

Summary Overview of Key Components of the NPRM

We provide below a summary overview of key components of the NPRM rules package. AACS will be holding a series of webinars, issue template comment letters, and provide more insights as our review process continues:

Materials Provided by ED:

[Notice of Proposed Rulemaking](#) dated May 19, 2023 (Public comments due by **June 20, 2023**)

A fact sheet on the GE and transparency parts of the rules can be found [here](#).

A fact sheet on the other provisions in the regulatory package are [here](#).

Version of data released by ED that was used to model the effects of the proposed gainful employment and financial transparency rules in the Regulatory Impact Analysis, which can be found [on this page](#) and are also linked below:

- **New** • GE Data 1* – Description [\(PDF\)](#) (182K) [5/17/2023]
- **New** • GE Data 2* – Data Codebook [\(Excel\)](#) (28K) [5/17/2023]
- **New** • GE Data 3* – Dataset [\(Excel\)](#) (54M) [5/17/2023]

(1) Certification Procedures (34 C.F.R. §§ 668.2, 668.13, and 668.14)

Initial Analysis: Most critically for AACS members, the proposed certification amendments would limit Title IV eligibility for clock hour programs (or those required to do a clock to credit conversion) to 100% of the state's minimum hours where the school is located, or *under limited circumstances*, 100% of a state's minimum hours for a state within the metropolitan statistical area of the institution. The current regulation permits institutions to offer Title IV aid up to 150% of the state minimum clock hour requirement for the program where the state has established such a minimum. ***This rule change is likely to significantly impact AACS members who offer programs now exceeding 100% of the state minimum, as well as short programs that under 600 clock hours and only obtained Title IV eligibility under the current 150% threshold.*** Any AACS members negatively impacted by these proposals should prepare for public comment detailing how limiting Title IV aid will negatively impact students, including low income students.

The certification rule changes also provide ED with far greater discretion to put an institution on provisional PPA status which allows imposition of a Letter of Credit requirement, Heightened Cash Monitoring, and other reporting and restrictions. Combined with the GE rule changes, and changes to Administrative Capability and

Financial Responsibility requirements, more frequent provisional status could put more institutions at risk of being removed from the Title IV program through ED enforcement actions.

The proposed certification amendments include (those most significant to AACS members highlighted):

- **Amends § 668.2 to add a definition of “metropolitan statistical area.”**
- **Amends § 668.14(b)(26)(ii) to limit the number of hours in a GE program to the greater of the required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, or the required minimum number of hours required for training in another State, if the institution provides documentation of that State meeting one of three qualifying requirements to use a State in which the institution is not located that is substantiated by the certified public accountant who prepares the institution’s compliance audit report as required under § 668.23.**
- Amends § 668.14(b)(32) to require all programs that are designed to lead to employment in occupations requiring completion of a program that is programmatically accredited as a condition of State licensure to meet those requirements.
- Amends § 668.13(b)(3) to eliminate the provision that requires ED to approve participation for an institution if it has not acted on a certification application within 12 months so ED can take additional time where it is needed.
- Amends § 668.13(c)(1) to include additional events that lead to provisional certification, such as if an institution triggers one of the new financial responsibility triggers proposed in the rule.
- Amends § 668.13(c)(2) to require provisionally certified schools that have major consumer protection issues to recertify after no more than two years.
- Adds a new § 668.13(e) to establish supplementary performance measures the Secretary may consider in determining whether to certify or condition the participation of the institution.
- Amends § 668.14(a)(3) to require an authorized representative of any entity with direct or indirect ownership of a private institution to sign a PPA.
- Amends § 668.14(b)(17) to include all Federal agencies and adds State attorneys general to the list of entities that have the authority to share with each other and ED any information pertaining to the institution’s eligibility for or participation in the Title IV programs or any information on fraud, abuse, or other violations of law.
- Amends § 668.14(e) to establish a non-exhaustive list of conditions that the Secretary may apply to provisionally certified institutions, such as the submission of a teach-out plan or agreement.
- Amends § 668.14(f) to establish conditions that may apply to institutions that undergo a change in ownership seeking to convert from a for-profit institution to a nonprofit institution.

- Amends § 668.14(g) to establish conditions that may apply to an initially certified nonprofit institution, or an institution that has undergone a change of ownership and seeks to convert to nonprofit status.

(2) Gainful Employment and Financial Value Transparency

Initial Analysis: ED has made significant, adverse changes to the GE rule as compared to the 2015 version. Notably, the addition of a new Earnings Premium measure would cause up to 2/3 of cosmetology programs to lose Title IV eligibility, striking a major blow to cosmetology schools' ability to continue operating. Consequently, the GE rule is a major focus of AAC's efforts with allies to seek solutions to change the Final Rule in a manner that will preserve access to these programs.

The proposed Gainful Employment and Financial Value Transparency rules, collectively, apply to all eligible programs and institutions, but the accountability aspect (potential loss of Title IV eligibility) continues only to apply to GE programs.

The Financial Value Transparency portion of the rule would apply to all programs and institutions, and require student disclosures, and in some instances student acknowledgment, for programs with high debt burdens and low financial values.

The Gainful Employment portion of the rule would also include sanctions, including the potential loss of Title IV eligibility, for programs that fail to satisfy the debt to earnings or EP metric. Both portions of the rule rely on the debt to earnings metric ("D/E") and the earnings premium metric ("EP").

AAC will be providing guidance to AAC members on messages and information to include in public comments, and we urge ALL AAC members to file public comments regarding the proposed GE rule.

Key Changes:

Financial Value Transparency Framework

The proposed Financial Value Transparency regulations would establish a framework to increase the quality and availability of information provided directly to students about the costs, sources of financial aid, and outcomes of students enrolled in all eligible programs. Specifically, the ED proposes to amend subpart Q by requiring Financial Value Transparency disclosures for *all eligible programs and institutions* to ensure all students have the benefit of access to accurate information on the financial consequences of their education program choices. Accordingly, ED proposes to calculate and disclose D/E and EP rates for all programs under proposed subpart Q. The regulations would apply to all educational programs that participate in the Title IV programs except for approved prison education programs and comprehensive transition and postsecondary programs.

The regulations also would require that current and prospective students be provided relevant disclosures and acknowledge when an educational program is associated with a high debt burden. This information would be made available via a website maintained by ED, and in some cases students and prospective students would be required to acknowledge viewing these disclosures before receiving Title IV funds to attend programs with poor outcomes.

Gainful Employment Framework

As described in the NPRM, the GE rule is intended to assess whether a program leads to “gainful employment.” The proposed accountability framework in subpart S is substantially similar to the most recent discussion draft developed by the rulemaking committee and would require that programs pass both the D/E **and** the EP metrics. In addition, the rule requires certification, reporting, disclosures, student warnings, and sanctions. The new rules apply to all programs offered by for-profit, proprietary institutions, as well as to most non-degree programs offered by public and private non-profit institutions.

Part 1 of GE Rule: Debt to Earnings

For the debt to earnings metric, ED has again proposed a two-prong framework that requires programs to meet either an Annual Earnings Rate or a Discretionary Income Rate. Generally speaking, these two rates, collectively referred to as the debt-to-earnings or “D/E rates,” measure graduate debt as a percentage of post-graduation earnings. A program would be classified as “high debt-burden” if its discretionary debt-to-earnings rate is greater than 20 percent and its annual debt-to-earnings rate is greater than 8 percent.

The formula associated with each metric is as follows:

$$\begin{aligned}\text{Annual Earnings Rate} &= \text{Annual Loan Payment} / \text{Annual Earnings} \\ \text{Discretionary Income Rate} &= \text{Annual Loan Payment} / \text{Discretionary Income}\end{aligned}$$

Under the proposed regulations, the annual debt-to-earnings rate would estimate the proportion of annual earnings that students who complete the program would need to devote to annual debt payments. The discretionary debt-to-earnings rate would measure the proportion of annual discretionary income--the amount of income above 150 percent of the Poverty Guideline for a single person in the continental United States--that students who complete the program would need to devote to annual debt payments.

If it is not possible to calculate or issue D/E rates for a program for an award year, the program would receive no D/E rates for that award year. The program would remain in the same status under the D/E rates measure as the previous award year.

Part 2 of GE Rule: Earnings Premium Measure

The proposed EP measure is designed to measure the extent to which the typical graduate of a program out-earns the typical individual with only a high school diploma or equivalent in the same State the program is located. ED would measure that gain with an administrable test that is pegged to earnings beyond a typical high school graduate. ED specifically rejected solutions proposed by AACs to account for under-reporting of earnings and thus ED would make no adjustment to earnings in either the D/E or EP metrics despite known flaws with federal earnings data. AACs believe this violates federal law.

The EP metric would compare the median annual earnings of Title IV recipients who completed the program measured three years after they complete the program to the median earnings of high school graduates. **The median earnings of high school graduates (or holders of an equivalent credential) would measure individuals who are between the ages of 25 and 34, and either working or unemployed, excluding individuals not in the labor force, in the State where the institution is located, or nationally if fewer than 50 percent of the students in the program are located in the State where the institution is located while enrolled.**

According to ED's rationale, when the EP is positive, it indicates that graduates of the program gain financially (i.e., have higher typical earnings than they might have had they not attended college).

If it is not possible to calculate or publish the EP measure for a program for an award year, the program would receive no result under the EP measure for that award year and would remain in the same status under the EP measure as the previous award year.

Student

For the purposes of subparts Q and S, a student is defined as an individual who received Title IV funds for enrolling in the program.

Completers List

ED would use administrative data reported by institutions to identify which students' information should be included when calculating the metrics established by this rule for each program. ED would use this data to compile and provide to institutions a list of students who completed each program during the cohort period. Institutions would have the opportunity to review and correct completer lists. The finalized completer lists would then be used ED to obtain from a Federal agency with earnings data the median annual earnings of the students on each list; and to calculate the D/E rates and the EP which we would provide to the institution.

Institutions would be required to update or otherwise correct any reported data no later than 60 days after the end of an award year.

If the minimum number of completers required to calculate the D/E rates or EP metrics to be calculated is not met, the program would not receive rates for the award year.

Earnings

ED would calculate both the D/E rates and the EP measure using earnings data provided by a Federal agency with earnings data, as defined in § 668.2.

For each completer list ED to the Federal agency with earnings data, the agency would return to ED: (1) The median annual earnings of the students on the list whom the Federal agency with earnings data matches to earnings data, in aggregate and not in individual form; and (2) The number, but not the identities, of students on the list that the Federal agency with earnings data could not match. ED proposes to measure earnings using only the median of program completers' earnings, rather than the maximum of the mean or median of completers' earnings.

The Federal agency with earnings data must have data sufficient to match with Title IV recipients in the program and could include agencies such as the Treasury Department, including the Internal Revenue Service ("IRS"), the Social Security Administration ("SSA"), the Department of Health and Human Services ("HHS"), and the Census Bureau.

If the Federal agency with earnings data does not provide earnings information necessary for the calculation of these metrics, ED would not calculate the metrics and the program would not receive rates for the award year.

Debt

In determining the loan debt for a student under new § 668.403(d), ED would include:

- (1) The total amount of Title IV loans disbursed to the student for enrollment in the program, less any cancellations or adjustments except for those related to false certification or borrower defense discharges and debt relief initiated by the Secretary as a result of a national emergency, and excluding Direct PLUS Loans made to parents of dependent students and Direct **Unsubsidized Loans that were converted from TEACH Grants**;
- (2) Any private education loans as defined in § 601.2, including such loans made by the institution, that the student borrowed for enrollment in the program; and
- (3) 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 that the student is obligated to repay after completing the program, including extensions of credit described in the definition of, and excluded from, the term "private education loan" in § 601.2.

Loan debt would include all debt incurred by the student for enrollment in a comparable program (certificate, undergraduate, or graduate) at the institution as of the end of the most recently completed award year prior to the calculation of the D/E rates. Loan debt would exclude any loan debt incurred by the student for enrollment in programs at other institutions, except that the Secretary could choose to include loan debt incurred for enrollment in programs at other institutions under common ownership or control.

Median Loan Debt and Annual Loan Payment

ED proposes to calculate the median loan debt of the Title IV recipients who completed the program during the cohort period, based on the lesser of the loan debt incurred by each student, computed as described in §668.403(d), or the total amount for tuition and fees and books, equipment, and supplies for each student, **less the amount of institutional grant or scholarship funds provided to that student**. For purposes of the D/E rates, ED defines institutional grants and scholarships as financial assistance that does not have to be repaid that the institution--or its affiliate--controls or directs to reduce or offset the original amount of a student's institutional costs. ED would remove the highest loan debts for a number of students equal to those for whom the Federal agency with earnings data does not provide median earnings data and calculate the median of the remaining amounts.

Under § 668.403(b), ED would determine the annual loan payment by taking the median loan debt and amortizing the median loan debt over a 10, 15, or 20 year period, depending on the length of the program.

Amortization Period

The length of the amortization period would depend upon the credential level of the program, using a 10-year repayment period for a program that leads to an undergraduate certificate, a post-baccalaureate certificate, an associate degree, or a graduate certificate; a 15-year repayment period for a program that leads to a bachelor's degree or a master's degree; or a 20-year repayment period for any other program.

Interest Rate

The amortization calculation would use an annual interest rate that is the average of the annual statutory interest rates on Federal Direct Unsubsidized Loans that were in effect during a period that varies based on the credential level of the program. For undergraduate certificate programs, post-baccalaureate certificate programs, and associate degree programs, the average interest rate would reflect the three consecutive award years, ending in the final year of the cohort period, using the Federal Direct Unsubsidized Loan interest rate applicable to undergraduate students.

- For an undergraduate certificate program, if the two-year cohort period is award years 2024-2025 and 2025-2026, the interest rate would be the average of the interest rates for the years from 2023-2024 through 2025-2026.
- For graduate certificate programs and master's degree programs, the average interest rate would reflect the three consecutive award years, ending in the final year of the cohort period, using the Federal Direct Unsubsidized Loan interest rate applicable to graduate students.
- For bachelor's degree programs, the average interest rate would reflect the six consecutive award years, ending in the final year of the cohort period, using the Federal Direct Unsubsidized Loan interest rate applicable to undergraduate students.
- For doctoral programs and first professional degree programs, the average interest rate would reflect the six consecutive award years, ending in the final year of the cohort period, using the Federal Direct Unsubsidized Loan interest rate applicable to graduate students.

Excluded Students

ED would exclude a student from both the numerator and the denominator of the D/E rates calculation if:

- (1) One or more of the student's Title IV loans are under consideration or have been approved by ED for a discharge on the basis of the student's total and permanent disability;
- (2) The student enrolled full time in any other eligible program at the institution or at another institution during the calendar year for which ED 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 (CTP) program; or
- (7) The student died.

Further, ED would not issue D/E rates for a program if fewer than 30 students completed the program during the two-year or four-year cohort period, or the Federal agency with earnings data does not provide the median earnings for the program.

Cohort Period

A two-year cohort period would consist of the third and fourth award years prior to the year for which the most recent data are available at the time of calculation.

For example, given current data production schedules, the D/E rates and earnings premium measure calculated to assess financial value starting in award year 2024-2025 would be calculated in late 2024 or early in 2025. For most programs, the two-year cohort period for these metrics would be award years 2017-2018 and 2018-2019 using the amount of loans disbursed to students as of program completion in those award years and earnings data measured in calendar years 2021 for award year 2017-2018 completers and 2022 for award year 2018-2019 completers, roughly 3 years after program completion.

A four-year cohort period would consist of the third, fourth, fifth, and sixth award years prior to the year for which the most recent earnings data are available at the time of calculation.

For example, for the D/E rates and the earnings threshold measure calculated to assess financial value starting in award year 2024-2025, the four- year cohort period would be award years 2015-2016, 2016- 2017, 2017-2018, and 2018-2019; and earnings data would be measured using data from calendar years 2019 through 2022.

Timing

If ED publishes the rule by November 1, 2023, the effective date would be **July 1, 2024**. Institutions would then be required to report program and student information to ED by July 31, 2024. In the NPRM, ED estimates that under the current data production schedules, the first D/E rates and EP measures calculated to assess financial value for award year 2024-2025 would be calculated in late 2024 or early in 2025. ED assumes that the first set of rates would be released in the 2025 award year.

2024-2025	First Year of Gainful Employment Rates
2025-2026	Second Year of Gainful Employment Rates
2026-2027	Third Year of Gainful Employment Rates

Programs must pass both the D/E and E/P metrics to pass a given award year. A program that fails 2 of 3 consecutive award years becomes ineligible. If the program becomes ineligible under the GE framework, its participation in the Title IV programs ends upon the earliest of—

- (1) The issuance of a new Eligibility and Certification Approval Report that does not include that program;

- (2) The completion of a termination action of program eligibility, if an action is initiated under subpart G of this part; or
- (3) A revocation of program eligibility, if the institution is provisionally certified.

Department Notification

For each award year for which ED calculates D/E rates and the EP measure for a program, ED would issue a notice of determination informing the institution of:

- (1) The D/E rates for each program;
- (2) The earnings premium measure for each program;
- (3) ED's determination of whether each program is passing or failing, and the consequences of that determination;
- (4) For a non-GE program, whether the student acknowledgement would be required under proposed § 668.407;
- (5) For a GE program, whether the institution would be required to provide the student warning under proposed § 668.605; and
- (6) For a GE program, whether the program could become ineligible based on its final D/E rates or earnings premium measure for the next award year for which D/E rates or the earnings premium measure are calculated for the program.

Reporting

The proposed rules would establish new institutional reporting requirements for students who enroll in, complete, or withdraw from a GE program or eligible non-GE program. For GE programs, institutions would be required to report the above information, as applicable, no later than July 31 following the date these regulations take effect. After the initial reporting, for each subsequent award year, institutions would be required to report by October 1 following the end of the award year.

For each eligible program during an award year, an institution would be required to report:

- (1) Information needed to identify the program and the institution;
- (2) The name, CIP code, credential level, and length of the program;
- (3) Whether the program is programmatically accredited and, if so, the name of the accrediting agency;
- (4) Whether the program meets licensure requirements for all States in the institution's metropolitan statistical area, whether the program or prepares students to sit for a licensure examination in a particular occupation, the number of program graduates from the prior award year that take the licensure examination within one year (if applicable), and the number of program graduates that pass the licensure examination within one year (if applicable);
- (5) The total number of students enrolled in the program during the most recently completed award year, including both recipients and non-recipients of Title IV funds; and

(6) Whether the program is a medical or dental program whose students are required to complete an internship or residency.

For each recipient of Title IV funds, the institution would also be required to annually report at a student level:

- (1) The date each student initially enrolled in the program;
- (2) Each student's attendance dates and attendance status (e.g., enrolled, withdrawn, or completed) in the program during the award year;
- (3) Each student's enrollment status (e.g., full-time, three-quarter time, half-time, less than half-time) as of the first day of the student's enrollment in the program;
- (4) The total annual cost of attendance;
- (5) The total tuition and fees assessed for the award year;
- (6) The student's residency tuition status by State or region (such as in-state, in- district, or out-of-state);
- (7) The total annual allowance for books, supplies, and equipment;
- (8) The total annual allowance for housing and food;
- (9) The amount of institutional grants and scholarships disbursed;
- (10) The amount of other state, Tribal, or private grants disbursed; and
- (11) The amount of any private education loans disbursed, including private education loans made by the institution.

In addition, if the student completed or withdrew from the program and ever received Title IV assistance for the program, the institution would also be required to report:

- (1) The date the student completed or withdrew from the program;
- (2) The total amount, of which the institution is or should reasonably be aware, that the student received from private education loans for enrollment in the program;
- (3) The total amount of institutional debt the student owes any party after completing or withdrawing from the program;
- (4) The total amount of tuition and fees assessed the student for the student's entire enrollment in the program;
- (5) The total amount of the allowances for books, supplies, and equipment included in the student's Title IV cost of attendance 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; and
- (6) The total amount of institutional grants and scholarships provided for the student's entire enrollment in the program.

Student Warnings and Notices

An institution would be required to provide a warning to students and prospective students for any year for which the Secretary notifies an institution that the GE program could become ineligible based on its final D/E rates or EP measure for the next award year for which those metrics are calculated. The warning would be the only substantive content contained in those written communications.

In addition, ED would require acknowledgments from current and prospective students if an eligible non-GE program leads to high debt outcomes based on its D/E rates prior to the disbursement of Title IV funds.

Program Sanctions

Under the proposed GE rule, a program would be ineligible if it fails the D/E rates measure or the EP measure in two out of any three consecutive award years for which the program's rates are calculated.

Certification – GE Program Requirements

- After the effective date of the GE rule, July 1, 2024, institutions will be required to transitionally certify all GE programs under their Program Participation Agreements. Newly added 34 C.F.R. § 668.604 would require transitional certifications for existing GE programs, as well as certifications when seeking recertification or the approval of a new or modified GE program. An institution would certify that each eligible GE program it offers is approved, or is otherwise included in the institution's accreditation, by its recognized accrediting agency.
- The certification would require the signature of an authorized representative of the institution and, for a proprietary or private nonprofit institution, an authorized representative of an entity with direct or indirect ownership of the institution if that entity has the power to exercise control over the institution. For each of its currently eligible GE programs, an institution would need to provide a transitional certification no later than December 31 of the year in which the regulation takes effect (likely, by December 31, 2024), as an addendum to the institution's PPA with ED. Failure to complete the transitional certification would result in discontinued participation in the Title IV, HEA programs. See FR, at 32346-47.

(3) Financial Responsibility (34 C.F.R. §§ 668.15, 668.23, and 668, subpart L §§ 171, 174, 175, 176 and 177)

Initial Analysis: The proposed financial responsibility regulations establish additional factors

that will be viewed by ED as indicators of an institution's lack of financial responsibility. When one of the factors occurs, ED may seek financial protection from the institution, most commonly through a letter of credit. The indicators of a lack of financial responsibility proposed are events that put an institution at a higher risk of financial instability and sudden closure. Particular emphasis will be made regarding events that bring about a major change in an institution's composite score, the metric used to determine an entity's financial strength based on its audited financial statement as described in § 668.172 and Appendices A and B in subpart L of part 668. Other examples of high-risk events that could trigger a finding of a lack of financial responsibility are when an institution is threatened with a loss of State authorization or

loses eligibility to participate in a Federal educational assistance program other than those administered by ED. When combined with the GE, Certification, and Administrative Capability proposed changes, these proposed changes put institutions at higher risk of having a discretionary or mandatory triggering event that could lead to one or more letters of credit, provisional status, and/or heightened cash monitoring or other restrictions.

Note: ED invites comments as to whether an investigation as described in § 668.171(f)(1)(iii) warrants inclusion in the final regulations as either a mandatory or discretionary financial trigger. ED also invites comment as to what actions associated with the investigation would have to occur to initiate the financial trigger.

Key Changes:

- Removes and reserves § 668.15 thereby consolidating all financial responsibility factors, including those governing changes in ownership, under part 668, subpart L.
- Amends § 668.23(a) to require that **audit reports are submitted in a timely manner**, which would be the earlier of 30 days after the date of the report or six months after the end of the institution's fiscal year.
- Amends § 668.23(d) to require that **financial statements submitted to ED must match the fiscal year end of the entity's annual return(s) filed with the Internal Revenue Service**. ED also amends § 668.23(d) to require the institution to include a detailed description of related entities with a level of detail that would enable ED to readily identify the related party. Such information must include, but is not limited to, the name, location and a description of the related entity including the nature and amount of any transactions between the related party and the institution, financial or otherwise, regardless of when they occurred.
- Amends § 668.23(d) to require that any domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized.
- Amends § 668.23(d) to require an institution to disclose in a footnote to its financial statement audit the dollar amounts it has spent in the preceding fiscal year on **recruiting activities, advertising, and other pre-enrollment expenditures**.
- Amends § 668.171(b) to require institutions to demonstrate that they are able to meet their financial obligations by noting additional cases that constitute a failure to do so, including failure to make debt payments for more than 90 days, failure to make payroll obligations, or borrowing from employee retirement plans without authorization.
- Amends § 668.171(c) to revise the set of conditions that automatically require posting of financial protection if the event occurs as prescribed in the regulations. These mandatory triggers are designed to measure external events that pose

risk to an institution, financial circumstances that may not appear in the institution's regular financial statements, or financial circumstances that may not yet be reflected in the institution's composite score. **Some examples of these mandatory triggers include when, under certain circumstances, there is a withdrawal of owner's equity by any means and when an institution loses eligibility to participate in another Federal educational assistance program due to an administrative action against the institution.**

- Amends § 668.171(d) to revise the set of conditions that may, at the discretion of ED, require posting of financial protection if the event occurs as prescribed in the regulations. These discretionary triggers are designed to measure external events or financial circumstances that may not appear in the institution's regular financial statements and may not yet be reflected in the institution's composite score. **An example of these discretionary triggers is when an institution is cited by a State licensing or authorizing agency for failing to meet State or agency requirements.** Another example is when the institution experiences a significant fluctuation between consecutive award years or a period of award years in the amount of Federal Direct Loan or Federal Pell Grant funds that cannot be accounted for by changes in those Title IV programs.
- Amends § 668.171(f) to revise the set of conditions whereby an institution must report to ED that a triggering event, described in § 668.171(c) and (d), has occurred.
- Amends § 668.171(h) to adjust the language regarding an auditor's opinion of doubt about the institution's ability to continue operations to clarify that ED may independently assess whether the auditor's concerns have been addressed or whether the opinion of doubt reflects a lack of financial responsibility.
- Amends § 668.174(a) to clarify the language related to compliance audit or program review findings that lead to a liability of greater than 5 percent of Title IV volume at the institution, so that the language more clearly states that the timeframe of the preceding two fiscal years timeframe relates to when the reports containing the findings in question were issued and not when the reviews were actually conducted.
- Add a new proposed § 668.176 to consolidate financial responsibility requirements for institutions undergoing a change in ownership under § 668, subpart L.
- Redesignates the existing § 668.176, establishing severability, as § 668.177 with no change to the regulatory text.

(4) Administrative Capability (34 C.F.R. § 668.16)

Initial Analysis: The administrative capability rule changes ED proposes would require institutions to meet specific, new administrative capability requirements. The amendments would apply to ALL Title IV institutions. The changes provide ED with more tools and explicit authority to make an administrative capability finding based on a broader set of issues than ED has used historically. Such findings could lead to new limitations, suspensions or terminations, including letter of credit or heightened cash monitoring requirements. Several of these new administrative capability factors do not

appear grounded in HEA language and could potentially be challenged on a statutory authority basis.

Key Changes:

- Amends § 668.16(h) to require institutions to provide adequate **financial aid counseling and financial aid communications** to advise students and families to accept the most beneficial types of financial assistance available to enrolled students that includes clear information about the cost of attendance, sources and amounts of each type of aid separated by the type of aid, the net price, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts.
- Amends § 668.16(k) to require that an institution **not have any principal or affiliate whose misconduct or closure contributed to liabilities** to the Federal government in excess of 5 percent of that institution's Title IV program funds in the award year in which the liabilities arose or were imposed.
- Adds § 668.16(n) to **require that the institution has not been subject to a significant negative action or a finding by a State or Federal agency, a court, or an accrediting agency**, where in which the basis of the action or finding is repeated or unresolved, such as noncompliance with a prior enforcement order or supervisory directive; and to further require that the institution has not lost eligibility to participate in another Federal educational assistance program due to an administrative action against the institution. *Note:* This would mean that an institution that loses VA funding by action of the VA would now have a Title IV administrative capability issue.
- Amends § 668.16(p) to strengthen the requirement that institutions must develop and follow adequate procedures to evaluate the **validity of a student's high school diploma**.
- Adds § 668.16(q) to require that institutions provide **adequate career services** to eligible students who receive Title IV program assistance. ED will require reporting of career services staff and analyze the sufficiency of that staff relative to enrollment levels.
- Adds § 668.16(r) to require that an institution provide students with **accessible clinical, or externship opportunities** related to and required for completion of the credential or licensure in a recognized occupation, within 45 days of the successful completion of other required coursework.
- Adds § 668.16(s) to require that an institution **timely disburses funds** to students consistent with the students' needs.
- Adds § 668.16(t) to **require institutions to meet new standards for their GE programs**, as outlined in regulation. *Note:* An institution would not be administratively capable if it derives more than 50% of its total Title IV revenues in the most recent fiscal year from GE programs that are failing or if it enrolled more than 50% of its students who receive Title IV aid in programs that are failing GE. Therefore, if an institution has failing GE programs that meet these thresholds after the first GE rates, the institution also has an administrative capability problem.

- Add § 668.16(u) to require that an institution **does not engage in misrepresentations or aggressive and deceptive recruitment.**

(5) Ability to Benefit (“ATB”) (34 C.F.R. §§ 668.2, 668.32, 668.156, and 668.157)

Initial Analysis: The amendments adopt the consensus rule changes agreed to during negotiated rulemaking. The regulations would retain current law that allows a student to be eligible for Title IV aid if a student has obtained a passing score specified by the Secretary on an independently administered test and: (1) either under proposed § 668.32(e)(2)(i) was first enrolled in an eligible program before July 1, 2012; or (2) under proposed § 668.32(e)(2)(ii) is enrolled in an **eligible career pathway program as defined in section 484(d)(2) on the HEA**. ED would, however, establish new documentation requirements to support ECPP compliance and would establish a new process to “verify” that each ECPP offered by an institution is compliant.

AACS members that offer an ECPP should carefully review the new documentation requirements and prepare for compliance. In addition, AACS members should include public comment requesting that institutions now offering ECPP programs be permitted to continue them during the time period when ED establishes a process to verify compliance. In other words, current ECPP programs should be grandfathered and not interrupted while schools seek verification of compliance through a process we presume will be announced by ED after July 1, 2024.

Key Changes:

- Amends § 668.2 to add a definition of “**eligible career pathway program**” – the impact is to put into regulations the ECPP definition for Title IV purposes as previously defined by Congress.
- Adds a new § 668.157 to clarify the **documentation requirements** for eligible career pathway programs. This section would dictate the documentation requirements for eligible career pathway programs for submission to ED for approval as a Title IV, HEA eligible program.
- Specifically, in proposed § 668.157(a)(1), an institution would demonstrate to the Secretary that a student is enrolled in an eligible career pathway program by **documenting that the student has enrolled in or is receiving all three of the following elements simultaneously**—
 - An eligible postsecondary program as defined in § 668.8;
 - Adult education and literacy activities under the Workforce Innovation and Opportunity Act as described in § 463.30 that assist adults in attaining a secondary school diploma or its recognized equivalent and in the transition to postsecondary education and training; and
 - Workforce preparation activities as described in § 463.34.
- In proposed § 668.157(a)(2), an institution would demonstrate to ED that a student is enrolled in an eligible career pathway program by **documenting that**

the program aligns with the skill needs of industries in the State or regional labor market in which the institution is located, based on research the institution has conducted, including—

- Government reports identifying in-demand occupations in the State or regional labor market;
- Surveys, interviews, meetings, or other information obtained by the institution regarding the hiring needs of employers in the State or regional labor market; and
- Documentation that demonstrates direct engagement with industry;
- In proposed § 668.157(a)(3) through (a)(6), an institution would demonstrate to ED that a student is enrolled in an eligible career pathway program by **documenting the following**:
 - The skill needs described in proposed § 668.157(a)(2) align with the specific coursework and postsecondary credential provided by the postsecondary program or other required training;
 - The program provides academic and career counseling services that assist students in pursuing their credential and obtaining jobs aligned with the skill needs described in proposed § 668.157(a)(2), and identifies the individuals providing the career counseling services;
 - The appropriate education is offered, concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster through an agreement, memorandum of understanding, or some other evidence of alignment of postsecondary and adult education providers that ensures the secondary education is aligned with the students' career objectives; and
 - The program is designed to lead to a valid high school diploma as defined in § 668.16(p) or its recognized equivalent.
- Under § 668.157(b), ED proposed that, for career pathway programs that do not enroll students through a State process as defined in § 668.156, the Secretary would **verify the eligibility of eligible career pathway programs** for Title IV program purposes pursuant to proposed § 668.157(a). Under proposed § 668.157(b), ED would also provide an institution with the opportunity to appeal any adverse eligibility decision.