Career Education Review and Ritzert & Leyton, P.C. Webinar Series: "Gainful Employment"

April 24, 2014

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GAINFUL EMPLOYMENT RULEMAKING

Meetings Held:

Session 1: September 9-11, 2013

Session 2: November 18-20, 2013

Session 3: December 13, 2013 (Added)

Result:

No consensus reached by negotiators.

Status:

Proposed Rule published March 25, 2014.

Next Steps:

Sixty day public comment period ends May 27, 2014.

GAINFUL EMPLOYMENT – COMMENT PROCESS

- Comments must be received on or before May 27, 2014.

- "Docket ID ED-2014-OPE-0039" required as an identifier at the top of all Comment Letters.

- Identify clearly the specific section of the proposed regulation that your comment addresses.

- Provide relevant information and data when possible: quality counts and any changes to the NPRM must be very well-supported for the Department to accept.

GAINFUL EMPLOYMENT – COMMENT PROCESS

- File electronically (strongly encouraged by ED) using Federal eRulemaking Portal at www.regulations.gov

- Or file by mail (commercial, U.S. postal or hand delivery) to:

  Ms. Ashley Higgins
  U.S. Department of Education
  1990 K Street NW, Room 8037
  Washington, DC 20006-8502

- No faxes or emails accepted.
- Remember: It's all public information once filed.

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PURPOSE OF GE RULE – PREAMBLE TO NPRM

TO "ADDRESS GROWING CONCERNS" ABOUT –

- PROGRAMS NOT TRAINING STUDENTS IN SKILLS THEY NEED TO OBTAIN AND MAINTAIN JOBS IN THE OCCUPATION FOR WHICH THE PROGRAM PURPORTS TO PROVIDE TRAINING.

- PROGRAMS PROVIDING TRAINING FOR JOBS THAT DO NOT PAY ENOUGH TO SERVICE DEBT OR (TO PUT IT ANOTHER WAY) PROGRAMS THAT ARE TOO EXPENSIVE.

- PROGRAMS THAT "CHURN" STUDENTS WITHOUT REGARD TO COMPLETION (ENROLL HIGH NUMBERS BUT GRADUATE FEW).

- AGGRESSIVE AND DECEPTIVE MARKETING PRACTICES

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CITED STATUTORY AUTHORITY

- Sections 101 and 102 of the Higher Education Act, as amended, define an eligible institution for Title IV purposes as one that provides an "eligible program of training to prepare students for gainful employment in a recognized occupation." This includes:
  - All for-profit programs except certain liberal arts programs.
  - Non-degree programs offered by non-profit and public vocational institutions.
- Section 481(b) of the HEA defines "eligible program" for Title IV purposes to include a program that "provides a program of training to prepare students for gainful employment in a recognized profession."

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TWO PRONGED FRAMEWORK

Accountability Framework

To define what it means to "prepare students for gainful employment in a recognized occupation" under the Higher Education Act through accountability metrics that allow the Department of Education to evaluate whether a GE program remains eligible for Title IV funds.

Transparency Framework

To increase the quality and availability of information about the outcomes of students enrolled in GE programs.

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ACCOUNTABILITY - CERTIFICATION

An institution must establish the eligibility of a GE program through:

- Certification In Good Faith and After Appropriate Due Diligence
  - →For Each Program Through PPA
  - →By Institution's Most Senior Executive Officer

- That a GE Program is included in the Institution's Accreditation (or for public vocational institutions is approved by a recognized state agency), and

- That a GE Program satisfies any applicable State or Federal program-level Accrediting or Licensing requirements for the occupations for which the program prepares the student (for each state in which institution is located or any state within the institution's Metropolitan Statistical Area)

ACCOUNTABILITY - CERTIFICATION

668.414(a) – Transitional Certification (for institutions not scheduled for recertification within six months of the effective date of the rule)

By no later than December 31 of year in which new regulations take effect, a transitional certification signed by most senior executive officer affirming that each eligible GE program then offered by the institution satisfies the requirements of the new rule. Secretary accepts as an addendum to the PPA.

668.414(b) – PPA Certification (New and Recertification)

As a condition of continued participation in Title IV program, an institution would certify in its PPA that each then-eligible GE program satisfies the certification requirements.

668.414(c) – Required Updates to List of Eligible Programs on E-App

- Required reporting of any changes to GE programs – i.e., name or credential level of current GE program, or addition of a GE program.
- Requirement to affirm that program satisfies certification requirements.

ACCOUNTABILITY FRAMEWORK – METRICS

Debt-to-Earnings (D/E) Rates Measure

Evaluates the amount of debt students who completed a GE program incurred to attend that program in comparison to the same students' discretionary and annual earnings after completing the program.

AND

Program Cohort Default Rate (pCDR) Measure

Evaluates the default rate of former students enrolled in a GE program, regardless of whether they completed the program. Meant to identify GE programs that pass the D/E rates measure but whose students incur debt they cannot repay and who ultimately default. Gets to programs with low completion rates but students with unmanageable debt. pCDR is calculated even if D/E rates are not and there is no minimum size program for calculating pCDR.

A GE Program must satisfy BOTH measures, as set forth in the rule, to remain eligible for Title IV funding.

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D/E RATES - KEY DEFINITIONS

GE Program: Any Title IV eligible educational program offered by a for-profit institution, and certain non-degree programs offered by non profit or public institutions, identified by a combination of the institution's six-digit OPE ID number, the program's six-digit CIP code as assigned by the institution or determined by the Secretary, and the program's credential level. Must have at least 30 completers in the 2Y or 4Y Cohorts (defined below) to be calculated.

Completers: The total number of students who completed the GE program during the applicable cohort period based on information provided by the institution, not including any excludable student.

Two Year Cohort Period (2Y Cohort): The cohort period covering two consecutive award years that are the third and fourth award years prior to the award year for which D/E rates are calculated (except programs requiring medical or dental internship or residency).

Example: For D/E Rates calculated for the award year 2014-15, the applicable 2Y Cohort for determining completers is 2010-11 and 2011-12.

Four Year Cohort Period (4Y Cohort): The cohort period covering four consecutive award years that are the third, fourth, fifth and sixth award years prior to the award year for which D/E rates are calculated (except programs requiring medical or dental internship or residency).

Overview of Proposed Gainful Employment Regulation

Two Independent Metrics Must Satisfy Both	Annual debt-to-earnings Or Discretionary debt-to-earnings (By Award Year)	Program cohort default rate (By Federal Fiscal Year)
Students - Defined	Completers of GE Program –Minimum Size 30 Students in 2Y Cohort (or 4Y Cohort if not 30 completers in 2Y Cohort)	Completers & non-completers – Only Title IV Borrowers
Categories & thresholds	**Passing Rates**: • debt to annual earnings rate ≤8% **OR** • debt to discretionary earnings rate ≤20% (Earnings are for year being measured) **Zone**: • Not passing either D/E rate **AND** • Between 8%< and ≤12% debt to annual earnings rate or Between 20%< and ≤30% debt to discretionary earnings rate **Failing Rate**: Above 12% debt to annual earnings rate or annual earnings is zero **AND** above 30% debt to discretionary earnings rate or discretionary earnings is zero	**Passing pCDR**: pCDR<30% for most recent fiscal year **Failing pCDR**: pCDR≥30% for most recent fiscal year

Overview of Proposed Gainful Employment Regulation Cont.

	Annual debt-to-earnings Or Discretionary debt-to-earnings (By Award Year)	Program cohort default rate (By Federal Fiscal Year)
Ineligibility rules (metrics operate independently of each other)	A program becomes T4 ineligible for 3 calendar years if: • It fails D/E rates in any 2 out of 3 consecutive years OR • It is in the Zone for 4 consecutive years (i.e. does not pass in 1 out of 4yrs) OR • A failing or zone program is voluntarily discontinued by the institution.	A program becomes T4 ineligible for 3 calendar years if: • The program has a pCDR of ≥30% for 3 consecutive fiscal years OR • A failing or zone program is voluntarily discontinued by the institution.
Restrictions	• Debt warning to actual and prospective students AND on template if program <u>could</u> become ineligible at the end of the next award year	• Debt warning to actual and prospective students AND on template if program <u>could</u> become ineligible at the end of the next fiscal year

Overview of Proposed Gainful Employment Rule Cont.

GE Reporting Requirements	**By July 31 following the date the regulations take effect, schools must report data for the 2^{nd} thru 7^{th} award years prior to the date for each student enrolled in a GE program during an award year who received title IV funds including name/SSN/ DOB, CIP code, credential level, program length, attendance status and dates for award year, enrollment status on first day of student's enrollment, date of completion/withdrawal, and total private and institutional loan debt, tuition/fees and costs for completed/withdrawn students**	
Gainful Employment Disclosure Template	• Occupation name, SOC code, link to occupational profile on O*Net • Cost of tuition, fees, books, supplies • Program length (weeks, months, years) and Total Enrollment for last completed award year • Completion and Withdrawal rate (for full and part-time students) • Placement rate (if required by state or accreditor) • Repayment rate (borrower-based) • Median earnings and Median loan debt • Clock and Credit Hours, if applicable • Whether licensure requirements are met (if applicable) • Whether program is accredited (if required) • pCDR • Annual Earnings Rate	
Calculating, issuing, and challenging completion,, withdrawal and repayment rates, median loan debt and median earnings	• **Institution may challenge accuracy of Secretary's calculations and data, except for the SSA earnings data. Burden of proof is on the institution**	

D/E RATES NOT CALCULATED IF –

(1) Fewer than <u>30</u> students completed the program during the 2Y Cohort period (3rd and 4th year prior to the year being calculated) AND fewer than 30 students completed the program during the 4Y Cohort period (3rd, 4th, 5th and 6th years prior to the year being calculated) if the 2Y Cohort had fewer than 30 completers); or

(2) Social Security Administration does not provide the mean and median earnings for the program.

Note : Being unable to calculate a D/E rate in one year DOES NOT mean that the D/E metric is deemed satisfied. For example, if a program fails the D/E rates measure in Year 1, received no rate in Year 2, passed in Year 3, and failed in Year 4, the program would be deemed ineligible in Year 4 because it failed the D/E measure in 2 out of 3 consecutive years – the year with no rate is thrown out/disregarded.

STUDENT EXCLUSIONS FROM D/E RATE CALCULATIONS

(1) One or more of the student's Title IV loans were in a military-related deferment status during the calendar year for which the Secretary obtains earnings information;

(2) One or more of the student's Title IV loans are under consideration by the Secretary, or have been approved, for a discharge on the basis of the student's total and permanent disability;

(3) The student was enrolled in any other eligible program at the institution or another institution during the calendar year for which the Secretary obtains earnings information;

(4) For undergraduate GE programs, the student subsequently completed a higher credentialed undergraduate GE program at the same institution or, for post-BA and graduate GE programs, the student subsequently completed a higher credentialed graduate GE program at the same institution; or

(5) The student died.

DISCRETIONARY INCOME RATE

$$\frac{\text{"Annual Loan Payment"}}{\text{"Discretionary Income"}}$$

"ANNUAL LOAN PAYMENT" – NUMERATOR DEFINED

(1) Determine the Median Loan Debt of the students (Title IV recipients) who completed the program during the applicable cohort period, based on the lesser of: (a) the Loan Debt incurred by each student or (b) the total amount of tuition and fees the institution assessed each student for enrollment in the program and the total amount for books, equipment and supplies as reported by the institution, and

(2) Amortizing the median loan debt over a

- 10-year repayment period for certificate (undergrad, post BA and graduate) and associate degree programs;
- 15-year repayment period for bachelor's and master's degree programs; and
- 20-year repayment period for doctoral and first professional degree programs.

(3) Calculate using the average annual interest rate on Federal Direct Unsubsidized Loans during the six years prior to the end of the applicable cohort period.

- Use interest rate applicable to undergraduate students for certificate, associates and BA programs and use interest rate applicable to graduates for masters, graduate, doctoral and first professional degree programs.

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"LOAN DEBT" - DEFINITION

(1) Title IV loans the student borrowed for enrollment in the GE program [data pulled from NSLDS] PLUS any private education loans , including loans made by the institution, borrowed for enrollment in the GE program PLUS any credit extended by, or on behalf of, the institution, such as from institutional financing or payment plans, regardless of who holds the debt and even if excluded from the definition of private education loans (PLUS Loans to parents and Direct Unsubsidized Loans that were converted from TEACH Grants are excluded from Title IV loans borrowed but Perkins loans are added) (non-Title IV loan debt information that the "institution is or should reasonably be aware of" must be reported under proposed 668.411)

(2) Excludes any loan debt incurred by the student for attendance in programs at other institutions. However, DOE may include loan debt from other institutions if under common ownership or control.

(3) Student's loan debt is the lower of the amount of Loan Debt or total amount of tuition, fees, books, equipment and supplies [the latter represents the "cap" on loan debt under the proposed rule], however, cap is not reduced by grant funds also received by student.

LOAN DEBT - ATTRIBUTION

For purposes of calculating the D/E rates, the Secretary attributes all of the Loan Debt incurred by the student to the highest credentialed undergraduate or graduate program completed by the student at the institution as of the most recently completed award year prior to the calculation of the D/E rates.

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"DISCRETIONARY INCOME" – DENOMINATOR DEFINED

The higher of the mean or median SSA-provided annual earnings, minus 150% of the Poverty Guideline for a single person residing in the United States as published by HHS ($11,670 x 1.5=$17,505)

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ANNUAL EARNINGS RATE

$$\frac{\text{"Annual Loan Payment"}}{\text{"Annual Earnings"}}$$

"ANNUAL EARNINGS" – DENOMINATOR DEFINED

- The higher of the mean or median of the most currently available annual earnings of the students who completed the GE program during the applicable cohort period and who are not otherwise excludable, as obtained from the SSA.
- Includes earnings reported by employers to SSA and earnings reported to SSA by self-employed individuals.

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EXAMPLES – DOE 2012 INFORMATIONAL RATES*

Credential	Completers	Ann. Rate	Ann. Loan Pymt.	Ann. Earn.	Dis. Rate	Ann. Pymt.	Dis. Earn.	Result
Assoc.Deg/Med.Asst.	109	14.55%	$2914	$20027	104.39%	$2914	$2792	F
Cert./Med.Asst.	498	9.61%	$1231	$12816	100%	$1231	$0	Z
Cert./PharmTech.	34	7.03%	$1058	$15051	100%	$1058	$0	P
Assoc.Deg/RN	225	5.4%	$2654	$49146	8.31%	$2654	$31911	P

*http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/2012-ge-rates.xls

TRANSITIONAL PERIOD

Intent: To assist schools in meeting the requirements of the new rule by lowering student debt for currently enrolled students under expectation that schools have had time and did make changes in programs since prior 2011 Rule was issued.

- In the first four award years that D/E rates are calculated under the rule (award years 2015-16 to 2018-19), if a program would be failing or in the zone, the Secretary will calculate transitional D/E rates using the median loan debt of the students who completed the program in the most recently completed award year prior to the calculation of the D/E rates. Thus, annual loan payment is based on most recent median loan debt versus what it would be with the earlier 2YP cohort.

TRANSITIONAL PERIOD

- Earnings would be determined based on the most currently available earnings for completers in the applicable cohort.
- Transitional rates will be used to assess the program if they are lower than what the rates would otherwise be. This will allow programs that promptly lower tuition and fees to realize the benefits of their changes.
- After the four year transition period, the calculation would revert to a normal approach that uses the outcomes of 2YP cohort for both earnings and annual loan payment.

CONSEQUENCES – WARNINGS

Within 30 days of receiving a Notice of Determination that the GE program could become ineligible based on D/E rates or pCDR, the institution is required to provide a written warning directly to each student enrolled in the program and include the student warning on the school's GE disclosure template using the following statement:

> "You may not be able to use federal student grants or loans to pay for this institution's program next year because the program is currently failing standards established by the U.S. Department of Education. The Department set these standards to help ensure that you are able to find gainful employment in a recognized occupation and are not burdened by loan debt you may not be able to repay. A program that doesn't meet these standards may lose the ability to provide students with access to federal financial aid to pay for the program."

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CONSEQUENCES – WARNINGS

- Institution must deliver the warning *directly* to enrolled students: hand delivery, as part of a group presentation, or email to student's primary email address, in the student's first language. Must maintain records to verify.
- Institution must provide warning directly to prospective students at the time a student first contacts, or is contacted by, the institution about a GE program.
  - 3 day cooling off period after warning before enrolling (warning and cooling off period required again after 30 days from first warning).
  - Maintain records to verify.
  - Student signature required.
  - Schools not required to provide to students categorically ineligible for Title IV, such as foreign students.
- Describe options available to enrolled students to continue their education at the same or another institution if the program loses eligibility also including whether school will refund the tuition, fees and other charges.

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RE-ESTABLISHING ELIGIBILITY

- Ineligible OR voluntarily discontinued zone OR failing programs OR programs substantially similar to such programs cannot seek to re-establish eligibility for three calendar years, either from date of Notice of Determination of ineligibility or date institution provides notice to the Secretary.

APPEAL RIGHTS – D/E RATES

- Institution may challenge accuracy of students on completers list prepared by Secretary (45 day correction period).
- Institution has 45 days to challenge the Loan Debt and calculation of the draft D/E rates after issuance by Secretary before rates become final. No challenge to SSA earnings permitted.
- Institution may appeal final rates by using earnings data from other sources including an institutional survey per specified NCES standards or state sponsored data system of the students who completed the program in the applicable years.
- Institution may also appeal based on mitigating circumstances:

  → By showing that less than 50% of the completers in the cohort period received loans (including those who received non title IV loans).

PROGRAM-LEVEL CDR

- Independent metric from D/E rates that must be met for program to pass.
- Substantially the same procedures and methodology used in calculating institutional CDRs (iCDRs) under 34 CFR Subpart N including same challenge and appeal rights as iCDRs.
- NPRM continues current policy of not including in CDR rates students who are receiving deferments, forbearances or IBR plans.
- GE program does not lose eligibility if pCDR rate exceeds 40% in one fiscal year.

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GE REPORTING AND DISCLOSURES

- Institutions must report, for each award year, information about each student who was enrolled in a GE program and received Title IV funds along with information on the GE program
- Institutions must provide additional disclosures about the program about Name, SSN, date of birth, institution

CHALLENGING SECRETARY'S CALCULATIONS

- Institution may be required to report completion, withdrawal and repayment rates in addition to required loan debt information. The Secretary would calculate all rates based on information provided.
- Institution would have rights to challenge debt to earnings rates, program cohort default rates, and completion, withdrawal and repayment rates.

  - Median Loan Debt: Secretary calculates based on information in NSLDS and provided by institution with respect to non-Title IV debt.
  - Median Earnings: Obtained from SSA. Same data as used for calculating D/E rates.
  - Completion Rate: Extent to which students complete a GE program within 100 percent and 150 percent of the length of the program.
  - Program CDR: Secretary calculates.
  - Withdrawal Rate: Percentage of students in enrollment cohort (based on enrollment status on first day of enrollment in program) who withdrew from the program within 100 percent and 150 percent of the length of the program (includes both official and unofficial withdrawals under Title IV rules).
  - Repayment Rate: "Borrower-based" repayment rate that reflects whether students entering repayment during the applicable cohort period are able to pay down, by at least one dollar, their outstanding FFEL/ Direct Loans and Graduate PLUS loan balance for the GE program (i.e., they paid at least the accruing interest). Does not include IBR payments.

AREAS FOR COMMENT

The Department has asked for comments on a significant number of issues including whether

- Schools should be able to include non-Title IV students in earnings information?
- D/E rates should include outcomes of students who did not complete?
- D/E passing rates should be based on same metrics as in 2011 rule?
- Enrollment limits should be placed on programs that could become ineligible?
- ED should include borrower relief provisions?
- One amortization period be used for all credential levels?
- The Zone should be retained as a category?

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QUESTIONS & ANSWERS

- **What if students choose not to work full time and therefore have lower earnings?**

Answer: The GE rule does not account for these individual choices.

- **If ED is using NSLDS for Title IV debt, how will ED get data about private or institutional loans?**

Answer: Non-Title IV loan debt information that the “institution is or should reasonably be aware of” must be reported under proposed rule.

- **What if self-employed graduates underreport income to IRS?**

Answer: The proposed rule relies on graduates to accurately report earnings to SSA.

- **For purposes of re-establishing eligibility, what does a “substantially similar” program mean?**

Answer: The program has the same credential level and first four digits of the CIP code.

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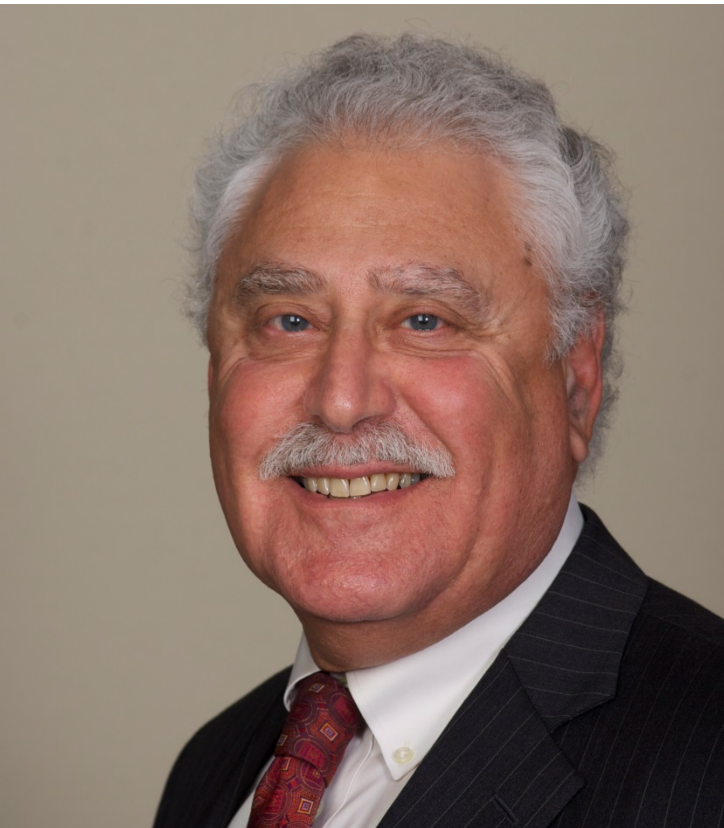

Peter is co-founder of the Washington, D.C. area law firm of Ritzert & Leyton, P.C. and head of the firm’s education practice group. Since 1980, Peter has represented many institutions of higher education, publicly traded companies, private investment groups and others with respect to resolving regulatory/compliance matters as well as with respect to achieving desired transactional results through mergers, acquisitions and reorganizations. The firm has eight attorneys involved in work involving the postsecondary education sector and is regularly involved with the U.S. Department of Education (DOE), national, regional and programmatic accrediting agencies, state licensing and other regulatory agencies and other third parties. Peter has served three two-year terms on the Association of Private Sector Colleges and Universities and predecessor board of directors. He received his law degree from Catholic University School of Law in 1980, a master's degree in public administration from American University in 1974, and a bachelor's degree in political science from Antioch College in 1971.

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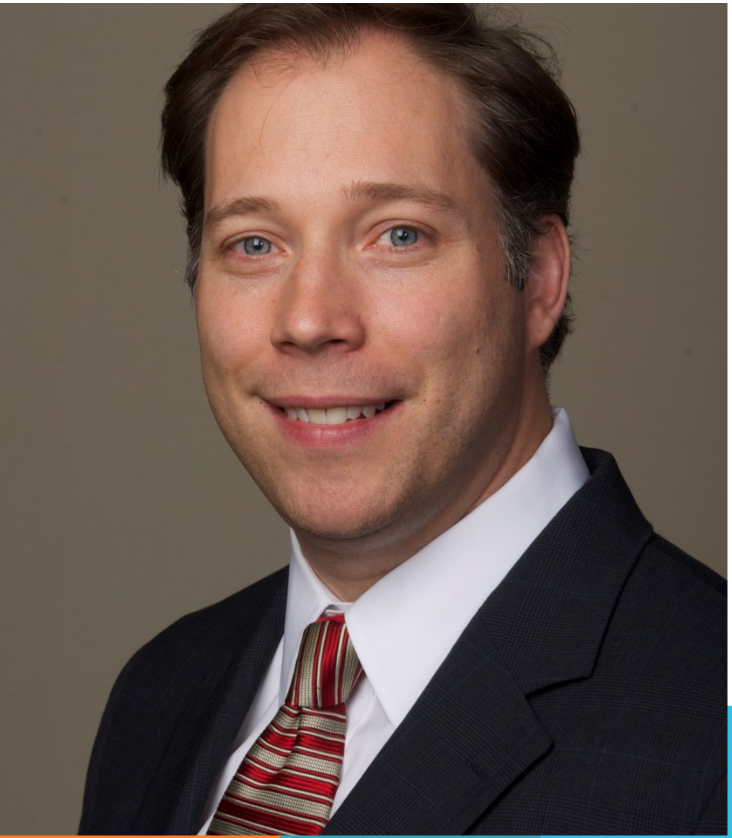

Steve is a Senior Associate at Ritzert & Leyton, PC. As a member of the Firm's Postsecondary Education Practice Group, he advises clients on a wide array of matters related to compliance with student financial aid programs under Title IV of the Higher Education Act, including topics such as 90/10, the incentive compensation rule, institutional and student eligibility issues, and gainful employment.

He also specializes in advising postsecondary institutions on compliance with privacy laws, including the Family Educational Rights and Privacy Act ("FERPA"), the Gramm-Leach-Bliley Act ("GLBA"), and the Federal Trade Commission's "Red Flags" rule. In addition, his work involves counseling institutions on issues related to anti-discrimination and employment law, campus security and consumer protection.

Steve has appeared in matters before the U.S. Department of Education, Office of Hearings and Appeals, and in administrative matters before national and regional accrediting agencies as well as state regulatory agencies. He has also counseled clients in the regulatory aspects of ownership changes and substantive changes resulting from mergers and acquisitions. He earned a B.A. from The College of the Holy Cross and a J.D. from Catholic University. Steve can be reached at stchema@ritzert-leyton.com or 703.934.9835.

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