FAME's INSIDE REPORT

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IMPORTANT NOTICE

FAME's INSIDE REPORT
September 2010 – Special Edition

INSIDE the July 26, 2010 Notice of Proposed Rulemaking – Program Integrity: Gainful Employment

In this Special Edition of the Inside Report we are taking a look at the Notice of Proposed Rulemaking (NPRM) that was published in the Federal Register on July 26, 2010. In our last Special Edition issue of the Inside Report (July 2010 – Special Report 10-01 SR) we announced this new NPRM had just become available for review and comment. **Comments are due by September 9, 2010**. This proposed piece of regulation will likely impact all FAME clients in significant ways. We encourage all schools to read this NPRM thoroughly and provide your thoughts on it to ED. More information on responding will be provided at the end of this Inside Report (IR).

BACKGROUND

This latest NPRM generated by the Department of Education (ED) is the end cap to the group of "program integrity" issues covered in the negotiated rulemaking (NegReg) process that occurred last winter, from November 2009 through January 2010 (see the July 2010 Special Edition IR for more information on this group of issues). This NPRM addresses more fully the Title IV Program Integrity Issue related to the concept of "Gainful Employment" of which we were given a precursor in the June 18, 2010 NPRM.

Like we mentioned in our last edition, schools' reactions and input carry great significance in the outcome of the final regulations that will result from the NPRM. When responding, a school should address both, items of concern, as well as items which you may support.

THE ISSUE in REVIEW

GAINFUL EMPLOYMENT - §§668.7, 668.13, 668.90:

While the phrase, "gainful employment" has been in regulation for years, it has not had a policed definition. It has been seen to be quite self-explanatory: someone who is employed/working for pay. In fact, legal precedent is seen in at least one State that has historically stated that gainful employment cannot be based upon a certain income in at least one instance: "Gainful employment will normally look like work to a reasonable person and will normally include withholding or payment of FICA. Gainful employment **cannot be measured by** the number of hours worked or **amount of earnings**, but is based solely on the activity involved." (emphasis added). [State of North Dakota - Gainful Employment 510-05-57-15 (Revised 6/1/04 ML#2925)]

The current piece of proposed regulation is one of the most dramatic and definitive published by ED with potentially momentous implications if enacted as proposed. The rationale given for presenting this NPRM is that statute requires that certain institutions, predominantly "proprietary institutions", but also some public "institutions of higher education" and "postsecondary vocational institutions", provide training that leads to gainful employment in a recognized occupation in order to be an eligible institution for Title IV program participation. ED proffers in Appendix A of the NPRM that this has been a requirement for some time, but there has not been a way to verify whether institutions in fact fulfill this criteria or not, and they have actually applied minimum enforcement of this requirement. The impetus for this new regulation is noted in ED's statement that the proposed regulations "are intended to address growing concerns about unaffordable levels of loan debt for students attending postsecondary programs that presumptively provide training that leads to gainful employment in a recognized occupation." Following is more detail on the highlights of the NPRM and its various components, as well as some points for consideration.

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Highlights

An institution's program(s) will be determined to be an eligible program if it is one that provides "training that leads to gainful employment in a recognized occupation".

The goal of this new regulation is stated to:

-- "protect taxpayers against wasteful spending on educational programs of little or no value that also lead to high indebtedness for students" and,

-- "protect students who often lack the necessary information to evaluate postsecondary education options and may be mislead by skillful marketing, resulting in significant student loan debts without meaningful career opportunities."

Stated differently, ED intends to ensure that students who attend a school do not borrow excessively, will be able to be employed in a career for which their program of study was designed to prepare them, and that the amount they borrow will not create an undue burden in repayment.

Another reported stimulus for this proposed regulation change is a Government Accountability Study (GAO) conducted in the 1990s. In the resulting report from the study, it was indicated that "occupation-specific training programs that lacked a general education component made graduates of for-profit institutions less versatile and limited their employment opportunities outside their field." ED states that "programs offered by the for-profit sector must lead to measurable outcomes, or those programs will devalue postsecondary credentials through oversupply." Thus, it appears that another goal of this proposal is to reduce oversupply in the labor market.

The Definition

The definition of gainful employment is established by a set of calculations that would be conducted on an annual basis. The metric for these calculations was provided in a chart contained in a press release from ED on July 23, 2010 (http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings). [ed. - This chart is provided later in this IR.] The specific comparisons made in this metric relate to how an institution's programs are measured for their eligibility based upon the amount its students borrow, how effective they are in making loan repayments (predominantly based upon a 10-year standard repayment plan), and how much they earn after graduation.

Specifically, the proposal provides for ED to assess whether an institution is providing training that leads to gainful employment in a recognized occupation by two different tests. The first test is one that is based upon the loan repayment rate for a program. The other test is based upon debt-to-income ratios. It is important to note that these tests are applicable to individual programs at an institution; they are not institution-wide assessments.

The "Tests"

1. **Loan Repayment Rate** (LRR): The LRR is the ratio resulting from the following:

$$\frac{\textbf{OOPB of LPF + OOPB of RPL}}{\textbf{OOPB of all loans for students attending the program}}$$

OOPB = original outstanding principal balance of FFEL and Direct Loans (including capitalized interest as of the date the loans enter repayment) that entered repayment in the 4 preceding Federal fiscal years (FFY).

LPF = loans paid in full (does not include loans paid through consolidation until the consolidation loan is paid in full).

RPL = reduced principal loans. These are loans that show a reduction in outstanding principal balance as a result of borrower payments during the most recently completed FFY. Additionally, RPL includes loans for borrowers whose payments and employment during that FFY qualify for the Public Service Loan Forgiveness program.

To ascertain the meaning of the above formula, it is helpful to be aware of the specific definition for the Federal loan repayment rate. As presented in the NPRM preamble and Appendix A it is:

-- Repayment rate. Of the program's former students entering repayment with Federal loans in the previous four FFYs, the proportion of loans for those students who are paying more than the interest charges (or fully repaid the loans) or are in full-time public service positions (i.e. eligible to seek Public Service Loan Forgiveness) in the most recent FFY. Borrowers using in-school and military deferments are excluded from both the numerator and denominator.

Note: In accordance with the above definition for Repayment Rate, the OOPB includes both program completers and non-completers. However, it does not include the loans of borrowers on an in-school deferment or military-related deferment status, or the OOPB of borrowers entering repayment in the last half of the FFY (i.e., April 1 to September 30).

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In summary, a loan counts in the reduced principal loan (RPL) category if the borrower:

- made loan payments during the most recent Federal fiscal year (FFY) that reduced the outstanding principal balance,
- made qualifying payments under the Public Service Loan Forgiveness Program, or
- paid the loan in full.

A loan will not count in the RPL category if:

- the loan was included in a consolidation loan (unless the consolidation loan was paid in full),
- the loan is in deferment or forbearance (unless a payment was made to reduce principal during the deferment or forbearance period), or
- the borrower entered repayment in the last half of the most recent FFY.

And, again, borrowers on military and in-school deferments are never included in the formula.

Example: Assume an institution that, as of July 1, 2012 (the currently planned fully effective date of the GE standards), has a certificate Medical Assistant Program (40 weeks in length, two 15-week semesters and one 10-week semester, with 30 semester credit hours) that it has offered during the immediate four prior federal fiscal years –- 2011, 2010, 2009 and 2008.

During those four prior fiscal years, this hypothetical program had a total of 190 graduates and 60 drops (76% completion rate) or 250 total students (annual average enrollment around 65), all of whom have Stafford loans. The aggregate of the original principal balances of the Stafford loans for these students is $2,200,000 (roughly an average of $8800 for all students). [Our example assumes all accrued interest was capitalized and added to the principal balances of these loans before they entered repayment.]

During the immediate prior fiscal year (2011), none of the 250 students paid their loans in full or were in the loan forgiveness program and the following was the status of their loans:

(i) 60 students, with original principal balances totaling $500,000, had forbearances and deferments (not in-school or military) with no payments reducing principal;
(ii) 30 students, with original principal balances totaling $300,000, consolidated their loans and none have paid their consolidation loans in full;
(iii) 30 students, with original principal balances aggregating $120,000, defaulted on their loans;
(iv) 30 students, with original principal balances totaling $150,000, entered repayment after March 31 of the immediate prior fiscal year;
(v) 10 students, with original principal balances aggregating $100,000, have in-school or military deferments;
(vi) 25 students, with original principal balances totaling $125,000, were in the IBR or ICR programs and made interest-only payments; and
(vii) 65 students, with original principal balances totaling $905,000, made payments that reduced their original principal balances.

The repayment fraction then is:

$$\frac{\text{Numerator: \$ 905,000 (category (vii) only)}}{\text{Denominator: \$1,950,000 (all categories except (iv) \& (v))}}$$

The **repayment rate** for our **hypothetical MA Program**, thus, is **46.4 %**, above the preferred rate of 45%.

The above example is provided by Ron Holt of Dunn & Davison, LLC, Kansas City, MO. Used with permission. "The views expressed in this example are opinions of the author about a proposed federal regulation and are not intended as legal advice about any particular academic program at any particular institution. A final regulation is expected to be issued by November 1, 2010. The provisions of that final regulation may be different from the proposed regulation, hopefully in a favorable way. No prediction is being made about the legal effect of that final regulation upon particular academic programs and readers seeking such analysis are encouraged to retain legal counsel of their choosing."

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2. **Debt-to-Income ratio** (DIR): The DIR is determined through an analysis of two different formulas; one looks at borrowers' discretionary income and the other looks at the borrowers' earnings. The formulas are:

a. Annual loan payment < Discretionary threshold * (Average Annual Earnings – (1.5 * Poverty Guideline)).

b. Annual loan payment < Earnings threshold * Average Annual Earnings.

The DIR test only looks at students who actually completed the program, but it does consider all types of educational debt the students incurred for attendance at your institution, including Title IV student loans (Parent PLUS loans are excluded), private loans and institutional financing plans. Debt incurred for attending another institution is specifically excluded unless the prior institution is affiliated with yours through common ownership or control.
It is important to have an understanding of what constitutes the key components of the formulas in order to analyze and use them. Critical elements include:

-- Annual loan payment. This is determined by calculating the median loan debt of students who completed the program during the three most recently completed award years, called the three-year period (3YP). Note that it is the median loan debt that is used, not the average debt. (The median is the middle point of all amounts borrowed, i.e., just as many borrowed more as borrowed less than the median.) The calculation is based upon a 10-year repayment schedule and the current interest rate on the Federal Direct Unsubsidized Loans. ED will consider the annual loan payment to be "reasonable" if the amount for the typical student completing the program is 30% or less of discretionary income, or 12% or less of average annual earnings.

If an institution can show that the earnings of its students who complete a particular program increase significantly after an initial period of employment, the annual loan payment measure could use the most current earnings information for students that completed the program in the four, five and six years prior to the most recent award year. (This is called the prior three-year period, or P3YP.) IF the P3YP is used rather than the 3YP, the annual loan payment must be less than 20% of discretionary income or less than 8% of average annual earnings to be considered reasonable.

Note that there is no indication given that ED will be able to analyze the loan debt of a student at your institution by program. Thus, if a student completes one program at your school and then enrolls in a second program at your school, the student's debt for both programs is likely to count if they fall within the 3YP.

-- Discretionary income. This is defined as the amount of total income above 150% of the poverty level for the domestic U.S. and a household size of one for the applicable year. The poverty level for the current year may be found at the U.S. Department of Health and Human Services website at http://www.aspe.hhs.gov/poverty.

-- Average annual earnings. Earnings data will be obtained from the Social Security Administration (SSA) most likely, but could be obtained from another Federal agency. The earnings will be the average for program completers from the 3 previous years unless the institution chooses to use the P3YP (prior years 4, 5, and 6) if they can document that the program's graduates typically see large earnings increases after an initial period of employment.

-- Debt threshold. This is expressed to be a proportion of loan payments compared to either discretionary income or total income. Again, the loan payments are based upon a 10-year standard repayment plan at the unsubsidized Stafford loan interest rate of 6.8%. To be within the threshold of full eligibility, the result must be below 20% of discretionary income or 8% of average annual earnings. If the result is above 30% of discretionary income or 12% of average annual earnings, the program becomes ineligible unless the program has an acceptable loan repayment rate (LRR).

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Example. Using the same hypothetical Medical Assistant Program, from the annual loan repayment example above, here are the facts relevant to the DIR metric.

(i) **Earnings:** Of the 190 graduates from the prior 4 fiscal years (the loan repayment universe), **150 graduates** were from the **prior 3 award years** or 3YP, i.e., 2011, 2010 and 2009. [We are not examining the P3YP in this example, which would be a separate calculation looking at MA Program graduates in the 2008, 2007 and 2006 award years].

* Of the 150 graduates in the 3YP, assume 110 were placed (73% placement rate), with total W-2 **earnings reported** to the SSA of **$2,400,000**. [Average annual earnings for placed MA grads was $25,000 (average hourly wage of $12.50), but 35 of the graduates had graduated during the immediate prior year and thus had less than a full year of earnings.]

* Note that, unlike cosmetology and certain other occupational programs (e.g., automotive, HVAC, electrical technician) that can result in somewhat significant levels of self-employment, MA Program graduates would almost always be employed by a doctor's office, a clinic or hospital and have W-2 wages. So, our example does not assume any self-employment, and, consequently, does not pose the problem of self-employment income not reported to the SSA.

* We assume our 40 non-placed graduates had total earnings of **$175,000**, assuming that half of them obtained minimum-wage, part-time employment (20-25 hours per week @ $7.50/hour).

* Total earnings of the 3YP graduates in calendar 2011 was **$2,575,000.**

***Average earnings** per MA Program graduate thus was **$17,167** ($2,575,000 divided by 150).

(ii) **Median Debt:** Total institutional charges for our hypothetical MA Program are $14,000. Over 60% of our MA Program students qualify for at least one-half of a maximum Pell Grant. The federal loan borrowing of our graduates ranges from a high of $12,600 (maximum loans [sub, unsub + ECASLA] for 1 1/3 academic years) down to a low of $4500. Some of our graduates, upon graduation, also have an institutional loan due over the next 24 months, with balances ranging from $500 to $2000 (students qualifying for less federal aid borrow more on their institutional loans). None of our graduates have private lender loans. Total educational debt for our 150 graduates ranges from $6500 to $13,000. For our example, we will say the **Median Debt** point – or position number 75 on our list of debt totals for the 150 graduates – is **$10,500**, since an overwhelming majority of our students borrow the maximum federal loan amount.

(iii) **Debt Service on Median Debt**: We amortize our average graduate debt of $10,500 over 10 years and use the current 6.8% federal loan interest rate. In year one of repayment, this results in annual debt service of **$1764** on **Median Debt.**

(iv) **Comparison of Annual Debt Service on Median Debt to Average Total Earnings:**
$1764 of Median Debt Service is **10.28 %** of $17,167 of average annual earnings of our Medical Assistant Program graduates, above the preferred 8% level but below the maximum 12% level.

(v) **Comparison of Annual Debt Service to Average Discretionary Income:** Average "discretionary income" of our graduates, average annual earnings minus 150% of the annual poverty earnings of a single person, is only $967 (150% x $10,800 – current annual poverty earnings for a single person - is $16,200, and $17,176 minus $16,200 yields $967). This full figure of $967 is far less than our annual debt service of $1764 on Median Debt, so 30% of this figure – the maximum level for this alternative DIR metric – is also far below the debt service. Our hypothetical MA Program thus fails the DIR metric focused on discretionary income.

(vi) **Conclusion**: Our MA Program passed one of the two DIR metrics, but only at a restricted level. However, our program passed the preferred 45% level on repayment rate, as explained above in the loan repayment rate example. So, our program would be eligible and subject to debt warnings, but not enrollment restrictions and employer affirmations.

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Below is the chart that ED provided with its press release on July 23rd that portrays the relationship of the various ratios and formulas. One analysis has referred to this as somewhat of a "traffic light" chart since it utilizes the familiar colors of green, yellow, and red to indicate appropriate action—proceed, proceed with caution, and stop!

Gainful Employment Proposed Rule

Debt Burden				
Repayment Rate		Above 12% of Total Income AND Above 30% of Discretionary Income	Neither Other Column	Below 8% of Total Income OR Below 20% of Discretionary Income
	Above 45%	Fully Eligible	Fully Eligible	Fully Eligible
	35% to 45%	Restricted	Restricted	Fully Eligible
	Below 35%	Ineligible	Restricted	Fully Eligible

As may be expected, there are varying levels of requirements upon schools depending upon where in the metric the program in question falls:

- **No consequences.** If the LRR is at least 45% and the DIR is 20% or less of discretionary income or 8% or less of average annual earnings, the school has no additional requirements.
- **Provide warnings.** When the LRR is at least 45% or the DIR is 20% or less of discretionary income or 8% or less of average annual earnings, the program remains fully eligible, but schools must warn consumers and current students of high debt levels and the most recent debt measures for the program.
- **Restrictions.** If the LRR is below 45% and the DIR does not meet the standard of 20% or less of discretionary income or 8% or less of average annual earnings, the institution must provide evidence of employer support for the program and warn consumers and current students of high debt levels and the most recent debt measures for the program. In this situation, the program is also subject to limits on enrollment growth.
- **Ineligibility.** Should the LRR fall below 35% and the DIR rises above 30% of discretionary income and 12% of average annual earnings, the school may not provide Title IV aid to any new students. Current students may continue to receive aid for the rest of the current award year and one additional award year to allow them time to complete the program. While the school phases out the program, it must warn current and prospective students of high debt levels and the likely reduced ability to repay their loans from projected earnings, in addition to providing the most recent debt measures for the program.

New Additional Programs

Under the new proposed regulations (§668.7(g), an institution will have to get ED approval before offering any new program that is to be eligible for Title IV aid. This approval process will require that the institution provide:

- Projected enrollment of the program for the next 5 years for each location where the program is to be offered.
- Documentation from employers that affirms the program's need, i.e., it will provide training for necessary occupations, and that there will be a need for future employees with such appropriate training. This includes the requirement to have documentation from employers (not affiliated with the institution) that the program's curriculum is designed to prepare students for jobs like those at that potential employer. The potential employer must have included in the documentation that there are job vacancies or expected demand for those occupations with that employer that is commensurate with the size of the school's program.
- Documentation of the program's approval from its accrediting agency if the program constitutes a substantive change.

Additionally, if the new program is considered a substantive change based solely on the program's content, it would be subject to the gainful employment measures as soon as data on the LRR and debt measures are available. In other cases, the LRR and debt measures would be based, in part, upon the institution's other programs that provide training for jobs in the same job family as the new program (determined by BLS Standard Occupational Classification Code).

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Provisional Certification and Hearings

It is proposed in §668.13 that ED may choose to provisionally certify an institution if one or more of its programs becomes ineligible or restricted as a result of the gainful employment regulation. It is stated that this would be one factor in the decision process.

The NPRM also indicates in §668.90(a)(3)(vii) that hearing officials may, in a termination action against an institution for not meeting the gainful employment standards, rely upon data provided by the Federal agency (likely the Social Security Administration) in determining the average annual earnings calculations. An institution's recourse in appealing appears to be that it would have to demonstrate that it has different amounts calculated as the average annual earnings figure. But, it would have to demonstrate that "the earnings information is reliable and for the same individuals who completed the program in question."

Timelines

July 1, 2011

It is important to keep in mind the proposed new requirements for disclosures that were presented in the June 18, 2010 NPRM when looking at this July 26, 2010 NPRM.

Institutions must begin providing information to ED about students who completed programs in the previous three years. ED would calculate the average earnings of those completers by using data from another Federal agency, most likely the SSA, and also determine the median student loan debt. (In 6/18/2010 NPRM.)

- Schools must begin providing information on their web sites about the occupations for which their programs are preparing students, along with the graduation rates and median student loan debts for those programs. (In 6/18/2010 NPRM.)
- Additional programs subject to gainful employment regulations must have employer affirmations (see bullet 2 under the "New Additional Programs" section above).

July 1, 2012

- Warning: Programs subject to gainful employment regulations that fail to meet one of the debt thresholds must include a warning in all promotional materials and provide the most recent debt measures for the program.
- Program eligibility
  - To remain eligible for Title IV funds, gainful employment programs must either have a Federal LRR of not less than 35%, or have student debt levels below the debt threshold. (See Debt-to-Income ratios earlier.) For one year, there would be a 5% cap on the number of programs (measured on the number of program completers in an award year) that can lose eligibility in that year.
  - Ineligible programs that remain outside the cap would be subject to the employer-affirmation and growth provisions applicable to additional programs.
  - Programs with LRRs below 45% that fail to meet one of the debt thresholds would be subject to employer-affirmation and growth provisions, and the institution may be provisionally certified.

Points for Consideration

1. Is the terminology, "gainful employment", an appropriate characterization for the intended outcome of these proposed regulatory changes in light of historic use of the expression (and perhaps, legal precedent, as in the example in North Dakota referenced earlier on page 1 under "The Issue in Review")?
2. Should ED be the entity that is able to manage the labor force, i.e., if ED thinks there is an oversupply in a particular field does it get to limit students' choices of career pursuit by restricting educational program access?
3. Since much of the data analysis done for this NPRM was based upon a study done in one State, Missouri, is the data adequate to represent the nation's demographics? And, were cosmetology schools even included in the data in the study?
4. Although as currently presented, the NPRM mostly affects proprietary schools (and other schools who offer programs not leading to a degree, but that have to affirm on their Program Participation Agreement with ED that they offer training that leads to gainful employment in a recognized occupation), it can certainly be presented as a harbinger of things to come in other sectors of higher education. See footnote 3 on page 43622 of the NPRM: "For professional degrees, the known debt levels at public and nonprofit institutions could be problematic if earnings are not sufficient." Why does ED limit the scope of this NPRM to exclude other degree programs, including professional degrees (e.g., medical and law)? ED states in the NPRM's Appendix A that it is because statute requires the gainful employment provision for proprietary schools, etc., but not for traditional colleges and universities. Does the silence in statute preclude ED from including them in regulation?

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5. ED proposes the inclusion of private loan debt in the median loan debt figure used by ED to calculate the "annual loan payment" figure. While that data may be available to schools going forward since they have to provide the private loan self certification form (which will at least make them aware the student is applying for a private loan), schools may not have this data available for immediate use considering that ED will calculate the median loan debt of students who completed the program in the 3YP. And, even with the use of the private loan self-certification form, it does not inform the school of the actual amount approved by the lender and/or accepted by the student. Schools do not always know of the actual amounts received or accepted.
6. Will there now be additional data gathering required by ED to start collecting the private loan data and institutional financing plans data? Will this be via NSLDS or IPEDS?
7. Should the definition for "discretionary income" provided on page 43628 of the NPRM be restated to read the "amount of total earnings above 150% of the poverty level…"? Or, is ED going to track all sources of "income" to include Social Security income, public assistance, etc.?
8. Will the data match with the Social Security Administration for students' earnings provide an accurate picture of students' income in cases where a large percentage of your programs' graduates are self-employed?
9. With the new category of programs that requires ED's approval before gaining Title IV eligibility, will there be longer delays in receiving approval, i.e., can ED handle the increased volume?
10. How can a school be "restricted" or declared "ineligible" when they do not even have access to the data for monitoring their status before a potential negative determination is made? The proposal is to use the most current income available of the students who completed the program in the most recent three year period (3YP) for calculating the debt-to-income ratio. That puts schools possibly in a negative situation before they have any time to change operations to prevent an unfavorable determination. Should this proposal be tempered by a delayed implementation for three years to allow schools to begin to improve any possible negatives that would show if implemented immediately using the 3YP data (which data they do not have)?
11. For schools that are in the "restricted" category in the Gainful Employment metric, there is no indication of how many employers will be required to support the school's program. Will it be a 1:1 ratio of enrolled students to the demand by businesses?
12. There are numerous issues over which schools will have no control. What about students who become incarcerated after attending? Students who transfer? Students who are laid off work due to the economy? Borrowers who choose to stay at home while a spouse works? How/why should the school be held accountable in these situations?
13. In Appendix A of the NPRM (page 43667), ED states that it has not indicated how it would treat program completers for whom there is no income information available and that it is interested in the public's input. When determining average earnings, should those individuals with no income be treated as zeroes, excluded from the calculation of the average, or should a median be used instead?
14. ED asks for comments on whether a program with a loan repayment rate below a specified threshold should be ineligible for Title IV funds, regardless of the debt-to-income ratio. To respond to this, consider: does the institution have control over how a borrower spends his/her income? If a school (or, ED via the SSA) demonstrates that its graduates are making an acceptable income (as ED determines with the debt-to-income ratio), should a school be held accountable for how the former student chooses to utilize their income?
15. The preamble to the NPRM states "the standard repayment plan chosen by most borrowers remains 10 years." (Page 43621.) Is this truly based upon a borrower choosing a 10 year repayment, or is it rather more a matter of the 10-year repayment plan being the one assigned by default by the lender or Direct Loan servicer if the borrower does not proactively choose any plan? If borrowers were actually required to choose a plan, in light of all borrowers' average outstanding principal balance, would many choose a longer repayment period? For the amounts being borrowed, does it seem unreasonable to anticipate a longer repayment period for all students in general? And a longer repayment period chosen could impact the LRR if allowed. An example of how financing periods are increasing overall may be seen in the automotive industry as well. Has there not been an increase in the length of the financing period for the purchase of a vehicle due to increasing amounts borrowed for the purchase of a vehicle? (Example: Formerly car loans were commonly for a 3 or 4 year term; now it is not uncommon to see a 6 or 7 year term in advertisements.) Should schools be held to more stringent criteria that does not allow for increased repayment periods (without penalty) as amounts financed go up over time?
16. If ED has promoted the use of deferments, forbearance, and alternative repayment plans (including the passage of new repayment options in very recent times, e.g., IBR), why is a school potentially penalized if borrowers choose to use these options? If a school is misleading students with the use of the various options to minimize its cohort default rate, would this not be better monitored for abuse without the addition of new regulation? For example, simply track the status of borrowers' repayment on NSLDS (i.e., how many are in deferment status for what time periods?) to gain a sense of potential misuse of deferment and forbearance options? Could this not then simply show potential reason for a program review or other analysis of a particular institution without the implementation of new regulations?

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17. What is the impact on your students and institution, as a result of this NPRM, when students who make regular required on-time payments and yet they do not reduce the principal on their loan in a given year? (It is possible this could occur, especially with borrowers' unsubsidized loans due to accrued but unpaid interest. Payments are applied to unpaid interest and late charges, etc., before being applied to principal reduction.)
18. Schools will not be able to challenge any ratios determined by ED as there is no due process for schools when borrowers' earnings will be verified by, most likely, the Social Security Administration. In the hearing process described for schools facing a program's termination action (or, for a school who simply wants to be proactive in tracking where they stand), there is no way provided for schools to know the details of the analysis. How will there be due process?
19. ED estimates that the data collection, tracking and providing of data to ED under the requirements of §668.7 (NPRM pages 43634-43637) will increase. Do these estimates sound reasonable to you? How will you handle this extra reporting requirement?
20. ED indicates that this NPRM is intended to address "growing concerns about unaffordable levels of loan debt for students attending postsecondary programs that presumptively provide training that leads to gainful employment in a recognized occupation", but yet this proposal does not seem to provide suggested tools for Financial Aid Administrators (FAAs) who would desire to see students borrow less. Would it be worth asking ED in your response to the NPRM for a provision, in this proposal or another one, to make it easier for FAAs to exercise professional judgment, for example, in cases where a student is working as a full-time employee and attending school part-time but wants to borrow as much as they possibly can?

Please keep in mind that the content in this Inside Report is not a legal interpretation of the July 26, 2010 NPRM. It is provided as a service to expand awareness of the NPRM and to give an examination of points of interest or concern that may assist institutions in conducting their own analysis of the impact of the proposed regulations as they prepare their individual responses.

RESPONDING TO THE NPRM

We have provided you with an overview of the July 26, 2010 NPRM. We trust it has been informative and that you will find it useful as you respond to this NPRM. We strongly encourage you to review the above information with the NPRM in hand, as well as other analyses available from various organizations and associations. Analyze the proposals and develop your own response. But, do keep in mind that your response carries much weight in the regulatory process. Each response to the NPRM has to be addressed by ED.

In responding, be sure to indicate the proposals you like, as well as the ones with which you have concerns. Also, be sure to make the response as personal about your institution as possible and especially about the impact on your students—positive and negative. If you provide data and facts, it will enhance the weight of your response, but if you do not have such available, do not let that keep you from responding. You may use a narrative format or a bullet point format. The key is to provide your response. If there is an issue you do not like, feel free to suggest an alternative.

You may respond to the NPRM at www.regulations.gov by September 9, 2010. You will need to enter the **Keyword/ID: ED-2010-OPE-0012.**

If you choose to respond other than online, you will need to make sure it is delivered to the office below **not later than September 9, 2010.**

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street NW
Room 8031
Washington, DC 20006-8502

Comments by fax or e-mail will not be accepted as official responses to the NPRM.

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Resources and further reading:

-- The **NPRM** itself at http://edocket.access.gpo.gov/2010/pdf/2010-17845.pdf.
-- **U.S. Department of Education** at http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings
-- Career College Association (CCA) website at www.career.org and webinars held on August 9, 16, and 30, 2010.
-- American Association of Cosmetology Schools (AACS) website at www.beautyschools.org for the Government Relations page at http://www.beautyschools.org/displaycommon.cfm?an=1&subarticlenbr=201 and links to the August 26, 2010 AACS Town Hall Meeting/ Webinar/ Conference Call on Gainful Employment, the August 4, 2010 Senate Hearing video, and the complete GAO Report on the undercover review of for-profit colleges.
-- National Association of Student Financial Aid Administrators (NASFAA) at http://www.nasfaa.org/PDFs/2010/NASFAAGainfulNPRM.pdf. This is NASFAA's analysis of the NPRM entitled "NASFAA Analysis of U.S. Department of Education Notice of Proposed Rulemaking (NPRM) on Gainful Employment - August 16, 2010".
-- "The Impact of 'Persistence of Interest' on Loan Repayment Rates" by Mark Kantrowitz at http://www.finaid.org/educators/20100823persistenceofinterest.pdf

Other Important Reminder:

FISAP Deadline – October 1, 2010

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