

Proposal to Separate the Regulations for GE and Eligible Non-GE Programs

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The Department's regulations propose to establish the same earnings premium for programs subject to gainful employment (GE) as for eligible non-GE programs. I applaud the approach of ensuring that all programs are subject to accountability and broadly share the Department's goal of harmonizing the accountability systems for the two types of programs. However, because the two sets of programs are subject to differing statutory authorities, I recommend that the Department **restructure the proposed regulations to distinctly provide for the treatment of each type of program.**

This need not substantively change the meaning, interpretation, or application of the rules (while I separately endorse other changes,¹ those are not necessary for this proposal). Restructuring the regulations to distinctly provide for the treatment of each type of program could be as simple as duplicating the Department's proposed language Subpart S—with the only difference being that one section applies only to GE programs while the other, identical section applies only to programs that are subject to the accountability test in the One Big Beautiful Bill Act (OBBBA).² This would provide clarity in the regulations about the authority that is being invoked.

The legal authority being invoked could have important consequences that warrant this added clarity, even if the metrics that apply to both sets of programs are identical. In particular, in the event that the GE regulations are subject to litigation – as they have been in more than half a dozen cases in the past³—this could help to ensure the separate operation and application of the rules for programs covered by OBBBA while any such litigation is being resolved.

While I have not included draft language for this proposal, drafting it should be relatively straightforward—simply replicating the existing language in separate subparts for GE and for OBBBA-covered programs. I am happy to consult further or provide language if needed.

¹ In particular, I support ensuring that GE programs that fail the earnings premium measure lose eligibility for all Title IV funds during the requisite period of ineligibility— not just Direct Loans.

² In the case of some programs, this would mean overlapping authorities apply; for-profit degree programs, for instance, would be covered by both the GE section and the OBBBA section. In other cases, only one authority would apply; undergraduate certificate programs would be covered only by the GE section, and nonprofit and public degree-granting programs would be covered only by the OBBBA section.

³ This includes litigation from the [Association of Private Sector Colleges and Universities](#) (APSCU) against the 2011 GE rule; litigation from [APSCU](#), the [Association of Proprietary Colleges](#), the [American Association of Cosmetology Schools](#), and a [group of Acupuncture and Oriental Medicine institutions](#) against the 2014 GE rule; litigation from a [group of state attorneys general](#) against the Department's delays in carrying out the 2014 rule; litigation from [another group of state attorneys general](#) and from the [American Federation of Teachers and California Federation of Teachers](#) against the Department's rescission of the 2014 rule; and litigation from the [American Association of Cosmetology Schools](#) and from [several institutions](#).