Introduction

Gainful employment metrics are a proxy measure for the value of a post-secondary program: does it result in employment outcomes for graduates sufficient to justify its cost. The GE metrics promote and protect the purpose of the federal student loan program by preventing federal dollars from subsidizing programs that do not provide students (and, by extension, the country as a whole) a sufficient return on investment. The availability of federally guaranteed student loans sends a strong signal that the program has been vetted, and merits the loan of federal taxpayer money, because the program will likely put the student in a position to repay the loans.

Under the Department's proposal, college programs can continue to receive federal aid for many years after the Department knows that the program is not succeeding, *i.e.* is not achieving a passing score in either debt-to-income calculation. The fastest that a program may lose eligibility is after two years of reporting failing G/E metrics. But even in that fastest case, a two-year program would have enrolled students and received aid for six years before that point. If the program loses eligibility after being in the zone for four years, a failing program may have enrolled students for eight years. It is also possible under the Department's proposal for a school to remain eligible indefinitely by passing a debt-to-income measure one out of every four years, even if outcomes for three out of four cohorts of completing students fall into the zone or failing range.

The Department's proposal generously allows institutions time to improve their programs before losing Title IV eligibility. While this policy may encourage institutions to refine their program's content and cost, and/or invest further in student placement services, it does not offer sufficient protection to students and, ultimately, to taxpayers. Multiple cohorts of students will borrow federally-guaranteed student loans in order to attend a program that **does not**, by the Department's own definition, prepare its students for gainful employment in a recognized occupation.

The harm to these individual borrowers cannot be undone. They have borrowed loans that, in hindsight, never should have been disbursed in the first place. Thus they have incurred debt, utilized a portion or all of their lifetime student loan allocation, and foregone other educational and employment opportunities on the basis of a false assurance about the nature and quality of the program. The availability of federally guaranteed student loans sends a strong signal that the program has been vetted, and merits the loan of federal taxpayer money, because the program will likely put the student in a position to repay the loans.

For students who reasonably relied on this assurance, simple fairness requires that the Department provide relief to borrowers who borrow money to attend programs that are known to fall below the Department's standards.

Relief to Students under the Proposed Regulation

The proposed regulation does not provide for any relief for students who are enrolled in a program that becomes ineligible, nor does it provide for any relief for students who attend programs with debt-to-income ratios that are in the zone or failing.

The regulation as currently drafted ensures that students will at least be aware of pending ineligibility of their program. Section 668.407(c) mandates that institutions in danger of becoming ineligible in the following award year must inform students that Title IV funds may not be available in the future. The institution must also explain whether it will continue to provide instruction; refund tuition, fees, and other required charges paid by the student or on behalf of the student to attend the program. The rule does not mandate that the schools make any of these options available to students.

Proposals for Student Relief

1. Recognize Failing or Zone GE Metrics as a Defense to Repayment and/or Collection

Framework:

This proposal calls for the Department to afford relief to the cohort of borrowers who attended a program during the time its GE metrics did not pass the Department's standards (*i.e.*, were in the zone or failing). It affords two tiers of relief.

First, for students who borrowed in order to attend a program that becomes ineligible, the Department will recognize the GE metrics as an affirmative defense to repayment. Once a program loses eligibility, under this proposal, the Department would notify all individuals with loans attributable to the program for the award years forming the basis of ineligibility of a procedure by which they may request recognition of their affirmative defense to repayment of the loan and/or cancellation of their loan.

Example: In 2014-15, Program X, a 2 year program, reports GE metrics for completers in 2009-10 and 2010-11 that are in the zone. In 2015-16, Program X's GE metrics reach the passing threshold, but fail for the next two years (2016-17 and 2018-19). The program becomes ineligible, and the Department notifies borrowers whose loans were disbursed between award years 2008-09 and the time that the program becomes ineligible that they may invoke the procedure.

Second, for students who borrowed to attend a program that was in the zone or failing during the student's entire period of enrollment, the Department will recognize the program's GE metrics as a defense to any collection action.

Authority:

With respect to Direct Loans, the Secretary has the authority to specific which "acts or omissions of an institution . . . a borrower may assert as a defense to repayment of a loan made under this part . . . ." 20 U.S.C. § 1087e(h).

The HEA grants the Secretary broad authority to "compromise, waive or release any right, title, claim, lien, or demand, however acquired . . . ." 20 U.S.C. § 1082(a)(6). This broad authority is reflected in the regulations, which state that "the Secretary may compromise a debt, or suspend or terminate collection of a debt, in any amount if the debt arises under the Guaranteed Student Loan Program authorized under Title IV, Part B of the Higher Education Act of 1965, as amended . . . ." 34 C.F.R. § 30.70(h). In addition, "The head of an executive, judicial, or legislative agency . . . may compromise a claim of the Government of not more than $100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe that has not been referred to another executive or legislative agency for further collection action . . . ." 31 U.S.C. § 3711(a)(2).

The Department may need to issue subregulatory guidance interpreting the authority mentioned above.

Budgetary Impact:

The Department could create a threshold that opens the possibility of cancellation only to borrowers who are in IBR, ICR, default, or otherwise demonstrate an inability to pay. Some graduates from failed programs would manage to repay loans and add no additional cost to the Department. The true cost of this proposal would amount to what the Department expects to receive on student loans once they are in default or collection.

Rationale:

This proposal provides a safety valve for student borrowers who attend programs that, in the relevant snapshot of time, do not meet the Department's definition of a passing program in terms of the GE metrics. Students who borrow to attend programs that later are deemed, ex post, to be ineligible are able to affirmatively defend against repayment of their loans. This compensates for the lag time of the metric.

For students who borrow in order to attend programs during a snapshot of time that is later determined to be in the zone or passing for the year that the loan was disbursed are able to assert GE metrics as a defense to collection, regardless of whether the program ultimately becomes ineligible. Thus, for this group, this proposal offers broader relief than the Department's current interpretation of its authority to recognize defenses to collection and repayment, found in its policy guidance and the language of the Direct Loan Master Promissory Note. Specifically, it does not require a borrower to demonstrate that his or her claim against an institution would form a cause of action under state law. This difference is crucial because a borrower who attended a school that did not prepare him or her for gainful employment will not necessarily have suffered a harm that constitutes a cognizable claim under applicable state law. The scope of consumer protection laws, if any, vary from state to state. Common-law claims of fraud or fraudulent inducement require high factual showings in order to make out a prima facie case. This proposal creates a presumption, based on the Department's own metrics, in favor of a defense to collection. In so doing, it relieves the borrower of the burden of investigating the law of his or her state, and eliminates additional barriers such as statutes of limitation and the effect of mandatory arbitration agreements that impact the availability of a cause of action.

Additionally, this proposal creates an incentive for the Department to exercise its oversight and enforcement powers, even beyond the gainful employment process. As discussed, the current proposed regulation relies heavily on ex post evaluation of GE programs. Ex ante evaluation would prevent the disbursement of loans to programs that fall short of the GE requirement and fewer borrowers would be in a position to raise the proposed defense to collection. To the extent that the final regulation does not incorporate ex ante evaluation, the Department will have an incentive to utilize other oversight and enforcement tools to limit Title IV participation to programs and institutions that provide value.

2. Require Schools to Refund Tuition as a Consequence of Ineligibility

Framework:

Amend § 668.407(c)(1)(ii): *Inform the student that, in the event that the program loses its eligibility for Title IV, HEA program funds, the institution will—*

(A)inform the student of the option, if any, to transfer to another program at the institution, and the financial impact of such a transfer on the overall cost to the student;

(B) inform the student of the option, if any, to transfer to another institution in order to complete the program, and the extent to which the student's credits will transfer;

(C) in the event that the institution will continue to offer instruction in the program, inform the student of the option to complete the program at the institution, and provide information on the total cost and amount of time associated with completion;

(D) inform the student that the school will refund the tuition, fees, and other required charges paid by, or on behalf of, the student for attending the program, and refund the same, if the student opts not to exercise the options in (A), (B), or (C).

Authority

The potential liability of an institution for return of tuition for an ineligible program is something that must be factored into the financial responsibility requirements of 20 U.S.C. §1099c(c).

Budgetary Impact

This proposal will not have any budgetary impact.

Rationale

Each award year, the institution attests, in the PPA, that its program prepares students for gainful employment in a recognized occupation, for example that the program length is reasonable in light of entry level qualifications in the specified occupation, and that there is a need for the training in order for the student to obtain a job in the specified occupation. 34 C.F.R. § 668.14(b)(26). When a school's program is in the zone or failing, even though it is not yet ineligible, it is not meeting the Department's definition of a passing program. When an institution receives notice from the Department that it is in the zone or failing the GE requirement, it should bear the risk that it will not improve outcomes for completers of the program.

Information asymmetry between the institution and the Department, and the institution and the student, justifies allocating the risk to the institution. In the first instance, the school has access to internal information about the cohort of student completers whose earnings will factor in to the subsequent year's calculations, as well as additional metrics that may indicate an improvement (or not) in completer outcomes. Unlike the Department, the institution is positioned to predict whether a program will become ineligible. Further, in most instances, non-passing programs will not be required to make any disclosures to current and prospective students under proposed § 668.407(c), which only requires disclosures in the year just prior to potential ineligibility.

In other areas of the HEA, the Department requires an institution to assume the financial risk that a future event will compromise its Title IV eligibility. For example, 34 C.F.R. § 600.10(c)(3) requires institutions to repay all Title IV HEA program funds received by or on behalf of students enrolled in a GE program that the school incorrectly concluded did not need to be approved by the Department as a "new program." Institutions are also liable for all Title IV funds distributed to or for the benefit of students enrolled in a branch campus that the school incorrectly concluded did not require authorization as a "new location" by the Secretary. *See* 34 C.F.R. § 600(h).

The proposed relief to students enrolled in non-passing programs is similar to that available indirectly to students enrolled in provisionally eligible institutions, once eligibility fails. Although a provisionally eligible institution is not required by the Department to repay all Title IV funds disbursed during its period of provisional eligibility, in effect the majority of students enrolled during the period of provisional institutional eligibility will be eligible for a closed school discharge. The reason for this is that the majority of institutions that fail to attain full eligibility cannot continue absent Title IV funds.

3. Require Schools to Post a Surety Bond or Letter of Credit

Framework

Add § 668.407(d)(2): *Zone or Failing Program: An institution with a program with final GE rates in the Zone or Failing range must post an irrevocable letter of credit or surety bond in an amount sufficient to cover refund of Title IV funds disbursed to or on behalf of students for attending the program in the event the program becomes ineligible. Institutions covered by the full faith and credit of a state are exempt from this provision.*

Authority

20 U.S.C. § 1099c (e) provides that "to the extent necessary to protect the financial interests of the United States," the Secretary may require financial guarantees from institutions participating in Title IV programs, in an amount "sufficient to satisfy the institution's potential liability to the Federal Government, student assistance recipients, and other program participants."

The Department already requires posting of letter of credit in certain circumstances. *See* 34 C.F.R. §§ 668.15(b)(5), (d)(1)(i), and (d)(2)(ii); 668.173(d); 668.175(b). For institutions that do not meet the financial responsibility standards in 34 C.F.R. § 668.171, 34 C.F.R. § 668.175 provides for irrevocable letters of credit in certain circumstances.

Budgetary Impact

This proposal would have no effect on the budgetary impact of the regulation.

Rationale:

This proposal requires schools with programs that are underperforming to bear the risk that the program will not improve.

4. Create a common pool to redress injuries to those attending closed programs

Framework: In order to be eligible for Title IV funds, institutions offering programs intended to prepare students for gainful employment in a recognized occupation must pay into a student protection fund administered by the Department, at a per-student rate established by the Secretary. In the event the program becomes ineligible, student borrowers enrolled in the program during an award year that the program's GE metrics were below the passing rate may apply for reimbursement from the fund.

Budgetary Impact

This proposal would impose administrative costs on the Department.

Rationale

This proposal mimics the practice in some states that protects students in the event of institutional closing. In some states, either for-profit schools or their students (passed through schools) pay into a student protection fund when students enroll. Students typically may seek reimbursement from the fund if (1) they were in attendance when school closed; or (2) they obtained a judgment against the school that they are unable to collect. Some states also provide relief when schools violate certain state laws. The fund is usually administered by the state agency responsible for the oversight of for-profit schools.

To the extent that schools pass this cost off to students, it will have an impact on their GE metrics.

5. Provisional Program Eligibility and False Certification Discharge

While we recognize that the Department will not consider False Certification Discharges during this rulemaking session, we include the analysis below for future consideration.

Framework:

Add subpart (f) to § 668.403: <u>Provisionally eligible program</u>. A GE program that is not a passing program.[1]

In the event that the school eventually becomes ineligible under the gainful employment standards, the Department could then revoke the program's provisional eligibility and provide false certification discharges to any student who was enrolled in the program during the provisional eligibility period, for loans paid by, or on behalf of the student, for attendance in the provisionally ineligible program.

Authority:

20 U.S.C. § 1087(c)(1) authorizes the Secretary to discharge a borrower's liability on a loan "if such student's eligibility to borrow…was falsely certified by the eligible institution." An "eligible student" is defined as a "regular student enrolled, or accepted for enrollment, *in an eligible program* at an eligible institution . . . ." 34 C.F.R. § 668.32(a)(1)(i) (emphasis added).

Budgetary Impact:

The Department has the authority to pursue the institution for repayment of loans discharged through false certification. The statute provides, "If a borrower who received, on or after January

[1] Provisional certification is not a new concept. In certain circumstances, the Department may provisionally certify and later revoke institutional eligibility. *See* 34 C.F.R. § 668.13(c) and (d).

1, 1986, a loan made, insured, or guaranteed under this part and . . . if such student's eligibility to borrower under this part was falsely certified by the eligible institution . . . then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees) *by repaying the amount owed on the loan and shall subsequently pursue any claim available to such borrower against the institutions and its affiliates and principals* . . . ." 20 U.S.C. § 1087(c)(1) (emphasis added). Moreover, a regulation provides, "The Secretary may require the repayment of funds . . . by the school if the Secretary determines that the unenforceability of a loan or loans, or the disbursement of loan amounts for which the borrower was ineligible, resulted in whole or in part from—(1) The school's violation of a Federal statute or regulation; or (2) The school's negligent or willful false certification." 34 C.F.R. § 685.308.

Rationale:

Same as for Proposal 3.