BASED ON THE JUNE 2023 PROPOSED FINANCIAL VALUE TRANSPARENCY AND GAINFUL EMPLOYMENT RULE

A Desk Guide for the 2023 Proposed Financial Value Transparency & Gainful Employment Rule

- ***Includes a step-by-step guide for projecting Debt-to-Earnings (D/E) rates under the proposed rule***

Brought to you by the Higher Education Team at Thompson Coburn LLP

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On May 19, 2023, the U.S. Department of Education (the "Department") published in the Federal Register the **official version** of its latest notice of proposed rulemaking ("NPRM").[1] While this proposed rule covers a number of important topic areas for Title IV-participating institutions, including financial responsibility, administrative capability, and certification procedures, the most substantial element of the Department's proposal is the reintroduction of the "gainful employment" or "GE" framework. Of particular significance, this latest version of the GE rule, now titled "Financial Value Transparency and Gainful Employment," has been expanded to cover all Title IV programs at all Title IV-participating institutions of higher education.

We have developed this Desk Guide to assist institutions as they contemplate compliance with this latest version of the GE rule. The Guide is divided into three parts. In Part I, we provide a succinct overview of the proposed Financial Value Transparency and Gainful Employment framework (for simplicity, hereinafter the proposed "GE rule"). In Part II, which is the primary focus of this Guide, we detail a step-by-step process institutions can follow to project Debt-to-Earnings (D/E) rates under the proposed rule. Finally, in Part III, we offer guidance regarding how institutions can project earnings premiums.

We believe efforts to project and understand D/E rate performance are worthwhile, even as calculated under the proposed rule. A final rule would not take effect until July 1, 2024, at the earliest, and lobbying, elections, and court challenges likely stand between the effective date and the first round of possible sanctions. This said, the sooner an institution is aware that it has (or may have) an issue, the sooner it can begin revising a problem program or creating and seeking approval of a new program to take its place. In addition, gathering data for the purpose of projecting rates may facilitate an institution's accompanying efforts to satisfy any reporting obligations under the final regulation.[2]

We hope you and your institution find this Desk Guide helpful as you navigate this latest version of the GE rule. If you have questions regarding the proposed rule or the projection methodology contained in this Guide, please do not hesitate to reach out. Contact information for our Higher Education Practice is included at the end of the Guide.
Kind regards,

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[1] *See 88 Fed. Reg. 32300 (May 19, 2023). The official title of the NPRM is Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB), and the Docket ID is* **ED-2023-OPE-0089**.
[2] As discussed in this Guide, under the proposed rule, institutions would be required to report a great deal of data to the Department by July 31, 2024.

Part I:
A Brief Overview of the Proposed Rule

From its enactment in 1965, the Higher Education Act ("HEA") has required all programs offered by proprietary institutions, and all non-degree programs offered by public and private non-profit institutions, to "prepare students for gainful employment in a recognized occupation."[3] In 2010, the Department determined to develop a system for measuring whether programs were satisfying this "gainful employment" standard.[4] The Department created a complex gainful employment rule that, among other things, attempted to compare the typical debt a program's graduates took on with their typical earnings after graduation. If a program's D/E rate did not consistently meet certain thresholds established by the Department, the program would lose its Title IV eligibility.

The 2010 GE rule, the first promulgated by the Obama administration, was largely **vacated** by the U.S. District Court in D.C. on the grounds that the Department did not sufficiently justify certain of its proposed thresholds.[5] In 2014, a new GE rule was created, and again, the court took issue with the rule, granting plaintiff's motion for summary judgment and finding, among other things, that the Department acted arbitrarily and capriciously with respect to its overall methodology for determining typical earnings.[6] In 2019, the 2014 GE rule was formally rescinded by the Trump administration for myriad reasons, including that it relied on a D/E rate formula "that is fundamentally flawed," is "inconsistent with the requirements of currently available student loan repayment programs," and "fails to properly account for factors other than institutional or program quality that directly influence student earnings and other outcomes."[7]

- The Department is now proposing to calculate and disclose D/E rates and a new "earnings premium" for every program at every Title IV institution. To be clear, it still would be the case that Title IV eligibility determinations would only be made for GE programs (non-degree programs offered by public and private non-profit institutions and all programs offered by proprietary institutions). But D/E rates and an earnings premium for non-GE programs (degree programs offered by public and private non-profit institutions) also would be calculated and disclosed to prospective and current students and be labeled "low-earning" or "high-debt-burden," per the agency's determination. Moreover, for any year in which the Department notifies an institution that its non-GE program has failed the D/E rates test, students would not be able to receive Title IV aid until they acknowledged that they reviewed the D/E rates and earnings premium for their non-GE program through the Department's new disclosure website.

- In addition to the D/E rates test, the proposed rule introduces an "earnings premium" test that also would be used to determine whether a GE program should remain Title IV-eligible. Even if a GE program's D/E rates were passing, the program still would lose its Title IV eligibility if the median earnings of the program's graduates fail to consistently exceed the median earnings of young adults who have only a high school diploma.

Following, we review each of the primary components of the proposed rule in additional detail.

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[3] *See* Pub. L. 89-329 (Nov. 8, 1965).
[4] This decision was not made in response to any new legislation or othert mandate from Congress.
[5] *See Ass'n of Priv. Colleges & Universities v. Duncan,* 870 F. Supp. 2d 133 (D.D.C. 2012).
[6] *See Am. Ass'n of Cosmetology Sch. v. Devos,* 258 F. Supp. 3d 50, 63 (D.D.C. 2017).
[7] 84 Fed. Reg. 31392 (July 1, 2019).

THE D/E RATES TEST FOR ALL PROGRAMS

With limited exceptions, each year the Department would calculate D/E rates for all Title IV-eligible programs at all Title IV-participating institutions. There are two proposed D/E rates, each of which attempts to measure graduate debt as a percentage of post-graduation earnings: (1) the Annual D/E Rate, and (2) the Discretionary D/E Rate. The formula associated with each metric is as follows:

$$\text{Annual D/E Rate} = \frac{\text{Annual Loan Payment}^{8}}{\text{Median Annual Earnings}^{9}}$$

$$\text{Discretionary D/E Rate} = \frac{\text{Annual Loan Payment}}{\text{Discretionary Earnings}^{10}}$$

Each year, the Department would calculate D/E rates for all programs at all Title IV institutions utilizing data obtained from institutions, the agency's systems, and a yet-to-be-determined federal agency that will provide the earnings information ("Earnings Agency").[11] The Department would determine whether a program "fails" the D/E rates test in accordance with the thresholds set out below:

FAIL
Annual D/E Rate greater than 8% **or** the denominator of the rate is zero and the numerator is positive
AND
Discretionary D/E Rate is greater than 20% **or** the income for the denominator of the rate is negative or zero and the numerator is positive

THE EARNINGS PREMIUM TEST FOR ALL PROGRAMS

With limited exceptions, each year the Department also would calculate an "earnings premium measure" for all Title IV-eligible programs at all Title IV-participating institutions. The earnings premium would be calculated using the following formula:

Earnings Premium = Median Annual Earnings - Earnings Threshold[12]

The Department would determine whether a program "fails" the earnings premium test in accordance with the following threshold:

FAIL
Earnings Premium is zero or negative (***i.e.,*** Annual Earnings are equal to or less than the Earnings Threshold)

[8] To calculate the Annual Loan Payment for each program, the Department would take a 2-year or 4-year cohort of qualifying graduates, determine the lesser of the total loan debt or net direct costs for each graduate, remove, if applicable, the appropriate number of largest loan debts, calculate the median loan debt for the cohort, and amortize that median loan debt over the applicable repayment period using the prescribed interest rate. See proposed 34 C.F.R. § 668.403.

[9] "Median Annual Earnings" is defined in the proposed rule as "the most currently available median annual earnings of the students who completed the program during the cohort period and who are not excluded…" Proposed 34 C.F.R. § 668.404(b). The Department "would calculate both the D/E rates and the earnings premium measure using earnings data provided by a Federal agency with earnings data." 88 Fed. Reg. 32328 (May 19, 2023).

[10] The Department would calculate Discretionary Earnings by subtracting from the Median Annual Earnings figure 150% of the Poverty Guideline for a single person in the continental United States, as published by the U.S. Department of Health and Human Services. The Department would use the Poverty Guideline for the most recent calendar year for which annual earnings are obtained. See proposed 34 C.F.R. § 668.403(a)(1).

[11] Though no agency has been selected, the Department indicates that its current preference is the Internal Revenue Service. 88 Fed. Reg. 32328 (May 19, 2023).

[12] "Earnings Threshold" is defined in the proposed rule as the "median earnings for working adults aged 25 34, who either worked during the year or indicated they were unemployed when interviewed, with only a high school diploma (or recognized equivalent) (1) In the State in which the institution is located; or (2) Nationally, if fewer than 50 percent of the students in the program are located in the State where the institution is located while enrolled."

PROCESS AND DETERMINATIONS FOR ALL PROGRAMS[13]

Each year, the Department would compile for each program a draft list of all students it believes graduated during the applicable cohort period ("Completer List") and provide the institution an opportunity to review and correct the list. The final Completer List would be sent to the Earnings Agency to obtain the median annual earnings of the students on the list. Once the earnings information is received, the Department would calculate the D/E rates and earnings premium for the program. Upo n finalizing the D/E rates and earnings premium, the Department would issue a notice of determination to the institution informing it of the D/E rates and earnings premium measure for each program, as well as whether each program is passing or failing, and the consequences of that determination. Unlike prior versions of the GE rule, the proposed process includes no opportunity for institutions to review and correct D/E rate data and calculations prior to reaching determinations or an alternate earnings appeal mechanism.

DISCLOSURE REQUIREMENTS FOR ALL PROGRAMS

The Department proposes to create a new disclosure website that would provide, among other things, the D/E rates and earnings premium for all GE and non-GE programs, as well as whether the program is "low-earning" or "high-debt-burden," per the agency's determination.[14] All institutions would be required to provide a "prominent link to, and any other needed information to access," the Department's disclosure website "on any web page containing academic, cost, financial aid, or admissions information about the program or institution."[15] In addition, institutions would be required to provide the information needed to access the disclosure website to current students and to "any prospective student, or a third party acting on behalf of the prospective student."[16]

CONSEQUENCES OF FAILURE FOR NON-GE PROGRAMS

For any year for which the Department notifies an institution that its non-GE program has failed the D/E rates test, the institution would have to ensure that students review the Department's website and acknowledge having seen the disclosure information about the program. Significantly, under the proposed rule, an institution would not be permitted to disburse Title IV funds to a student in a non-GE program with failing D/E rates until the student provided the required acknowledgment.[17]

CONSEQUENCES OF FAILURE FOR GE PROGRAMS

The proposed rule outlines three fundamental consequences of failure for GE programs:

Loss of Title IV Eligibility. A GE program becomes ineligible for federal financial aid if the program (1) fails the D/E rates test in two out of any three consecutive award years for which the program's D/E rates are calculated, OR (2) fails the earnings premium test in two out of any three consecutive award years for which the program's earnings premium is calculated.[18] Warnings and Acknowledgements. An institution must provide a warning to current and prospective students if its GE program could become ineligible in the next award year for which D/E rates or the earnings premium are calculated.[19]

As a practical matter, this means institutions would be required to issue warnings if a GE program fails a single year, because a GE program would be one year from potentially losing eligibility following a single failure. The Department indicates in the proposed rule that its new disclosure website will host the warnings, and an institution may not disburse Title IV funds to a student until the student acknowledges having reviewed the warning on the website.[20]

Period of Ineligibility. Significantly, an institution "may not seek to reestablish the eligibility of a failing GE program that it discontinued voluntarily either before or after D/E rates or the earnings premium measure are issued for that program, or reestablish the eligibility of a program that is ineligible under the D/E rates or the earnings premium measure, until three years following the earlier of the date the program loses eligibility... or the date the institution

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[13] *See* proposed 34 C.F.R. §§ 668.405 and 668.406.
[14] *See* proposed 34 C.F.R. § 668.407.
[15] *See* proposed 34 C.F.R. § 668.43(d), which details the required student disclosures.
[16] *Id.*
[17] *See id.* at proposed § 668.407(c).
[18] *See id.* at proposed § 668.602(a).
[19] *See id.* at proposed § 668.605(a).
[20] *See id.* at proposed § 668.605(g).

voluntarily discontinued the failing program."[21] The Department indicates in the commentary to the NPRM that this prohibition would cover any "substantially similar program," as well, which is defined as any program with "the same 4-digit CIP prefix and credential level."[22]

IMPACT PROJECTIONS FOR NON-GE PROGRAMS

The Department projects over 875,000 students in 1,633 failing non-GE programs.[23] The NPRM indicates 873 public programs (representing 561,100 students) and 760 private, non-profit degree programs (representing 313,900 students) would fail at least one of the proposed D/E rate or earnings premium tests.[24] The Department also observes that rates of not passing at least one of the tests are particularly high "for professional programs in law (19.6 percent of law programs representing 29.2 percent of enrollment in law programs), theology (6.6 percent, 25.4 percent) and health (9.7 percent, 18.6 percent)."[25] The Department projects over 400,000 students in 989 non-GE programs would be required to receive the required acknowledgment prior to receiving Title IV aid. The NPRM indicates 335 public programs (representing 127,900 students) and 654 private, non-profit degree programs (representing 273,700 students) would fail the D/E rate test.[26]

IMPACT PROJECTIONS FOR GE PROGRAMS

The Department projects nearly 700,000 students in 1,775 failing GE programs.[27] The NPRM states that 195 public GE programs (representing 38,000 students), 84 private, non-profit degree programs (representing 35,200 students), and 1,496 proprietary GE programs (representing 626,500 students) would fail at least one of the D/E rate or earnings premium tests.[28] Of the 1,496 proprietary GE programs that fail one of the two tests, 916 (61%) are undergraduate certificate programs that fail only the earnings threshold test.[29] The highest rate of failure is in Personal and Culinary Services, where 76 percent of enrolled students are in programs that would have failing metrics.[30]

REPORTING REQUIREMENTS

Under the proposed regulations, all institutions would be required to report to the Department an extraordinary array of data for their Title IV-eligible programs and students. Such data includes, for each student, the amount of institutional grants and scholarships disbursed; the amount of other State, Tribal, or private grants disbursed; and the amount of any private education loans disbursed, including private education loans made by the institution.[31] Institutions would be required to begin reporting data "no later than July 31 following the date these regulations take effect…," which likely would be July 31, 2024.[32] If the proposed regulations take effect July 1, 2024, institutions would be required to report data for "the second through seventh award years" by July 31, 2024. We believe this would mean data for award years 2014-2015 through 2019-2020 (the proposed rule is not perfectly clear on this point).[33]

CERTIFICATION REQUIREMENTS

As a condition of continued participation in the federal financial aid programs, an institution must certify that each GE program it offers "is approved by a recognized accrediting agency or is otherwise included in the institution's accreditation by its recognized accrediting agency, or, if the institution is a public postsecondary vocational institution, the program is approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation."[34] Institutions would have to update the certification within 10 days "if there are any changes in the approvals for a program, or other changes for a program that render an existing certification no longer accurate."[35]

[21] *Id.* at proposed § 668.603(c).
[22] 88 Fed. Reg. 32345 (May 19, 2023).
[23] *See* 88 Fed. Reg. 32418-32419 (May 19, 2023).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] See 88 Fed. Reg. 32420 - 32421 (May 19, 2023).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See id.* at proposed § 668.408.
[32] 88 Fed. Reg. 32339 (May 19, 2023).
[33] The Department proposes that for non-GE programs only, during the initial award year for which D/E rates and the earnings premium are calculated (likely 2024-2025), institutions may opt to only report data for the two most recently completed award years (2022-2023 and 2023-2024). *See* proposed 34 C.F.R. § 668.408(c).
[34] Proposed 34 C.F.R. § 668.604.
[35] *Id.*

Part II:
Projecting Debt-to-Earnings Rates

As noted in Part I, under the proposed rule, the Department annually would calculate the following two D/E rates for all Title IV-eligible programs at all Title IV-participating institutions:

$$\text{Annual D/E Rate} = \frac{\text{Annual Loan Payment}}{\text{Median Annual Earnings}}$$

$$\text{Discretionary D/E Rate} = \frac{\text{Annual Loan Payment}}{\text{Discretionary Earnings}}$$

In this Part II, we set forth a nine-step process institutions can follow to project D/E rates as calculated under the proposed rule.

Before we begin, we offer a word of caution. It is not possible to project with absolute certainty whether a program will produce satisfactory D/E rates because the public does not have access to some of the data the Department will use when making its determination for each program. Most significantly, under the proposed rule, the annual earnings information for graduates, which informs the denominator in each of the D/E rates, will be obtained directly from the yet-to-be-named Earnings Agency. This having been said, the steps set forth below should help institutions project whether programs will pass easily, will come close, or will likely fail.

Part II: Projecting Debt-to-Earnings Rates

Step 1: Determine the Scope of Your Institution

Step 2: Identify your "Programs"

Step 3: Determining which Students to Include in your Base Cohort

Step 4: Identifying the Applicable Cohort Period

Step 5: Determining Each Student's Loan Debt

Step 6: Calculation of the Median Loan Debt for Each Program

Step 7: Amortization of the Median Loan Debt to Determine the Annual Loan Payment

Step 8: Annual Earnings

Step 9: Discretionary Earnings

STEP ONE: DETERMINE THE SCOPE OF YOUR INSTITUTION

When the Department calculates D/E rates, it does so for each Program offered within a single institution. Accordingly, an accurate understanding of your institution, as viewed by the Department, is foundational to your rate projections and worthy of attention.

When an institution is first approved to participate in the federal financial aid programs, the Department assigns it a unique six-digit Office of Postsecondary Education Identification number ("OPE ID"). This OPE ID includes the institution's main campus and any additional locations the Department associates with that main campus. From the Department's perspective, the "institution" and the OPE ID are one in the same.

For many institutions, all locations — and all programs — fall within a single OPE ID. However, on occasion, and for various reasons, a single organization may operate more than one OPE ID. For example, if a local college merged into a large university, the college could retain its own OPE ID after the transaction. In such an instance, the Department would continue to view the university and the college as distinct "institutions," even if the public viewed them as a unified postsecondary entity. In this example, when calculating D/E rates, the Department would calculate separate rates for the university's programs and the college's programs, respectively.

It also can be the case that institutions considered completely unrelated by the public are, in fact, part of a single OPE ID. For example, assume the same large university acquired a small, well-known college located in a different state, and all agreed that the college would retain its independent identity. If, as part of the transaction, the college's OPE ID was retired and it was joined to the OPE ID of the large university, the Department would deem them a single institution, without regard to whether the public was aware of their affiliation.

With these concepts in mind, the first step in projecting your D/E rates is to identify your OPE ID, and to ensure that you know the universe of locations (e.g., main, branch, satellite, extension, etc.) and programs included within the scope of the OPE ID.

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STEP TWO: IDENTIFY YOUR "PROGRAMS"

Once you have confirmed the scope of your institution (i.e., your OPE ID), you'll need to identify each program for which you are projecting D/E rates. Once again, this step, like the previous one, can be deceptively complex, as the Department's view of a "program" may differ from your own.

Because under its "financial value transparency framework" the Department proposes to use the same methodology to calculate D/E rates for both GE programs and non-GE programs, we use the term "Program" in this Desk Guide to cover both. To be clear, the proposed rule does not define the term "Program" that is our defined term. The proposed rule does, however, include definitions for "gainful employment program" and "eligible non-GE program," respectively.[36] And both are defined as a Title IV-eligible educational program identified by a combination of (1) OPE ID, (2) credential level, and (3) six-digit CIP code.[37]

For purposes of this analysis, we are assuming that you are projecting D/E rates for a single OPE ID. Thus, from a regulatory perspective, the Department views all of your Programs as being part of, and offered by, a single institution. As a consequence, the only two factors distinguishing one Program from another within your OPE ID are the credential level and the six-digit CIP code assigned to the program. In the definition of "Credential level" found in proposed 34 C.F.R. § 668.2, the Department identifies the following eight credential levels:

1. Undergraduate certificate or diploma
2. Associate degree
3. Bachelor's degree
4. Post-baccalaureate certificate
5. Master's degree
6. Doctoral degree
7. First professional degree (e.g., MD, DDS, JD)
8. Graduate certificate (including a postgraduate certificate)

If your institution offers more than one educational program at a single credential level (e.g., multiple graduate certificate programs), you will need to examine the six-digit CIP Code for each program within the credential level.

If each educational program you offer within a given credential level has a unique CIP Code, then the Department, like the institution, will view each program as distinct. However, if within a single credential level your institution offers two or more programs with the same six-digit CIP Code, when projecting your D/E rates, the programs with identical CIP codes will be consolidated.

Indeed, neither the name of the educational program, nor the location where it is offered, is relevant to the Department. An institution could be required to combine its two graduate certificate programs even if they have different names and they are offered at completely different locations. Again, if they are offered within the same OPE ID, and share the same credential level and six-digit CIP Code, the Department considers them to be a single "Program" and will consolidate them when calculating D/E rates.

[36] *See* proposed 34 C.F.R. § 668.2 (definitions of "Eligible non-GE program" and "Gainful employment program").
[37] Every Title IV program has a Classification of Instructional Program code or "CIP" code. It is derived from the system of instructional program classifications and descriptions developed by the Department's National Center for Education Statistics ("NCES").

Part II: Projecting Debt-to-Earnings Rates

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Step 8: Annual Earnings

Step 9: Discretionary Earnings

STEP THREE: DETERMINING WHICH STUDENTS TO INCLUDE IN YOUR BASE COHORT

Having identified your OPE ID and isolated the Programs offered within that OPE ID (steps one and two in our process), you now are ready to determine the students who will be included in each Program's cohort (i.e., the students for whom you will be analyzing debt and earnings data).

For purposes of calculating D/E rates, the Department defines a "student" as any "individual who received Title IV, HEA program funds for enrolling in" a non-GE or GE Program.[38] Notably, this definition of student includes individuals who received any form of federal financial aid. Thus, for example, a student who received only Pell grants would be included, even if she did not receive any loans.

When determining which students to include in your cohort, you will eliminate students who did not receive any Title IV funds for enrolling in the Program. In addition, pursuant to proposed § 668.403(e), you also will exclude from your cohort any student satisfying one or more of the following criteria:

1. One or more of the student's Title IV loans are under consideration by the Department, or have been approved, for a discharge on the basis of the student's total and permanent disability;
2. The student was enrolled full time in any other eligible Program at the institution or at another institution during the calendar year for which the Department obtains earnings information;
3. For undergraduate Programs, the student completed a higher credentialed undergraduate Program at the institution subsequent to completing the Program as of the end of the most recently completed award year prior to the calculation of the D/E rates;
4. For graduate Programs, the student completed a higher credentialed graduate Program at the institution subsequent to completing the Program as of the end of the most recently completed award year prior to the calculation of the D/E rates;
5. The student is enrolled in an approved prison education program;
6. The student is enrolled in a comprehensive transition and postsecondary program; or
7. The student died.

Any student who received Title IV funds for enrolling in his or her Program, and who fails to fall into one of the excluded categories detailed above, would be included in the base cohort for the Program (a "Student").

[38] Proposed 34 C.F.R. § 668.2 (definition of "Student").

STEP FOUR: IDENTIFYING THE APPLICABLE COHORT PERIOD

The D/E rates for each Program are based on the debt and earnings data for Students who completed the Program during the applicable cohort period. Accordingly, in order to finalize the Student cohort for each Program, you will need to determine whether to use a two-year cohort period or a four-year cohort period (the only two options).

Pursuant to the proposed regulations, the Department uses the two-year cohort period when the number of Students completing the Program during the two-year cohort period is 30 or more.[39] The Department proposes to use the four-year cohort period when the number of Students completing the Program in the two-year cohort period is fewer than 30 and the number of Students completing the Program in the four-year cohort period is 30 or more.[40]

The Department would define the two-year cohort period as the third and fourth award years prior to the year for which the most recent earnings data are available "from the Federal agency with earnings data at the time the D/E rates and earnings premium measure are calculated."[41] The four-year cohort period, in turn, would be defined as the third, fourth, fifth, and sixth award years prior to the award year for which the most recent earnings data are available.

By way of example, let us assume that you are projecting D/E rates in award year 2024-2025 (the first full award year following the likely effective date of the proposed GE rule). The Department indicates in the commentary to the proposed rule that in this scenario, the year for which the most recent earnings data are available would be calendar year 2022.[42] If, after applying all the exclusions discussed in step three, 30 or more Students completed your Program during award years 2017 2018 and 2018 2019, then 2017 2018 and 2018 2019 would comprise the applicable two-year cohort period for the Program. If, however, fewer than 30 Students completed your Program during award years 2017 2018 and 2018 2019, then you would have to expand the cohort period for the Program to include the applicable four award years: 2015-2016, 2016 2017, 2017 2018, and 2018 2019.In the graphic below, we've illustrated both the two-year and four-year cohort periods described in this example:

Cohort Periods for D/E Rates Calculated in Award Year 2024 2025						
2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	CY 2022
6th Prior AY	5th Prior AY	4th Prior AY	3rd Prior AY	2nd Prior AY	1st Prior AY	For AY 2024-2025, the Department indicates that the year for which the most recent earnings data are available is CY 2022.
		Two-Year Cohort Period				
Four-Year Cohort Period						

If, after applying all exclusions, 30 or more Students did not complete the Program over the expanded four-year cohort period, the Department would not calculate D/E rates for the Program for the 2024-2025 award year.[43] However, for purposes of this projection exercise, we suggest that you simply proceed with the four-year cohort, with the understanding that projecting rates based on a 25-Student cohort is better than not projecting them at all.

[39] *See* proposed 34 C.F.R. § 668.2 (definition of "Cohort period").
[40] *See id.*
[41] *See id.*
[42] *See* 88 Fed. Reg. 32329 (May 19, 2023).
[43] *See* proposed 34 C.F.R. § 668.403(f)(1). The Department also will decline to calculate D/E rates if the Earnings Agency does not provide the median earnings for the program.

Part II: Projecting Debt-to-Earnings Rates

Step 1: Determine the Scope of Your Institution

Step 2: Identify your "Programs"

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Step 8: Annual Earnings

Step 9: Discretionary Earnings

Finally, we highlight that under the proposed rule, there is an exception to the two- and four-year cohort periods set out above for Programs whose Students are required to complete a medical or dental internship or residency after completion of the Program.[44] For these Programs only, the two-year cohort period would be the sixth and seventh award years prior to the calendar year for which the most recent earnings data are available, and the four-year cohort period would be the sixth, seventh, eighth, and ninth award years prior to the award year for which the most recent earnings data are available. If you are projecting D/E rates in award year 2024-2025 for such a Program, the calendar year for which the most recent earnings data are available would be 2022, the two-year cohort period would be comprised of award years 2014 2015 and 2015 2016, and the four-year cohort period would be award years 2012 2013, 2013 2014, 2014 2015, and 2015 2016.

[44] Pursuant to proposed 34 C.F.R. § 668.2 (definition of "Cohort period"), a "required medical or dental internship or residency is a supervised training program that (A) Requires the student to hold a degree as a doctor of medicine or osteopathy, or as a doctor of dental science; (B) Leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers post-graduate training; and (C) Must be completed before the student may be licensed by a State and board certified for professional practice or service."

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STEP FIVE: DETERMINING EACH STUDENT'S LOAN DEBT

Once you have determined the applicable cohort period for each Program for which you are projecting rates, you will be able to identify the universe of Students who will be included in each Program's cohort. With this data in hand, you're ready to determine the loan debt for each individual Student.

Significantly, the amount used for each Student's "loan debt" in the D/E rate calculations is, in fact, the lesser of the Student's (1) actual loan debt, or (2) net direct costs.[45] Thus, for each Student, you will have a choice to make regarding which number to include when calculating the median loan debt for the cohort. And keep in mind that the lesser number may vary from Student to Student, depending on his or her personal circumstances.

Under the proposed regulations, when calculating each Student's actual loan debt, you will need to include any debt that falls into the following three categories:[46]

- Any Title IV loans that the Student borrowed (total amount disbursed less any cancellations or adjustments except for those related to false certification, borrower defense discharges, or debt relief initiated by the Secretary as a result of a national emergency) for enrollment in the Program, excluding Direct PLUS Loans made to parents of dependent Students and Direct Unsubsidized Loans that were converted from TEACH Grants; AND

- Any private education loans as defined in 34 C.F.R. § 601.2,[47] including private education loans made by the institution, that the Student borrowed for enrollment in the Program and that are required to be reported to the Department under the GE framework; AND

- The amount outstanding, as of the date the Student completes the Program, on any other credit (including any unpaid charges) extended by or on behalf of the institution for enrollment in any Program attended at the institution that the Student is obligated to repay after completing the Program, including extensions of credit described in clauses (1) and (2) of the definition of, and excluded from, the term "private education loan" in 34 C.F.R. 601.2.

When calculating net direct costs for each Student, you will need to include the following amounts:[48]

- The total amount for tuition and fees; AND

- The total amount of the allowances for books, supplies, and equipment included in the Student's Title IV Cost of Attendance (COA) for each award year in which the Student was enrolled in the Program, or a higher amount if assessed the Student by the institution for such expenses; LESS

- The amount of institutional grant or scholarship funds provided to the Student.[49]

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[45] *See* proposed 34 C.F.R. § 668.403(b)(1)(i).
[46] *See* proposed 34 C.F.R. § 668.403(d).
[47] Pursuant to 34 C.F.R. § 601.2, a "private education loan" includes any "loan provided by a private educational lender that is not a Title IV loan and that is issued expressly for postsecondary education expenses to a borrower, regardless of whether the loan is provided through the educational institution that the student attends or directly to the borrower from the private educational lender." The term excludes an "extension of credit under an open end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling" or an "extension of credit in which the educational institution is the lender if (i) the term of the extension of credit is 90 days or less; or (ii) an interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the credit is payable in more than four installments."
[48] *See* proposed 34 C.F.R. § 668.403(b)(1)(i).
[49] Proposed 34 C.F.R. § 668.2 defines "institutional grants and scholarships" as "financial assistance that the institution or its affiliate controls or directs to reduce or offset the original amount of a student's institutional costs and that does not have to be repaid. Typical examples of this type of assistance would include grants, scholarships, fellowships, discounts, and fee waivers."

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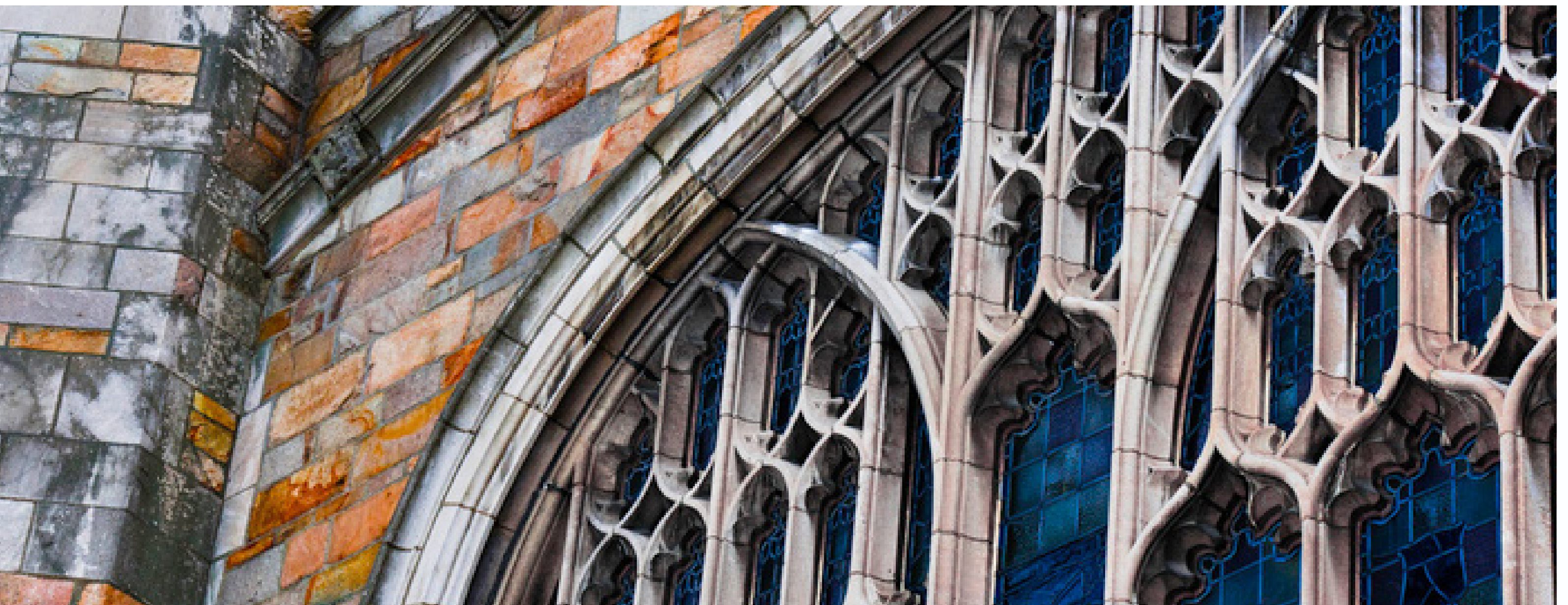
There are a handful of additional wrinkles that may surface at this step and that should be taken into account when calculating each Student's actual loan debt and net direct costs. The first concerns the management of Students who may have completed multiple Programs at your institution (e.g., a Student who completed an associate's degree, then went on to get her bachelor's degree). In such instances, all of the actual loan debt/net direct costs incurred by the Student for attendance in the institution's undergraduate Programs would be attributed to the highest credentialed undergraduate Program subsequently completed by the Student at the institution as of the end of the most recently completed award year prior to the calculation of the D/E rates.[50] Similarly, all of the actual loan debt/net direct costs incurred by a Student for attendance in any graduate Programs would be attributed to the highest credentialed graduate Program completed by the Student at the institution as of the end of the most recently completed award year prior to the calculation of the D/E rates.[51]

The second wrinkle involves Students with no loan debt. Recall that for purposes of calculating D/E rates, the Department would only include students "who received Title IV, HEA program funds for enrolling in" the applicable Program.[52] Notably, this would include individuals who received only Pell grants and other grants under Title IV, even if they did not receive any loans. Thus, it is possible that you may have Students properly included in your cohort who have no associated loan debt.

Finally, as a general rule, the Department would exclude any loan debt incurred by a Student for enrollment in Programs at other institutions. But note that the Department, in its discretion, may include loan debt incurred by a Student for enrollment in Programs at other institutions if your institution and the "other" institutions are under common ownership or control, as determined by the agency.[53] We expect that in the coming months and years the Department will establish parameters for the exercise of this discretion.

[50] Proposed 34 C.F.R. § 668.403(d)(2)(i).
[51] Proposed 34 C.F.R. § 668.403(d)(2)(ii).
[52] Proposed 34 C.F.R. § 668.2 (definition of "Student").
[53] Proposed 34 C.F.R. § 668.403(d)(3).



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STEP SIX: CALCULATION OF THE MEDIAN LOAN DEBT FOR EACH PROGRAM

At this point in the process, for each Program you should have a list of the Students included in the Program's cohort, accompanied by each such Student's total loan debt (or more precisely, the lesser of each Student's actual loan debt or net direct cost). You now are prepared to determine the median loan debt for the cohort that will be used in your D/E rate projection. The median of a set of values is the "middle" value. Thus, to determine the median loan debt, one simply need place the loan debt numbers in value order and identify the middle number. The graphic below illustrates this idea:

Program Cohort			
Student Number	Actual Debt	Net Direct Costs	Lesser of Debt/Cost
Student 12	$0	$60,000	$0
Student 10	$0	$80,000	$0
Student 2	$5,000	$80,000	$5,000
Student 13	$30,000	$25,000	$25,000
Student 7	$50,000	$45,000	$45,000
Student 6	$50,000	$45,000	$45,000
Student 11	$50,000	$80,000	$50,000

The median loan debt for the Program cohort set out above is the highlighted value: $25,000. In instances where your Program cohort includes an even number of Students, you would identify the middle pair of numbers and calculate the value that would be halfway between them (i.e., add them together and divide by two). Also note, in instances where more than half of the Students in your cohort have no associated loan debt, the median loan debt for the Program would indeed be $0.

We appreciate that most individuals tasked with projecting rates will not be doing so manually, but instead will be using some form of software to facilitate the process. For those using an Excel spreadsheet, you can calculate the median of a group of numbers by using the MEDIAN function.

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STEP SEVEN: AMORTIZATION OF THE MEDIAN LOAN DEBT TO DETERMINE THE ANNUAL LOAN PAYMENT

The final step in determining the numerator for your D/E rates is to amortize the median loan debt for each Program over a 10-, 15-, or 20-year repayment period.[54] Under the proposed rule, the credential level of the Program determines the repayment period. A ten-year repayment period would be used for Programs that lead to an undergraduate certificate, a post-baccalaureate certificate, an associate degree, or a graduate certificate. Fifteen years would be used for Programs that lead to a bachelor's degree or a master's degree. And twenty years would be used for any other Program.

When calculating D/E rates, the interest rate the Department would use to amortize the median loan debt would vary, depending on the length and type of Program, as follows:[55]

- For undergraduate certificate Programs, post-baccalaureate certificate Programs, and associate degree Programs, the Department would use the average of the Federal Direct Unsubsidized Loan interest rates applicable to undergraduate students that were in effect during the three consecutive award years ending in the final year of the cohort period.
- For graduate certificate Programs and master's degree Programs, the Department would use the average of the Federal Direct Unsubsidized Loan interest rates applicable to graduate students that were in effect during the three consecutive award years ending in the final year of the cohort period.
- For bachelor's degree Programs, the Department would use the average of the Federal Direct Unsubsidized Loan interest rates applicable to undergraduate students that were in effect during the six consecutive award years ending in the final year of the cohort period.
- For doctoral Programs and first professional degree Programs, the Department would use the average of the Federal Direct Unsubsidized Loan interest rates applicable to graduate students that were in effect during the six consecutive award years ending in the final year of the cohort period.

By way of example, assume you were projecting the D/E rates for the 2024-25 award year for a bachelor's degree Program using a two-year cohort period, such that the applicable cohort period was award years 2017 2018 and 2018 2019. The repayment period would be fifteen years (because the credential level is a bachelor's degree), and the applicable interest rate would be the average of the interest rates used for undergraduate Federal Direct Unsubsidized Loans for award years 2013 2014 through 2018 2019 (i.e., the six consecutive award years ending in 2018-2019).

[54] *See* proposed 34 C.F.R. § 668.403(b)(2)(i).
[55] Proposed 34 C.F.R. § 668.403(b)(2)(ii).

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Over the last decade, the historic fixed interest rates for graduate and undergraduate Direct Unsubsidized Loans are as follows:[56]

First Disbursement Date	Undergraduate	Graduate or Professional
7/1/22 6/30/23	4.99%	6.54%
7/1/21 6/30/22	3.73%	5.28%
7/1/20 6/30/21	2.75%	4.30%
7/1/19 6/30/20	4.53%	6.08%
7/1/18 6/30/19	5.05%	6.6%
7/1/17 6/30/18	4.45%	6%
7/1/16 6/30/17	3.76%	5.31%
7/1/15 6/30/16	4.29%	5.84%
7/1/14 6/30/15	4.66%	6.21%
7/1/13 6/30/14	3.86%	5.41%
7/1/06 6/30/13	6.8%	6.8%

Based on the data set out above, the average of the interest rates used for undergraduate Federal Direct Unsubsidized Loans for award years 2013 2014 through 2018 2019 is 4.35%.[57]

Once you have determined the applicable repayment period and interest rate for each of your Programs, you will have all the data points you need to calculate each Program's Annual Loan Payment. Because students typically make monthly loan payments (not a single, annual payment), you will actually determine the monthly loan payment associated with each Program, and then multiply the monthly payment by twelve to determine the Annual Loan Payment.

The monthly amortization formula, with associated values, is detailed below:

$$A = P\frac{r(1+r)^n}{(1+r)^n - 1}$$

A = monthly loan payment
P = median loan debt for the Program
r = monthly interest rate (annual interest rate divided by 12)
n = total number of monthly payments (number of years for repayment multiplied by 12)

Because we appreciate that most institutions likely will use Excel, or some similar software, to carry out their calculations, we have set out below a spreadsheet-friendly version of the formula that you can use to calculate the Annual Loan Payment for your Programs (the formula calculates the monthly payment using the amortization formula above, then multiples the result by twelve).
12*(D*((I/12)*((1+(I/12))^(Y*12)))/((1+(I/12))^(Y*12)-1))

The values included in this spreadsheet-friendly version of the formula are defined as follows:

D = median loan debt for the Program
I = annual interest rate
Y = number of years for repayment

[56] *See Previous Years' Interest Rates*, U.S. Dep't Educ., *available at* https://studentaid.gov/understand-aid/types/loans/interest-rates#older-rates.
[57] (3.86% + 4.66% + 4.29% + 3.76% + 4.45% + 5.05%) / 6 = 4.35%.

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Now you will put it all together. If you are projecting the Annual Loan Payment for an undergraduate bachelor's program for the 2024-2025 award year, and the median loan debt for the Program is $25,000, the values for your calculation would be as follows:

D = $25,500
I = 4.35%
Y = 15

When you input these values into the Annual Loan Payment formula above, you get the following equation:
12*(25000*((0.0435/12)*((1+(0.0435/12))^(15*12)))/((1+(0.0435/12))^(15*12)-1))

The calculation, once performed, yields an Annual Loan Payment of $2,272. You now have the numerators for your two D/E rate calculations, and are ready to move to the final steps of the projection process.

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STEP EIGHT: ANNUAL EARNINGS

In our prior step, we discussed how to finalize the Annual Loan Payment for each Program, which constitutes the numerator for both Annual D/E Rate and Discretionary D/E Rate calculations, as illustrated below:

$$\text{Annual D/E Rate} = \frac{\text{Annual Loan Payment}}{\text{Median Annual Earnings}}$$

$$\text{Discretionary D/E Rate} = \frac{\text{Annual Loan Payment}}{\text{Discretionary Earnings}}$$

With the Annual Loan Payment in hand, all that remains is to calculate the denominator for each equation.

In order to determine the Annual Earnings for each Program, the Department would obtain from the Earnings Agency "the most currently available median annual earnings of the students who completed the program during the cohort period and who are not excluded..."[58] Each year the Department would take the Completer List and send it to the Earnings Agency requesting the median for the cohort. The Earnings Agency would retrieve the reported earnings for each Student on the Completer List for the calendar year that is approximately three years following the award year during which the Student graduated.

Recall our example above, in which you were projecting the D/E rates for the 2024-25 award year for a bachelor's degree Program using a two-year cohort period, such that the applicable cohort period was award years 2017 2018 and 2018 2019. For this Program, we anticipate that the Completer List would include some Students who graduated in 2017 2018, and some who graduated in 2018 2019. For the Students who graduated in 2017 2018, the Earnings Agency would retrieve income reported for calendar year 2021, and for those who graduated in 2018 2019, the Earnings Agency would retrieve income reported for calendar year 2022.[59] Thus, the interval between the award year of graduation and the calendar year for which earnings are calculated would be the same for every Student. The graphic below illustrates this relationship between the award years of graduation and the calendar year for which earnings would be retrieved.

Award Year During Which Student Graduated	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021
Calendar Year Earnings Data	2019	2020	2021	2022	2023	2024

If the Earnings Agency is unable to match one or more of the Students on the Completer List, the Department would exclude from the median debt calculation the same number of Students with the highest loan debts as the number of Students whose earnings could not be matched.[60] Also, if the Earnings Agency ultimately is unable to retrieve earnings for at least 30 Students on the Completer List, the Department would not calculate D/E rates or an earnings premium for the Program.[61]

[58] Proposed 34 C.F.R. § 668.404(b). Though no agency has presently been selected, the Department indicates that its current preference is the Internal Revenue Service. See 88 Fed. Reg. 32328 (May 19, 2023).

[59] We observe that this is a significant change from prior versions of the GE rule, which calculated D/E rates using the earnings from the same calendar year for all students in cohort, without regard to their award year of graduation.

[60] "For example, if the Federal agency with earnings data is unable to match three students out of 100 students, the Secretary orders by amount the debts of the 100 listed students and excludes from the D/E rates calculation the three largest loan debts." Proposed 34 C.F.R. § 668.405(d)(2).

[61] *See* proposed 34 C.F.R. § 668.403(d).

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Because the Earnings Agency data is not (and presumably will not be) made available to the public, for each Program, you will have to develop a proxy for the earnings information. There are a variety of ways an institution can go about estimating earnings data, and the methodology used might differ from Program to Program, depending on the information available. Ultimately, your institution should seek to identify and use data that is most likely to resemble that of the Earnings Agency that will be provided to the Department.

If your institution conducts graduate surveys that include salary information, it may be that you are able to estimate the typical earnings of your graduates based on actual salary data. Alternatively, you might be able to determine typical earnings by interviewing regional employers regarding their salary practices. Faculty, staff, program advisory committees, and experienced career services personnel also may be able to provide insight into the typical salary of graduates in particular fields. This having been said, we remind you that a Program's Annual Earnings number will incorporate earnings data for all graduates in the applicable cohort, including, for example, those who are not working or who may underreport their income. We recommend that institutions take a conservative approach, and remember to factor in earnings for all graduates when you estimate your median, not just those who are successfully employed and accurately reporting their earnings.

You also could estimate earnings using the data that was prepared and released by the Department in connection with the proposed rule. This data, referred to as the "2022 Program Performance Data (2022 PPD)," is described in detail in the "Data Used in this RIA" section of the preamble.[62] This data set includes median earnings for all Programs, both GE and non-GE. It uses data assembled for all Title IV-eligible Programs operating "as of March 2022 that also had completions reported in the 2015 16 and 2016 17 award years."[63] The earnings data used in the data set are based on 2018 and 2019 calendar year earnings. As acknowledged in the "**2022 Program Performance Data Description**," a standalone document the Department released with the proposed rule, "[t]he variables included in the 2022 PPD are constructed using different methodology than that described in the proposed regulations in several ways." Nonetheless, this represents the most recent earnings data for Programs released by the Department. The 2022 PPD data description document, as well as the dataset and a related data codebook, all are available at regulations.gov under Docket ID ED-2023-OPE-0089.[64]

Finally, institutions also can attempt to estimate median earnings using data made available by the **U.S Department of Labor, Bureau of Labor Statistics** ("BLS"), or by one or more **State Employment Security Agencies** (regional earnings data may be a better proxy for actual earnings where most graduates find employment within a specific geographic area). If your institution decides to move in this direction, your best starting point may be the **O*NET Online website**. This website, sponsored by the U.S. Department of Labor, Employment and Training Administration, compiles both federal and state wage data in a single location. Institutions can locate salient earnings information through the website's **crosswalk page**, which permits a user to search for job-specific data using a variety of inputs, including the CIP code associated with the Program, or the Standard Occupational Classification ("SOC") code associated with the occupation into which most graduates' are placed. Take a conservative approach when interpreting this data, and be mindful regarding the impact of geography, market events, and graduate behavior, among other factors, when estimating your Program median.

[62] 88 Fed. Reg. 32410 (May 19, 2023).
[63] 88 Fed. Reg. 32395 (May 19, 2023).
[64] *Available at* **https://www.regulations.gov/docket/ED-2023-OPE-0089/document**.

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Finally, if you do not presently gather actual earnings data from graduates through surveys or other means, you may want to introduce a process for doing so. Although this effort may not assist you with your near-term projections, it will provide you better data for projections made in years to come. Also, if you ever intend to challenge the earnings data the Department uses in calculating your D/E rates, you likely will need salary information gathered through institutional surveys to use as the basis of your claim.

STEP NINE: DISCRETIONARY EARNINGS

The final step in our process involves calculating the Discretionary Earnings for each Program, which constitutes the denominator of the Program's Discretionary D/E Rate. For each Program, the Discretionary Earnings is calculated by subtracting from the Annual Earnings figure 150% of the Poverty Guideline for a single person in the continental United States, as published by the U.S. Department of Health and Human Services. The Department would use the Poverty Guideline for the most recent calendar year for which annual earnings are obtained.[65]

By way of example, the 2022 Poverty Guideline for a single person residing in the United States was $13,590. Thus, to determine the Discretionary Earnings for a Program with an Annual Earnings of $40,000, an institution would complete the following calculation: $40,000   ($13,590 x 1.5) = $19,615

The Poverty Guideline for a single person in the continental United States as published by the U.S. Department of Health and Human Services and available at **http://aspe.hhs.gov/poverty**. Each year, institutions will want to check this website to ensure that the most current number in being used in the school's projections.

RATE PROJECTION TEMPLATE

The following chart gathers together all of the information for our hypothetical bachelor's degree Program. Recall that for this Program, the Median Debt was $25,000, which resulted in an Annual Loan Repayment of $2,272. We have estimated for purposes of our calculation that the Median Annual Earnings is $40,000. If we apply the appropriate Repayment Period (15 years), Average Interest Rate (4.35%), and Poverty Guideline ($13,590), we project an Annual D/E Rate of 5.7% and a Discretionary D/E Rate of 11.6%, which pass the proposed thresholds of 8% and 20%.

2024-2025 D/E Rate Projections for a Bachelor's Degree Program	
Median Annual Earnings (Estimated)	$40,000.00
Poverty Guideline * 1.5 (2022)	$20,385.00
Discretionary Earnings (Estimated)	$19,615.00
Median Debt	$25,000.00
Annual Interest Rate	4.35%
Repayment Period	15
Annual Loan Payment	$2,272
Annual D/E Rate Projection	5.7%
Discretionary D/E Rate Projection	11.6%

[65] *See* proposed 34 C.F.R. § 668.403(a)(1).

CONSOLIDATED GAINFUL EMPLOYMENT DATA TIMETABLE

We have included below a chart that sets out certain of the data and timelines discussed above. We have found this useful when putting together projections, and thought you might, as well.

Award Year of Calculation	2024-2025		2025-2026		2026-2027	
	Award Year (AY) of Graduation	Calendar Year (CY) Earnings	Award Year (AY) of Graduation	Calendar Year (CY) Earnings	Award Year (AY) of Graduation	Calendar Year (CY) Earnings
2-Year Cohort	2018-2019 2017-2018	2022 2021	2019-2020 2018-2019	2022 2021	2020-2021 2019-2020	2024 2023
4-Year Cohort	2018-2019 2017-2018 2016-2017 2015-2016	2022 2021 2020 2019	2019-2020 2018-2019 2017-2018 2016-2017	2023 2022 2021 2020	2020-2021 2019-2020 2018-2019 2017-2018	2024 2023 2022 2021

Part III:
Projecting Earnings Premiums

As you will recall from Part I of this Desk Guide, with limited exceptions, each year the Department would calculate an "earnings premium measure" for all Title IV-eligible programs at all Title IV-participating institutions. The earnings premium would be calculated using the following formula:

Earnings Premium = Median Annual Earnings - Earnings Threshold

The Earnings Premium for each Program is simply the amount by which the Program's Median Annual Earnings exceeds the Earnings Threshold.[66]

In Step Eight of Part II, above, we offer suggestions for how an institution might project the Median Annual Earnings for each Program. Because, under the proposed rule, the same Median Annual Earnings figure is used in both the D/E rates calculations and the Earnings Premium calculation, the suggestions in Step Eight of Part II can be used to determine a Median Annual Earnings for your Earnings Premium projections.

In the proposed rule, the Earnings Threshold is defined as the "median earnings for working adults aged 25 34, who either worked during the year or indicated they were unemployed when interviewed, with only a high school diploma (or recognized equivalent) (1) in the State in which the institution is located; or (2) nationally, if fewer than 50 percent of the students in the program are located in the State where the institution is located while enrolled."[67] The Department indicates in the proposed regulatory text that for purposes of calculating the Earnings Threshold, it will use the "median annual earnings of students with a high school diploma or GED using data from the Census Bureau."[68] Each year, the Department would publish the applicable Earnings Thresholds "through a notice in the Federal Register."[69]

Though we cannot predict the Earnings Thresholds for future years, we do have access to the various thresholds that the Department included with the 2022 PPD data set and used as the basis for its impact projections. The data documents accompanying the NPRM indicate that the national Earnings Threshold used by the Department was $25,453, which represents the "[m]edian earnings for a high school graduate without postsecondary education (age 25-34) that is currently in the labor force in the US, according to 2019 American Community Survey (ACS) and Puerto Rico Community Survey (PRCS) 5-year estimates. Weighted with perwt."[70] The Earnings Threshold used by the Department for each State is detailed in Table 3.1-Earnings Thresholds by State, 2019, which is set forth in full on page 32413 of the NPRM.[71]

Using the Median Annual Earnings calculated under Step Eight of Part II, above, and the Earnings Thresholds included with the proposed rule, institutions should be able to determine generally whether the Earnings Premium test is likely to present a challenge for their Programs.

[66] *See* proposed 34 C.F.R. § 668.2 (definition of "Earnings premium").
[67] Proposed 34 C.F.R. § 668.2 (definition of "Earnings threshold").
[68] Proposed 34 C.F.R. § 668.404(b).
[69] *Id.*
[70] *GE Data 2* - Data Codebook,* available at **https://www.regulations.gov/docket/ED-2023-OPE-0089/document**.
[71] *See* 88 Fed. Reg. 32413 (May 19, 2023).

INQUIRIES

Institutions with questions regarding the NPRM discussed in this document are welcome to contact Aaron Lacey at **alacey@thompsoncoburn.com** or Hope Watson at **hwatson@thompsoncoburn.com**. Aaron Lacey is the Chair of Thompson Coburn LLP's Higher Education practice, host of the firm's popular Higher Education Webinar Series, and editorial director of **REGucation**, the firm's higher education law and policy blog. Hope is an attorney in the Higher Education practice who works on regulatory and corporate matters for postsecondary institutions, and has a particular focus on the proposed Financial Value Transparency and Gainful Employment rule.

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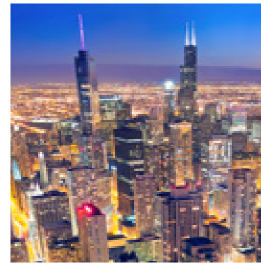

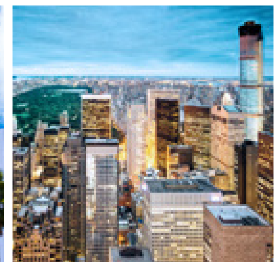

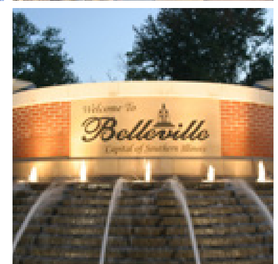

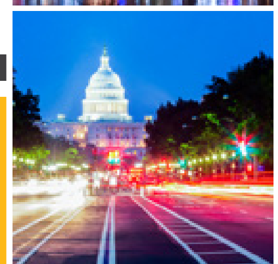

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