Regulation Review

Revised Gainful Employment Final Rule

NOVEMBER 3, 2014

The Department of Education (ED) recently released the final version of its revised "Gainful Employment" standards. The rulemaking required revisions after a court struck down its origin

al iteration. The American Action Forum (AAF) previously reviewed the rule's proposed version. The unofficial, pre-publication version of the rule was 945 pages.

BREAKDOWN

Proposed Rule

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

Final Rule

- Total Regulatory Costs: $4.33 billion (over 10 years)
- Annualized Costs: $433 million
- Total Paperwork Burden: 6.93 million hours

Total Change

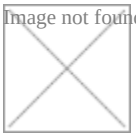
- Total Regulatory Costs: + $1.97 billion
- Total Paperwork Burden: – 16,750 hours

ANALYSIS

The most notable aspect of the rule's final version is the substantial increase in regulatory costs. The nearly $2 billion in additional burdens essentially doubles the rule's price tag. And while the paperwork burden decreases slightly, both the final cost and paperwork estimates stand as the most burdensome ED rules since at least 2010.

On a procedural note, the most curious issue is the lack of a proper analysis under the Unfunded Mandates

Reform Act (UMRA). In fact, it is not even a matter of ED incorrectly ascertaining whether the rule triggers UMRA, but rather the complete omission of any analysis. This is, if nothing else, a program that ought to at least include some basic determination on the matter. Take the rule's own "Accounting Statement" below:



The rule's own estimate clearly presents $433 million in total annualized costs to regulated entities, well above the UMRA threshold. One could perhaps point to the transfer section as an area where the federal government is actually paying for such mandates – thus avoiding at least the spirit of UMRA – but yet none of the transfers listed are of that nature. The administration could also argue that the regulation, "Contains duties that are a condition of receiving federal financial assistance." And again, one could have such a discussion about the rule's implications under UMRA, but ED included no such discussion nor did they provide any rationale for the omission of a legally required regulatory analysis.

The analysis that the agency actually does provide includes some disconcerting details. As noted in AAF's previous review of the proposed rule, this final measure will have significant costs for students. As ED withholds funding for failing or "zone" (near-failing) programs, students will either transfer to compliant programs or drop out of secondary education altogether, depending upon how prohibitive the costs are.

The proposed version estimated 233,000 would transfer and 45,000 would drop out. The final version estimates that the annual transfer rate will increase by nearly 100,000 to 330,484 students and the drop-out rate will more than double to 110,161 students. The agency also includes even more dramatic figures using less favorable assumptions. At the most extreme level, ED estimates there could be 520,813 transfers and 173,916 drop-outs annually.

The rule officially takes effect on July 1, 2015. Over the past few years it has had to, in some format, wind its way in and out of the administration and the courts. This current iteration drew nearly 95,000 public comments. Members of Congress on both sides of the aisle are already casting doubts on its intended purpose and effectiveness. Thus, despite its finalization, this rule and its significant burdens will likely continue to face litigation and political scrutiny.