Regulation Review

Revised Gainful Employment Proposal

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The Department of Education (Education) recently released the revised version of its Gainful Employment regulation covering for-profit colleges and universities. The proposal is an attempt to revisit a rulemaking that the United States District Court for the District of Columbia struck down in 2012. The rule establishes certain benchmarks that institutions have to achieve to assure their graduates attain "gainful employment." If institutions fail to reach these federal benchmarks, they will not receive federal funding. This idea would appear somewhat reasonable; however, the administration has largely targeted for-profit institutions, and not all post-secondary institutions. The unofficial, pre-publication version of the revised proposal is 841 pages.

The court struck down the original rule's debt repayment threshold as "arbitrary and capricious." In this new proposal, Education seeks to remedy that issue by: 1) expanding the amount of data it uses in making a determination about an institution, 2) utilizing separate metrics in its evaluation, and 3) providing a "zone" determination that would provide notice to programs facing potential non-compliance in the near-term.

BREAKDOWN

- Total Regulatory Costs: $2.36 billion (over 10 years)
- Annual Regulatory Costs: $236 million
- Total Paperwork Burden: 6.94 million hours

ANALYSIS

Considering that Education seeks to bolster its proposal's legal standing with a more comprehensive approach, such significant burdens should come as little surprise. At more than 6.9 million hours of paperwork, it is now the most burdensome non-tax rule to date in 2014 (overtaking EPA's Pesticide Rule from last month). This figure is even more jarring when compared to the 2011 version, 260,000 hours; the revised rule represents a 26-fold increase.

At $236 million in annual costs, it is now the third most expensive rulemaking in 2014, behind two other rules released in March: new nutrition labels and EPA's Tier 3 Fuel Standards. As in the prior version, there are no quantified benefits and Education did not address the proposal's implications under the Unfunded Mandates Reform Act. However, considering that it maintains the same type of costs as the previous final rule, one can expect this regulation to include that determination, just as the previous rule.

In addition, although it does not include a definitive determination about the proposal's impact on small entities, the "Initial Regulatory Flexibility Analysis" does seem to suggest significant implications for smaller institutions. Because Education's analysis finds that neither private non-profit nor public institutions face non-compliance, their "analysis of the effects on small entities focuses on the for-profit sector." Nearly 35 percent of small 4-year institutions could fail to meet the gainful employment standards. This is significant because, as Education notes: "the loss of title IV, HEA program eligibility for any program would be more likely to cause the institution to shut down."

This proposal has significant implications for students. Approximately one-third of the increased paperwork burden applies directly to students due to, "proposed requirements that students read the disclosures and student warnings from institutions." Education estimates that roughly 800,000 students are enrolled in either "failing" or "zone" programs. They further estimate that 233,000 students could transfer to better-performing programs. However, they also note that:

> *Students who transfer to programs at other postsecondary institutions to continue their education could face increased commuting costs, additional tuition and fees if their credits do not transfer, or other costs due to disruptions in their educational plans.*

If those costs prove too expensive, Education estimates that 45,000 students could eventually drop out of post-secondary education entirely. However, the agency fails to monetize this profound burden to the students and to the national economy as a whole.

In the face of a definitive court order, the administration has seemingly prioritized reviving this regulatory program to combat the debt-to-earnings ratio certain graduates face. However, this revised version represents a more expansive regulatory regime that shares many of the previous concerns for students and institutions alike.