingly, the preamble provides that “institutions unable to obtain State authorizations in [such a] State may request a one-year extension of the effective date of these final regulations to July 1, 2012, and if necessary, an additional one-year extension of the effective date to July 1, 2013.” 75 Fed. Reg. at 66863. “[T]o receive an extension of the effective date . . . an institution must obtain from the State an explanation of how a one-year extension will permit the State to modify its procedures to comply with amended § 600.9.” *Id.*; *see also* 75 Fed. Reg. at 66833.

C) Institutions Authorized by the Federal Government or an Indian Tribe

The Secretary considers an institution to meet the provisions of paragraph (a)(1) of this section if the institution *is authorized by name to offer educational programs beyond secondary education by (i) the Federal Government; or (ii) . . . an Indian tribe*, provided that the institution is located on tribal lands and the tribal government has a process to review and appropriately act on complaints concerning an institution and enforced applicable tribal requirements or laws.

34 C.F.R. § 600.9(a)(2) (emphasis added).

Tribal college programs located on non-tribal lands must comply with any state approval requirements in order for the tribal college to maintain its status as an eligible institution.

D) Religious Institutions

[A]n institution is considered to be legally authorized to operate educational programs beyond secondary education if it is exempt from State authorizations as a religious institution under the State constitution or by State law.

34 C.F.R. § 600.9(b)(1).

A religious institution is one that “is owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation” and “awards only religious degrees or certificates.” *Id.* at (b)(2).

E) Institutions Offering Distance or Correspondence Education

If an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located or in which it is otherwise subject to State jurisdiction as determined by the State, the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State. An institution must be able to document to the Secretary the State’s approval upon request.

34 C.F.R. § 600.9(c).

Institutions must demonstrate to the Department that they are legally authorized by their “home” state as well as any other state in which they are physically located. Note that the meaning of the term “offering” is left to state discretion. Beyond this requirement, an institution must comply with any state requirement for it to offer postsecondary distance or correspondence education within the borders of another state.

The preamble acknowledges that states may enter into reciprocal agreements to recognize each other’s authorizations. In such cases, the Department will consider an institution legally authorized in both states (its home state and the reciprocal state) so long as the institution provides appropriate documentation of its home state authorization and the reciprocal agreement. 75 Fed. Reg. at 66867.

Under the rule, institutions offering distance or correspondence postsecondary education must comply with all applicable requirements in their relevant non-home states by July 1, 2011. However, as discussed below, this deadline will be postponed for a

particular institution if it is deemed to be making a “good-faith effort” to comply, by principally being able to demonstrate that it has applied for the required state approvals.

F) Note Regarding Complaint Procedures

In addition to following the applicable established-by-name and approval/licensure requirements, if an institution is to be considered legally authorized to offer postsecondary education in a state, the state must have “a process to review and appropriately act on complaints concerning [an] institution including enforcing applicable State laws.” 34 C.F.R. § 600.9(a)(1). As noted, however, an institution within a state that has no complaint procedure by July 1, 2011, may request a waiver from the Department for the 2011-2012 year. This request must be accompanied by an explanation from the State as to how a one-year extension will permit the State to comply with the new rules. 75 Fed. Reg. at 66833, 66863. This extension may be further extended to July 1, 2013.

Under § 668.43(b), an institution must “provide its students or prospective students with contact information for filing complaints with its accreditor and with its State approval or licensing entity and any other relevant State official or agency that would appropriately handle a student’s complaint.” 34 C.F.R. § 668.43(b).

III. March 17, 2011, April 20, 2011 Dear Colleague Letters—State Authorization, Distance Education

The March 17, 2011 Dear Colleague Letter focused primarily on the new state authorization rule. The Department provided interpretive guidance and clarified provisions of the rule. *See* Dear Colleague Letter, GEN-11-05 (Mar. 17, 2011). On April 20, 2011, the Department issued another Dear Colleague Letter providing additional clarifications to the distance education component of the state authorization rule. *See* Dear Colleague Letter, GEN-11-11 (Apr. 20, 2011). The following is an overview of this guidance.

A) Clarifications Regarding Authorization by Name

The Department reiterated that a state may use a variety of means to establish postsecondary institutions, including charters issued by a state agency, statute, constitutional provision or other action issued by an appropriate state agency or entity.

With respect to “other action,” a letter issued by the state naming an institution does not satisfy the requirements of § 600.9(a)(1)(i)(A). The institution must be authorized by name *to offer postsecondary education*. The “other action” may be an institution’s articles of incorporation, but only if the articles are for the establishment of a postsecondary institution and the institution is incorporated by name. If the articles of incorporation are merely for a business or nonprofit charitable entity in the state, they are insufficient to authorize the institution to offer postsecondary education. In the latter case, the institution must receive further approval or licensure by the state to operate as a postsecondary education institution. DCL, GEN-11-05 at 2.

The Department noted that the appropriate state entity to take the “other action” will depend on state law.

Again, the Department emphasized that the new rule does not require that a state have, and does not preclude a state from having, a further approval or licensure process with which institutions must comply. However, if such approval or licensure processes are in place, an institution is required to comply with the additional requirements, unless specifically exempted by the state for reasons such as accreditation by an authorized accreditation agency, years in operation, or other comparable exception. The Department noted that an act of the state legislature may provide any necessary approval. *Id.* at 3–4.

Institutions established only as business or nonprofit charitable organizations must be approved or licensed by name by the state. Approval or licensure may not be exempted for such institutions.

B) Clarifications Regarding Religious Institutions

The Department reiterated that “when an institution is subject to State laws independent of its status as a religious institution, the Department requires that it have State legal authorizations.” *Id.* at 3. By way of example, the Department discussed a religious institution also operating a nursing school. According to the Department, the nursing school must comply with any state requirements imposed on nursing schools, even though the institution otherwise qualifies for the religious institution exemption.

Even if a religious institution complies with the exemption under § 600.9(b), the institution must also comply with, or meet exceptions contained within, state law in order to remain an eligible institution for federal financial aid funding purposes. *Id.*

C) Clarifications Regarding Complaint Process

Multiple state agencies or officials may be used to handle complaints about an institution. In such cases, the institution, pursuant to 34 C.F.R. § 668.43(b), must provide current or prospective students with the contact information for filing complaints with the state approval or licensing entity and any other relevant state agency or official that would handle a student’s complaint. This requirement also applies to institutions offering distance education, regardless whether the non-home state regulates the out-of-state institution’s provision of distance education. *Id.* at 4, 6.

In general, a state may not rely on institutional complaint and sanctioning processes because they are not deemed sufficiently independent. *See* 75 Fed. Reg. at 66866. However, a state may rely on a governing board or central office of a state-wide system of public institutions if deemed by the state to be sufficiently independent. Such board or central office should not handle complaints against other institutions in the state. *Id.* at 5.

D) **Clarifications Regarding Distance or Correspondence Education**

1. **Enforcement Date**

The Department commented in its March 17, 2011 Letter that an out-of-state institution offering distance education to students in a state has always been required to determine whether approval by the state was necessary and to have sought such approval. However, in response to institutions' concerns relating to the time and expense involved in complying with state regulations, the Department clarified in its April 20, 2011 Letter that it "will not initiate any action to establish repayment liabilities or limit student eligibility for distance education activities undertaken before July 1, 2014, so long as the institution is making good faith efforts to identify and obtain necessary State authorizations before that date." DCL GEN-11-11 at 2. Evidence of good faith efforts can include any one or more of the following:

- Documentation that an institution is developing a distance education management process for tracking students' place of residence when engaged in distance education.
- Documentation that an institution has contacted a State directly to discuss programs the institution is providing to students in that State to determine whether authorization is needed.
- An application to a State, even if it is not yet approved.
- Documentation from a State that an application is pending.

Id.

The April 20, 2011 Letter also confirmed that if a state has no applicable regulation or law governing the offering of distance education in the state, "then no action on the part of the institution is required." *Id.* Institutions are only expected to seek authorization under new state regulations *after* they are established.

2. **Directory of State Requirements**

Although the Department initially reported in the March 17, 2011 Letter that it would not be publishing a list of state authorization methods or agencies for distance education, it stated in the April 20, 2011 Letter that it is "committed to working with appropriate parties to develop a comprehensive directory of State requirements that provides a meaningful opportunity for States to clearly articulate their specific requirements and for institutions of higher education to easily access the requirements and apply to the State for authorizations." *Id.* Once developed, the directory will be publicly available on the Department's website.

3. **Military Personnel**

With respect to distance education provided to military personnel stationed in a state that requires approval for distance education programs originating in a different state, whether the institution must have approval from the state where the military personnel

are stationed is a matter of state law and is determined by whether the state applies its laws to military personnel located within its boundaries. DCL GEN-11-05 at 6.

4. No Minimum Number of Enrollments

The Department confirmed that there is no Federal minimum number of enrollments that will trigger compliance. States, however, may adopt their own standards for determining when enrollments trigger compliance with its approval requirements. *Id.* at 7.

5. Documentation that No State Approval is Required

Although the Department does not require an institution to obtain a document from a state confirming that the state does not require approval, the Department does expect an institution to be able to demonstrate upon request that no state approval was required. *Id.*

6. State Coordination

The Department noted in its April 20, 2011 Letter that is it interested in working with the higher education community “to support States’ efforts to develop model reciprocal agreements, common applications, or other methods that States could adopt to foster compliance” with the new rules. DCL GEN-11-11 at 3.

7. Enforcement

The Department reiterated in the March 17, 2011 Letter that, as has always been the case, if an out-of-state institution does not obtain the required state approval to offer distance education in a state, the Department can declare residents of that state enrolled in the institution’s distance education program ineligible for any title IV, HEA funds and hold the institution liable for those funds. The Department also retains the ability to take other actions it deems appropriate against a noncompliant institution. *Id.* at 6–7.

IV. Practical Tips and Best Practices for Compliance

- A) **Review how your institution is established.** Is the institution established by name to specifically offer postsecondary education? Or is the institution only established as a business or nonprofit charitable organization? If established by name, no further authorization may be required unless the state imposes additional rules.
- B) **See what approval or licenses are required by the state, if any.** Do not overlook approvals or licenses for specific programs, as may be required for nursing or other programs. If the institution is established by name to offer postsecondary education, it must also comply with applicable approvals or licenses unless the state offers an exemption based on accreditation, length of operation, or other comparable exemption.

If the institution is not established by name to offer postsecondary education, the institution must be approved or licensed by the state to do so. Determine whether the

state currently has an approval or licensure procedure. If the state does not, and will not by July 1, 2011, prepare a waiver request for the Department and gather appropriate documentation from the state explaining why an additional year will permit the state to comply with the new rules.

- C) **If your institution offers distance education:** Identify every state in which the institution is offering postsecondary education. Determine whether the states require approval for out-of-state institutions to operate or whether accreditation by an approved accreditation agency is sufficient. See resources such as the Council for Higher Education Accreditation, *State Uses of Accreditation: Results of a Fifty-State Inventory*, 7 (Sept. 2010) (providing a list of states that, at the time, declared accreditation sufficient for out-of-state institutions) or the State Higher Education Executive Officers, *State Authorization Resources and Directory*, available at <http://www.sheeo.org/stateauth/stateauth-home.htm> (developing a directory of state regulators and compendium of state regulations) to assist in this determination.

For the states in which accreditation is sufficient, the institution should immediately send these states notice that it is offering postsecondary education in the state and attach a copy of the institution's current accreditation. The institution should ask these states to keep it informed of any changes to the required state complaint process and contact information so that the institution may provide this information to its students.

If state approval is required, contact the state directly to discuss procedures for seeking authorization (and document such discussions), apply for state approval and receive documentation that the application for approval is pending, or other similar activities that demonstrate a good faith effort to identify and obtain necessary state authorizations. Note that developing a process for tracking and determining students' place of residence and applying in those states may in and of itself demonstrate a good faith effort.

Despite the extension of time to comply with distance education state approvals, evidence that an institution knew of a state requirement but willfully refused to comply will be grounds for enforcement action by the Department.

- D) **Band together with other institutions in a state to seek reciprocal treatment in as many states as possible.**

- E) **Determine what entities or officials are responsible for handling complaints made against your institution.** This includes any and all accrediting agencies. Remember that within a state a variety of entities or officials may have responsibility for handling complaints made against an institution. Prepare a disclosure for current and prospective students identifying all entities and officials and providing contact information for filing complaints. Institutions offering distance education must comply with this requirement for all states in which they are physically located and those states in which they offer distance education.

- F) A key reminder.** As state laws evolve in response to the new rules (and undergo future changes), it is critical that an institution take reasonable steps to respond to these changes. The Department stated in the March 17, 2011 Letter that it “recognizes that institutions need time to adjust to changes in State law, and the reasonableness of the steps taken by an institution to respond to those changes will be considered by the Department in evaluating an institution’s eligibility to participate in programs authorized by the HEA.” DCL GEN-11-05 at 5. Documenting steps taken and communicating with the Department about the process should help an institution avoid loss of eligibility for title IV funds while it attempts to come into compliance with newly enacted state statutes and regulations.
- G) Utilize NACUA resources.** NACUA members should consult with the State Authorization resource page created by NACUA, available at http://www.nacua.org/lrs/NACUA_Resources_Page/StateAuthorizationRule.asp. This site includes links to the comprehensive directory of state requirements being developed by the State Higher Education Executive Officers (SHEEO), with support from NACUA. NACUA members may also join the NACUALINK online discussion group devoted to the state authorization rule at <http://tinyurl.com/43o5rpz>.

ATTACHMENTS

American Council on Education
Summaries of Gainful Employment Regulations

Division of Government & Public Affairs

U.S. Department of Education Regulations Related to Programs That Must Lead To Gainful Employment Under Title IV of the Higher Education Act

The U.S. Department of Education (“ED”) has issued new rules pertinent to programs that are required to lead to gainful employment in a recognized occupation for purposes of federal student financial aid programs (“GE programs”). On Oct. 29, 2010, ED issued final rules, effective July 1, 2011, that impose new reporting, disclosure, and notice and approval requirements with respect to GE programs. In addition, on June 13, 2011, ED published final rules establishing new debt measures for determining whether a program leads to gainful employment in a recognized occupation and is therefore eligible for federal student financial aid. We summarize here, in question and answer form, certain aspects of the gainful employment requirements, with a focus on describing the types of programs that are GE programs. The attachment provides a decision tree for determining whether a program offered by a non-profit or public institution is a GE program.

1. Do the gainful employment requirements apply to public and independent non-profit 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 (“Title IV”), regardless of whether the institution is non-profit, public, or proprietary. However, the requirements apply only with respect to certain programs at non-profit and public institutions, whereas they apply to all programs at proprietary institutions with some limited exceptions.

2. Do the new disclosure and reporting requirements in 34 C.F.R. § 668.6, the new program notice and approval requirements in 34 C.F.R. §§ 600.10 and 600.20, and the new debt measures for determining whether a program leads to gainful employment in a recognized occupation in 34 C.F.R. § 668.7 apply to all education programs offered by institutions that participate in the Title IV programs?

No, the gainful employment requirements apply only to GE programs.

3. Are programs that lead to a degree—including associate’s degrees, bachelor’s degrees, graduate degrees, and professional degrees—GE programs?

Degree programs are not GE programs when offered by non-profit or public institutions, because degree programs that are offered by such institutions are not required to lead to gainful employment in a recognized occupation in order to be Title IV eligible. With limited exceptions, degree programs are GE programs when offered by proprietary institutions because degree programs that are offered by such institutions generally must lead to gainful employment in a recognized occupation in order to be Title IV eligible.

This memorandum was prepared by the Washington, DC law firm Hogan Lovells US LLP (June 24, 2011).

4. Are non-degree programs at public and non-profit institutions GE programs?

Yes, if the non-degree program is a Title IV-eligible program in accordance with applicable requirements. ED has indicated that non-degree GE programs at non-profit and public institutions include undergraduate certificate programs, postbaccalaureate certificate programs, graduate certificate programs, and postgraduate certificate programs.

At public and non-profit institutions, the following types of non-degree programs are Title IV eligible:

- (1) A program that is at least one-academic-year in length, leads to a certificate or other non-degree recognized credential, and prepares students for gainful employment in a recognized occupation.
- (2) A program that is less than one-academic-year in length and meets ED requirements applicable to vocational programs. Three types of vocational programs are Title IV eligible; all must lead to gainful employment in a recognized occupation. They are:
 - 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 persons who have not completed the equivalent of an associate degree.
 - Programs that provide at least 300 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 or 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 vocational programs.

5. Are non-degree programs at proprietary institutions GE programs?

Yes, if the non-degree program is a Title IV-eligible program in accordance with applicable requirements. A non-degree program that is offered by a proprietary institution must meet the requirements above related to vocational programs in order to be Title IV eligible. ED has indicated that non-degree GE programs at proprietary institutions include undergraduate certificate programs, postbaccalaureate certificate programs, graduate certificate programs, and postgraduate certificate programs.

6. Are there other programs that are GE programs?

Yes. ED-approved “comprehensive transition programs” for students with intellectual disabilities are also GE programs when offered by non-profit, public, or proprietary institutions. 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.

7. Are non-Title IV eligible programs GE programs?

No, non-Title IV eligible programs are not GE programs and therefore are not subject to the gainful employment requirements.

8. Suppose a program is Title IV eligible and would ordinarily qualify as a GE program. If the institution awards no Title IV aid to students who are enrolled in that program, does it still qualify as a GE program?

ED has indicated that it will consider a Title IV-eligible program that is otherwise required to be treated as a GE program to be a GE program (and thus subject to GE program requirements) even if the institution awards no Title IV aid to students enrolled in the program. However, if the institution notifies ED that it does not want the program to be treated as a Title IV-eligible program and it will award no Title IV aid to students enrolled in the program, ED will no longer consider the program to be a GE program. The program's Title IV-eligibility end date, as reported to ED, affects when the institution no longer must comply with gainful employment requirements with respect to that program. ED's Gainful Employment Frequently Asked Questions ("FAQs") provide guidance on the process to follow to discontinue a program's Title IV eligibility. The FAQs are posted at <http://www.ifap.ed.gov/GainfulEmploymentInfo/2011GEFAQ.html>.

9. If a program leads to a degree but students also earn certificates as part of the degree program, is any aspect of the program considered to be a GE program?

ED has indicated that awarding students one or more certificates as part of a degree program does not create GE programs based upon the awarding of the certificates when the degree program is offered by a non-profit or public institution.

10. 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. The distinction is based on Title IV eligibility requirements. A teacher certification program that results in a certificate awarded by an institution must meet the applicable criteria identified in Question 4 in order to be a Title IV-eligible program, and thus must lead to gainful employment in a recognized occupation. In contrast, teacher certification programs that do not result in a certificate awarded by the institution but which consist of a collection of course work necessary for the student to receive a state professional teaching credential or certification are not Title IV-eligible programs and, thus, are not GE programs. Students enrolled in such teacher certification programs are nevertheless 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.

11. In addition to teacher certification programs that do not lead to an institutionally awarded credential, are there other non-degree programs that are not GE programs when offered by a non-profit or public institution?

Yes, there are two additional types of non-degree programs that are not GE programs: (1) Programs that are at least two academic years in length and are fully transferable to a bachelor's degree program are not GE

programs, and (2) preparatory courses of study that provide course work that is necessary for enrollment in a Title IV-eligible program are not GE programs. The latter type of program is similar to teacher certification programs that result in no certificate being awarded by the institution (see Question 10), 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.

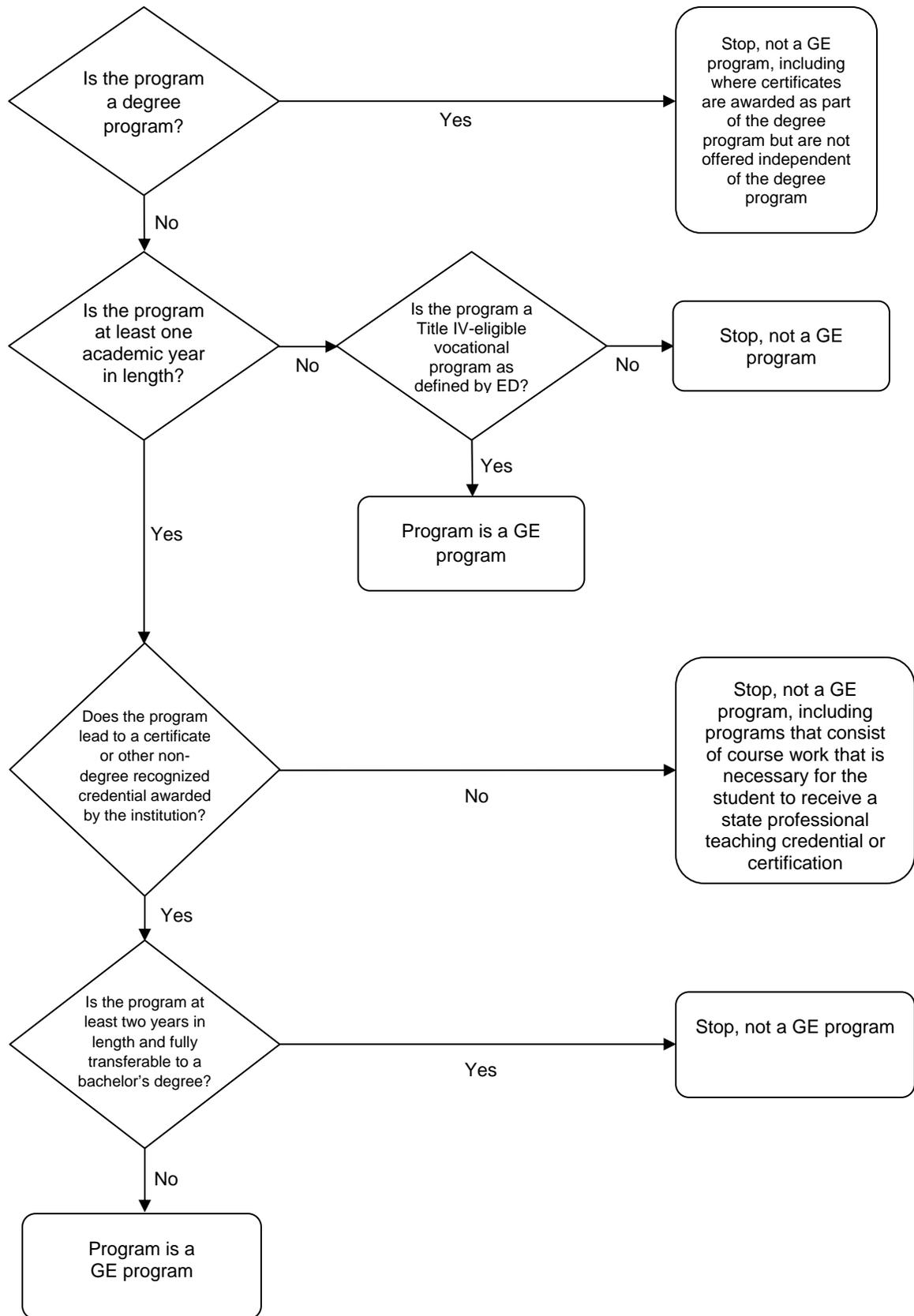
12. Are there programs that are not GE programs when offered by a for-profit institution?

In addition to the non-GE programs identified in Questions 10 and 11 (other than programs that are at least two-academic-years in length and are fully transferable to bachelor's degree program), proprietary institution programs that lead to a baccalaureate degree in liberal arts are non-GE programs if the institution has been accredited by a regional accrediting agency since October 2007 and the institution has offered the program since January 2009. Few proprietary institutions have such programs.

13. Do the gainful employment requirements apply to foreign institutions?

Yes. With respect to foreign public and non-profit institutions, programs that are 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, the only programs that are eligible for Title IV aid are degree programs in medicine, nursing, and veterinary science; those programs are GE programs and are subject to gainful employment requirements.

GE Programs Decision Tree for Non-Profit and Public Institutions



This decision tree aims to guide an institution through major considerations related to determining whether a program is a GE program. It does not address all considerations nor does it incorporate all GE and non-GE programs. Please review the Q&A for more detail.