



COMMITTEE *for a* RESPONSIBLE FEDERAL BUDGET

CHAIRMEN

Mitch Daniels
Leon Panetta
Tim Penny

PRESIDENT

Maya MacGuineas

DIRECTORS

Barry Anderson
Brian Bernasek
Erskine Bowles
Saxby Chambliss
Kent Conrad
Jim Cooper
Dan Crippen
Esther George
Bill Gradison, Jr.
Keith Hall
Jane Harman
Heidi Heitkamp
William Hoagland
James Jones
John Kasich
Ron Kind
Joe Manchin
Marjorie Margolies
Dave McCurdy
Mame Obernauer, Jr.
Rudolph Penner
Franklin Raines
Robert Reischauer
Reid Ribble
Charles Robb
Mitt Romney
Isabel Sawhill
Eugene Steuerle
David Stockman
John Tanner
Tom Tauke
Carol Cox Wait

We are writing in response to the proposed rule ED-2026-OPE-0100, RIN 1840-AE06, related to implementing the accountability provisions in the One Big Beautiful Bill Act as well as changes to the Gainful Employment rules. The Committee for a Responsible Federal Budget is a nonpartisan, non-profit organization committed to educating the public on issues with significant fiscal policy impact. The Committee has significant experience analyzing the cost and effects of federal policy, including as it relates to higher education financing.

Background

We are concerned by the Department's proposal to substantially limit the consequences of existing Gainful Employment (GE) provisions. The Department's own cost estimate suggests that the proposed regulatory package will cost \$6 billion, with \$5 billion of the cost from increased spending on Pell Grants to low-earning programs (including \$4 billion from the discretionary portion of the Pell Grant program).

We urge the Department to keep in mind that the Pell Grant program faces an historic and structural shortfall:

- The Pell Grant program is projected to be \$5 billion underwater by the end of this fiscal year without action by Congress.
- CBO projects that the Pell Grant program faces a \$104 billion to \$132 billion shortfall over the next decade. CRFB projects it could grow to \$157 billion under alternative assumptions.
- CBO estimates structural deficits every year for the next decade between \$9 to \$14 billion.

These facts must be kept in mind as the Department considers implementing changes not required by Congress in the face of a crisis in Pell funding.

Concerns

As the Department correctly notes, the Department needs a reason for the regulatory action, particularly as it relates to the Gainful Employment rules that were not included in the reconciliation law commonly known as the "One Big Beautiful Bill Act" (OBBBA or OBBB). The Department states that "the proposed regulations are also needed to align existing accountability framework under the current FVT/GE rule ([88 FR 70004](#)) with those in the OBBB." However, the Department does not adequately explain why that is the case.



The Gainful Employment (GE) rule operates separately from OBBBA accountability rules and we believe that there is no rationale for the Department to adjust the GE rules simply because it is implementing the OBBBA rules. If Congress wanted to make changes to Gainful Employment regulations, it would have done so. For example, it could have modified the language of the HEA to further detail the meaning of the words “gainful employment.” Or, it could have proposed repealing Gainful Employment, as the House did propose in its reconciliation instructions to the Senate. In enacting OBBBA, Congress did neither. Notably, the Senate removed the House’s proposed provision that would have repealed the GE rules, but kept other regulatory relief provisions in the regulatory relief section of its bill. OBBBA’s lack of any changes to GE speaks volumes: Congress did not intend to change it even though they had the opportunity -- and entertained a proposal -- to do so.

If the Senate had wanted to “harmonize” GE with Do No Harm, it would have done so. It did not, and gave no indication it wanted the Department to do that or to change or repeal GE in any way.

ED’s current argument is that certificates are excluded from Section 84001 in OBBBA, but that ED can nonetheless impose the same earnings accountability test by modifying and repurposing GE authority. That implicitly concedes the force of *expressio unius* against inclusion (i.e., Congress omitted undergraduate certificates from the new list), while simultaneously asserting that ED may supply the omission by regulation using another provision. That is the kind of move that invites a court to view ED as attempting to accomplish through regulation what Congress withheld in text.

In arguing that Congress intended certificates to be covered by the “Do No Harm” accountability measures in OBBBA, the Department [cites](#) an FAQ provided by the Senate HELP Committee. The document states that Do No Harm “does not apply to undergraduate certificate programs, which are covered by a *similar* earnings test in the Gainful Employment regulation.” (Emphasis added). To the extent an FAQ published after the passage of a bill indicates Congressional intent, the wording clearly suggests that the HELP committee expected GE to remain in place, without further change, by its use of the word *similar*. A standard [definition](#) of the word “similar” is “showing resemblance in qualities, characteristics, or appearance; alike but not identical.” This means that, while Senate HELP thought that the accountability provision *resembled* Do No Harm, it did not believe the provisions were -- or should be -- exactly the same. The Department is thus acting outside of what it believes Congress intended. In any event, a post-enactment FAQ cannot substitute for statutory text. The Department cannot rely on extra-textual material to justify a regulatory result that the enacted law itself does not require.

This “harmonization” rationale results in a net budget impact of over \$6 billion over 10 years. This appears to be inconsistent with Congressional intent – Congress enacted accountability measures that they believed would save \$1 billion over 10 years, not cost \$6 billion.



The Department's plan to weaken GE regulations to "harmonize" them with the Do No Harm standard also unnecessarily puts in jeopardy its ability to hold undergraduate certificate programs accountable, by potentially subjecting such efforts to legal challenge.

Conclusion

The Department's proposal to weaken GE rules would reduce accountability, harm school quality, widen an already large Pell Grant shortfall, and add at least \$6 billion to the deficit over the next decade. Given the Department's stated commitment to fiscal prudence and quality improvement, it should abandon the proposed changes to GE and instead implement OBBBA as intended, leaving the 2023 GE rules intact for the programs to which those rules apply.