September 9, 2010

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street, N.W.
Room 8031
Washington, D.C. 20001

Re: Comment on Gainful Employment Rule
ED-2010-OPE-0012

Dear Ms. Finkel:

On behalf of Career Education Corporation and its 116,000 students, I am submitting these comments on the "Program Integrity: Gainful Employment" Notice of Proposed Rulemaking, 34 CFR Part 668, published by the Secretary of Education on July 26, 2010, to propose the "Gainful Employment Rule." While we applaud the efforts of the Department of Education ("ED") in seeking to address responsible student debt levels and the appropriate usage of federal student aid funding, we believe ED's approach is inappropriate and fundamentally flawed necessitating foundational change to successfully achieve its stated goals.

Nearly 500,000 students have graduated from our institutions in the last 15 years, and have gone on to better lives and professional careers based on their training in the many programs we provide. In most cases, these are students from diverse backgrounds and with diverse needs, including the need for federal financial support to be able to pay for their education. We are proud of their successes and our ability to serve them. A list of all of the CEC institutions, with campuses in 25 states, is attached to this letter.

We are deeply concerned that the proposed regulation will have the effect of limiting the ability of these and similarly situated students to pursue their education, contrary to the basic purpose of the federal student aid funding programs to expand educational opportunities for students from all sectors and sections of our country. In the name of "gainful employment," the ED is proposing a rule that will reduce educational opportunities based on flawed data, a flawed analysis and a deeply mistaken reading of the Higher Education Act.

For the reasons set forth herein, we urge the Secretary to withdraw the proposed regulation in its entirety, and engage in a more constructive dialogue on how to address issues this proposed rule apparently is intended to rectify. For instance, if ED genuinely wishes to avoid excessive student borrowing, we strongly suggest that ED revise its regulations and

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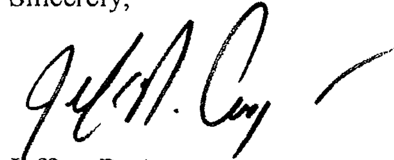
guidance to give institutions the authority to limit student borrowing, rather than proposing this convoluted and punitive regulation that does not get at the heart of the issue.

Thank you for your consideration of these comments and if you have any questions about any aspect of our comments please do not hesitate to contact met at 1-847-585-2020.

Sincerely,



Jeffrey D. Ayers
Senior Vice President and General Counsel

School	Location	President/Campus Director
ARIZONA		
Collins College, Phoenix Campus	Phoenix, AZ	Christine Murphy
Le Cordon Bleu College of Culinary Arts in Scottsdale	Scottsdale, AZ	Jake Elsen
Sanford-Brown College Phoenix	Phoenix, AZ	George Fitzpatrick
CALIFORNIA		
Brooks Institute, Santa Barbara	Santa Barbara, CA	Sue Kirkman
Brooks Institute, Ventura	Ventura, CA	Sue Kirkman
California Culinary Academy, San Francisco	San Francisco, CA	Peter Lee
Le Cordon Bleu College of Culinary Arts, Los Angeles	Pasadena, CA	Tony Bondi
Le Cordon Bleu College of Culinary Arts, Hollywood	Hollywood, CA	Tony Bondi
International Academy of Design & Technology, Sacramento	Sacramento, CA	Patricia Hoffman
Le Cordon Bleu College of Culinary Arts in Sacramento	Sacramento, CA	Kris DiGiacomo
COLORADO		
Colorado Technical University, Colorado Springs	Colorado Springs, CO	Greg Mitchell
Colorado Technical University, Denver	Greenwood Village, CO	Dr. Mark A. Pieffer
Colorado Technical University, Denver North	Westminster, CO	Dr. Mark A. Pieffer Dr. Michael Alexander
Colorado Technical University Online	Colorado Springs, CO	Jack Koehn
Colorado Technical University, Pueblo	Pueblo, CO	Greg Mitchell
CONNECTICUT		
Gibbs College, Farmington	Farmington, CT	Kurt Peterson
FLORIDA		
American InterContinental University South Florida (Fort Lauderdale)	Weston, FL	Dr. Hisham Shaban
International Academy of Design & Technology, Orlando	Orlando, FL	Ian Gill
International Academy of Design & Technology, Tampa	Tampa, FL	Dr. Karen O'Donnell
International Academy of Design & Technology, Tampa Online	Tampa, FL	Mark Page
Le Cordon Bleu College of Culinary Arts in Miami	Miramar, FL	Bob Kane
Le Cordon Bleu College of Culinary Arts in Orlando	Orlando, FL	Joe Hardiman
Sanford-Brown Institute, Fort Lauderdale	Fort Lauderdale, FL	Michael LaBelle
Sanford-Brown Institute, Jacksonville	Jacksonville, FL	Scott Nelowet
Sanford-Brown Institute, Tampa	Tampa, FL	Steeve Dumerve
Sanford-Brown Institute, Orlando	Orlando, FL	Aida Shehu
GEORGIA		
American InterContinental University Atlanta	Atlanta, GA	Peter Correa

School	Location	President/Campus Director
Le Cordon Bleu College of Culinary Arts in Atlanta	Tucker, GA	Glenn Mack
Sanford-Brown College, Atlanta	Atlanta, GA	Danielle Millman
ILLINOIS		
American InterContinental University Online	Hoffman Estates, IL	Steve Tober
Le Cordon Bleu Institute of Culinary Arts in Chicago	Chicago, IL	Lloyd Kirsch
Harrington College of Design	Chicago, IL	Erik Parks
International Academy of Design & Technology, Chicago	Chicago, IL	Robert Nachtsheim
International Academy of Design & Technology, Schaumburg	Schaumburg, IL	Tom Timmons
Sanford-Brown College, Collinsville	Collinsville, IL	Tina Seidel
Sanford-Brown College Hillside, IL	Hillside, IL	Michael O'Herron
Sanford-Brown College Tinley Park, IL	Tinley Park, IL	Lawrence McGhee
Sanford-Brown College Skokie, IL	Skokie, IL	Scott Lesht
INDIANA		
Sanford-Brown College Indianapolis, IN	Indianapolis, IN	Rod Rumler
MARYLAND		
Sanford-Brown Institute, Landover	Landover, MD	Greta Bonaparte
MASSACHUSETTS		
Gibbs College, Boston	Boston, MA	Dr. Richard Farmer
Le Cordon Bleu College of Culinary Arts in Boston	Cambridge, MA	Andrew Abelman
MICHIGAN		
International Academy of Design & Technology, Detroit	Troy, MI	Cynthia Bechill
Sanford-Brown Institute Grand Rapids, MI	Grand Rapids, MI	Rick Amidon
Sanford-Brown Institute Dearborn, MI	Dearborn, MI	Roger Hosn
MINNESOTA		
Brown College	Mendota Heights, MN	Dr. William Cowan
Brown College, Brooklyn Center Campus	Brooklyn Center, MN	Elizabeth Beatty
Le Cordon Bleu College of Culinary Arts in Minneapolis/St. Paul	Mendota Heights, MN	Kevin Sanderson
MISSOURI		
Colorado Technical University, North Kansas City	North Kansas City, MO	Tim Gramling
Le Cordon Bleu College of Culinary Arts in St. Louis	St. Peters, MO	John Fogerty
Missouri College	Brentwood, MO	Karl Petersen
Sanford-Brown College, Fenton	Fenton, MO	Melissa Uding-Mangold
Sanford-Brown College, Hazelwood	Hazelwood, MO	Julia Leeman

School	Location	President/Campus Director
Sanford-Brown College, St. Peters	St. Peters, MO	Lisa Mancini
NEVADA		
International Academy of Design & Technology, Las Vegas	Henderson, NV	Jason Smith
Le Cordon Bleu College of Culinary Arts in Las Vegas	Las Vegas, NV	Ken Hause
NEW JERSEY		
Sanford-Brown Institute, Iselin	Iselin, NJ	Dennis J. Mascali
NEW YORK		
Briarcliffe College, Bethpage	Bethpage, NY	Dr. George Santiago, Jr.
Briarcliffe College, Patchogue	Patchogue, NY	Lou Commisso
Sanford-Brown Institute, Garden City	Garden City, NY	James Swift
Sanford-Brown Institute, New York	New York, NY	Daniel Lenzo
Sanford-Brown Institute, Melville	Melville, NY	Eric Ricioppo
Sanford-Brown Institute, White Plains	White Plains, NY	Rolando Manna
OHIO		
Sanford-Brown College, Cleveland	Middleburg Heights, OH	Christine Koch
OREGON		
Le Cordon Bleu College of Culinary Arts in Portland	Portland, OR	Jon Alberts
Sanford-Brown College, Portland	Portland, OR	Winn Sanderson
PENNSYLVANIA		
Le Cordon Bleu Institute of Culinary Arts in Pittsburgh	Pittsburgh, PA	Pearce Miller
Sanford-Brown Institute, Pittsburgh	Pittsburgh, PA	Patti Yakshe
Sanford-Brown Institute, Trevose	Trevose, PA	Matthew Diacont
Sanford-Brown Institute, Monroeville	Pittsburgh, PA	Thomas Contrella
RHODE ISLAND		
Sanford-Brown Institute, Cranston	Cranston, RI	Christine Gaza
SOUTH DAKOTA		
Colorado Technical University, Sioux Falls	Sioux Falls, SD	David Heflin
TENNESSEE		
International Academy of Design & Technology, Nashville	Nashville, TN	Richard Wechner
TEXAS		
American Intercontinental University Houston	Houston, TX	Stephen Malutich
International Academy of Design & Technology, San Antonio	San Antonio, TX	Brian Silver
Le Cordon Bleu College of Culinary Arts in Dallas	Dallas, TX	Maureen Clements
Sanford-Brown Institute, Dallas	Dallas, TX	David Bowman

School	Location	President/Campus Director
Sanford-Brown College, Houston	Houston, TX	James Garrett
Sanford-Brown Institute, North Loop	Houston, TX	Marilyn Hall
Sanford-Brown College, San Antonio	San Antonio, TX	James Yeaman
Le Cordon Bleu College of Culinary Arts in Austin	Austin, TX	Julia Brooks
VIRGINIA		
Sanford-Brown College, Vienna	Vienna, VA	Dr. Raul Garza
WASHINGTON		
International Academy of Design & Technology, Seattle	Tukwila, WA	Khaled Sakalla
Le Cordon Bleu College of Culinary Arts in Seattle	Tukwila, WA	Michael Giacomini
WISCONSIN		
Sanford-Brown College, Milwaukee	West Allis, WI	Steven Guell

CAREER EDUCATION CORPORATION

COMMENTS ON GAINFUL EMPLOYMENT NOTICE OF PROPOSED RULEMAKING

September 9, 2010

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EXECUTIVE SUMMARY

Career Education Corporation ("CEC") believes that the Department of Education's (the "Department" or "ED") July 26, 2010 Notice of Proposed Rulemaking on Gainful Employment (the "Proposed Regulation" or "GE Regulation") is ill-conceived and should be withdrawn for the following reasons.

First, the Proposed Regulation directly conflicts with many aspects of the existing regulatory system created by Congress to regulate for-profit and other schools, as well as the policy behind the federal student aid programs:

- **Failure to Address Student Over-Borrowing:** The Proposed Regulation is intended to discourage students from perceived over-borrowing by imposing restrictions based on a comparison of a student's long-term borrowing level to the wages the student earns immediately following graduation. While CEC strongly endorses enabling students to graduate with the lowest amount of debt possible, the Proposed Regulation takes an indirect and ineffective approach because it does not change current regulations and Department guidance that prohibit schools from limiting student indebtedness, so that the Proposed Regulation continues to allow students to borrow above tuition levels. Thus, it fails to give schools the direct tools they need to help the Department reach this shared goal.

- **Conflict with Existing 90/10 Rule:** The Proposed Regulation is intended to reduce student debt levels by forcing for-profit schools to reduce tuition rates. However, this goal directly conflicts with the existing 90/10 Rule, which inhibits, and in many cases effectively prohibits, for-profit schools from reducing tuition. Thus, the net effect of the Proposed Regulation combined with the 90/10 Rule (in addition to inhibiting schools from reducing tuition) is to force institutions to seek to enroll wealthier students and to discourage institutions from serving minority and disadvantaged students, contrary to the fundamental purpose of the student aid program.

- **Unauthorized Usurpation of Cohort Default Rate System:** Congress created the cohort default rate ("CDR") system to measure how an institution's former students perform on the repayment of their federal loans. The Proposed Regulation would impermissibly usurp this system by counting loans in income-based repayment plans or most forbearance and deferral programs against institutions, contrary to the treatment under the CDR system. The Proposed Regulation also would omit all of the procedural protections and data correction mechanisms provided by the CDR system (e.g., the ability to review and address errors through the "challenge" process afforded by the CDR).

- **Loss of Educational Opportunities:** By reducing the number of available programs and seats, the Proposed Regulation would make it much more difficult for students in currently underserved populations to obtain the education they need to improve their

future prospects. This defeats the goal of the Higher Education Act ("HEA") and Obama Administration policy to expand educational opportunities.

- **No Real Transition Period:** Despite some token language suggesting otherwise, there is no real transition period to allow institutions to come into compliance with the Proposed Regulation. Instead, the Department would begin to terminate or restrict eligibility for educational programs based on student borrowing decisions and student performance on their loans that have already occurred. This implementation schedule differs significantly from past regulatory changes, including most recently the transition from a 2 year to 3 year CDR evaluation period.

Second, the Proposed Regulation must also be withdrawn because it is contrary to law for the following reasons:

- **Violates Due Process:** The Proposed Regulation violates the basic due process rights of schools because they would be evaluated and potentially penalized based on data that they cannot get and metrics that they cannot determine. For example, the Proposed Regulation would measure institutions based on individual earnings data that schools cannot see and, even in an appeal, would be prohibited from accessing.

- **Exceeds the Department's Statutory Authority:** The Proposed Regulation is based on the references to "gainful employment" in a few provisions of the HEA. However, the plain meaning of the phrase gainful employment, as it is used in the HEA, common discourse, and by other federal agencies, is work that pays. Congress nowhere authorized the Department to treat these few words as the basis to create elaborate backward-looking ratios assessing repayment rates and comparing assumed debt payments to earnings.

- **Arbitrary and Capricious:** The Proposed Regulation departs without reason from ED's established interpretation of the term "gainful employment." It also relies on artificially truncated windows of time to assess performance when students are likely to be earning entry level salaries. Many of the core assumptions underlying the Proposed Regulation have been rejected by the experts cited in the July 26, 2010 Notice of Proposed Rulemaking on Gainful Employment ("NPRM").

- **Selective Negotiated Rulemaking:** Despite claims that ED has been in discussions with higher education representatives on this subject for an extended period, in fact the Department never circulated many of the key elements of the Proposed Regulation, including the Loan Repayment Rate, for discussion during the negotiated rulemaking process.

Finally, even if it did not suffer from all the flaws discussed above, the Proposed Regulation still would be incomplete and unworkable and must be withdrawn for the following reasons as well. Critical issues that the NPRM does not address include the following:

- **Failure to Specify Source of Earnings Data and Earnings Measure:** The Proposed Regulation fails to define the critical term "earnings," or to specify what will be included or excluded from that measure, or even to commit to a particular source to obtain individual earnings data. Not only is this data unavailable, but the calculation methodology excludes any consideration for program completers who choose not to enter the workforce immediately, specifically those who go on to more advanced degrees (e.g., Bachelors or Masters), take maternity leave, suffer a disability, or are subject to a variety of other situations where their earnings would not be reflective of their preparation for gainful employment.

- **Treatment of Consolidation Loans:** The Proposed Regulation fails to explain the many variations for the treatment of consolidation loans, which millions of borrowers have chosen based on the Department's encouragement and offer of favorable terms, for purposes of assessing loan repayment.

- **Access to Loan Level Repayment Data:** The Proposed Regulation is based upon a method that uses loan level data, which is not currently available to institutions, impacting institutions' ability to assess, track, and monitor compliance.

SUMMARY OF COMMENTS

CEC hereby submits the following comments on the July 26, 2010 NPRM on Gainful Employment. The NPRM proposes to establish new measures for determining whether postsecondary educational programs offered by for-profit and certain other institutions lead to gainful employment in recognized occupations. As demonstrated in detail below, the Proposed Regulation lacks any legal or logical basis and should be withdrawn in its entirety. Furthermore, the construct of the Proposed Regulation cannot be applied in a consistent, logical, and transparent manner.

Founded in 1994, CEC is a dynamic educational services company committed to quality, career-focused learning, led by passionate professionals who inspire individual worth and lifelong achievement. The CEC system is made up of over 80 schools, colleges and universities across the United States, with over 13,000 dedicated employees including over 6,500 educational professionals and 116,000 students.

CEC's 116,000 students come from many diverse backgrounds. Most are non-traditional students in that they are not 18 to 22 year olds recently graduated from high school. Nearly a half million people, a large proportion of whom are adult learners, have graduated from CEC's educational institutions during the past 15 years and have gone on to better lives and professional careers as a result of their enrollment in the varied programs that CEC's schools and colleges offer.

In many cases, CEC's students have been unable to gain admission to or succeed in the so-called "traditional" non-profit and public colleges and universities. As a general matter, the academic needs and financial resources of CEC's students differ radically from students who attend traditional colleges and universities. CEC has tailored its educational offerings to the particular needs of its students. CEC's schools and colleges have been and continue to be successful because we provide a sound education to our students who thus are able to achieve their goals.

Unfortunately, the Proposed Regulation would make it much more difficult to serve these students and potentially lead to denying access to a significant portion of this group. If implemented, the Proposed Regulation would disenfranchise hundreds of thousands of students who attend the schools and colleges that CEC, as well as certain other institutions, own and operate. Specifically, the Proposed Regulation would create an incoherent and unfair regulatory structure that would disadvantage for-profit schools and their non-traditional students in numerous ways.

First, the Proposed Regulation combined with the "90/10 Rule" would perversely undermine the core purpose of the student aid program. As stated in the NPRM, the Department intends the Proposed Regulation to reduce student debt levels by forcing for-profit institutions to reduce their tuition rates. However, the Department has failed to consider that the existing 90/10 Rule discourages institutions from setting lower tuition rates. The 90/10 Rule bars institutions that receive more than 90% of their funding from Title IV sources from participation in Title IV programs. Under current law and Departmental guidance, institutions cannot limit student

borrowing. Thus, if an institution reduces its tuition rates, there is no assurance that the amount of Title IV aid the student receives would be similarly reduced. As a result, the vast majority of existing students may receive an even higher percentage of Title IV funds to fund their education, thereby causing a school to exceed the limits imposed by the 90/10 Rule unless it reduces student borrowing by recruiting wealthier students. *Thus, the net effect of the Proposed Regulation combined with the 90/10 Rule would be to limit access and availability of educational choice for students, and discourage institutions from serving minority and disadvantaged students, a result directly at odds with the purpose of the student aid programs and the Obama Administration's goal of expanding higher education to a greater percentage of the United States population.* This issue is exacerbated because temporary provisions under the 90/10 Rule for additional unsubsidized Stafford loan amounts will expire concurrent with the effective date of the Proposed Regulation, making it impossible for schools to plan how to adapt.

Second, the combination of the Proposed Regulation with the existing 90/10 Rule would create an extremely narrow range of tuition levels that would satisfy these two inconsistent standards. If the Proposed Regulation is adopted, institutions will need to set tuition low enough to meet the limits imposed by the Proposed Regulation, but also high enough to satisfy the 90/10 Rule. Despite the obvious importance of this issue, the former Senior Advisor for Education on the White House Domestic Policy Council has recently stated that the drafters of the Proposed Regulation were not willing to consider the combined effect of the existing 90/10 Rule and the Proposed Regulation. The Department's unwillingness to look at the combined effect of these two regulatory standards would force institutions, in setting their tuition, to thread this needle in the dark.

Third, the Proposed Regulation would impose enormous costs on institutions. The Proposed Regulation relies on two formulas, the Debt to Earnings Ratio and the Loan Repayment Rate, which are based in large part on information that the Proposed Regulation bars institutions from accessing or that is not available unless an institution undertakes a herculean effort to extract it from individual student files and the National Student Loan Database System ("NSLDS"). For CEC alone, it is estimated that this would require the manual effort to enter NSLDS, pull multiple screens of the student data record, download these records into a suitable system, and re-aggregate the data over 400,000 times per year. Even considering this overwhelming undertaking, the NSLDS system lacks all the necessary data points needed to calculate the loan repayment rate with 100% accuracy.

Fourth, the Proposed Regulation also conflicts with the detailed CDR system that Congress created to monitor Title IV loan repayment rates. Through the proposed Loan Repayment Rate metric, the Proposed Regulation appears to be in effect a rewrite of the CDR rules enacted by Congress to the substantial disadvantage of for-profit schools and their students. While Congress provided that students in income-based repayment plans would not be considered as having defaulted for purposes of calculating the CDR (and the President and the Department have long encouraged students to use these and other devices to manage their debt), the Proposed Regulation provides that students making use of these options would be counted against the institution in determining the Loan Repayment Rate (assuming payments made applied only to interest as is the case in many situations). While the CDR rules provide for a detailed process and related procedural protections to determine, correct, and publish final

default rates, the Proposed Regulation would prohibit institutions from even seeing, much less being able to contest, the individual graduates' earnings history used to determine the Debt to Earnings Ratio.

Fifth, in a further contradiction to the CDR system, while Congress provided for a reasonable transition period when it recently increased the CDR window from two years to three years to prevent that change from having a retroactive effect, the Proposed Regulation would subject institutions to sanctions based on debt that was incurred before the NPRM for the Proposed Regulation was even issued. Indeed, the author of research that the NPRM extensively relies upon has recently questioned whether the Proposed Regulation, as written, was merely a punitive measure directed at for-profit institutions. It is also worth noting that for-profit institutions will be required to comply with various debt repayment metrics at two, three, and four year terms, all with different benchmarks, and none of which are truly aligned with a student tenure as low as nine months, as is often the case with CEC institutions.

These inconsistencies and untoward results are unsurprising given that the Proposed Regulation was not properly subjected to the negotiated rulemaking process that the HEA mandates. Crucial elements of the Proposed Regulation, including the Loan Repayment Rate, were never proposed until the NPRM was issued, and the only proposed regulation that was provided during the process was made available to participants shortly before the last of three negotiated rulemaking sessions. Even still, the Proposed Regulation leaves numerous gaps and fails to define core concepts, such as the "Earnings" that will be the basis of the Debt to Earnings Ratio, or to specify where the data will be obtained. While CEC opposes the Proposed Regulation for the reasons explained in these comments, it would seem far more appropriate for the Department to base any Debt to Earnings Ratio on data made available by the Bureau of Labor Statistics, adjusted appropriately to match the tenure of the student debt repayment period. This data is publicly available and does not present the serious due process and privacy concerns attributable to the Proposed Regulation's use of individual earnings data to which schools (and even the Department) would be denied access. Moreover, no complex system would need to be created to obtain that data and there would be no need to coordinate with another, as yet, unidentified federal agency to obtain it.

As explained in detail below, the Proposed Regulation should be withdrawn because it is contrary to controlling law for a number of reasons.

First, the Proposed Regulation is unconstitutional because it would deny institutions due process in a number of material respects, including the following:

- The Proposed Regulation denies institutions the opportunity to monitor their own performance under the new standards and thus denies them notice and any opportunity to respond to any pending deficiencies.

- The Proposed Regulation denies institutions the opportunity to confront and respond to the evidence against them because, among other things, it bars schools from reviewing and contesting the individual earnings data on which they will be assessed.

- The Proposed Regulation does not allow an institution an opportunity to revise its policies and procedures to come into compliance before sanctions would be imposed.

- The Proposed Regulation is unconstitutionally vague because it does not set out any standards for the Department's review of new educational programs, and fails to define or make clear basic concepts necessary to apply the Proposed Regulation.

Second, the Proposed Regulation is barred under the doctrine of ultra vires because it exceeds the Department's statutory authority to promulgate regulations.

- The Department's reading of the term "gainful employment" is contrary to the plain meaning of the term. The HEA does not authorize the Department to penalize institutions for post-graduation conduct. Instead, the focus of the statutory language at issue is whether a program "prepare[s] students for gainful employment," i.e. work that pays. This is a prospective measure and does not authorize the Department to impose a backward looking quantitative income test to assess educational programs.

- There is nothing in the legislative history of the "gainful employment" requirement that authorizes the Department to regulate programs based on the Loan Repayment Rate and Debt to Earnings Ratio of their students.

- The Department's new construction of the term "gainful employment" is directly at odds with the Department's own prior well-settled interpretation of the term. The NPRM provides no reason for this sudden departure from precedent. In fact, it does not even discuss the Department's prior reading of this language.

- Congress has amended the HEA many times and has never changed the statutory "gainful employment" language. Thus, Congress has ratified the Department's prior reading of the "gainful employment" requirement.

- Congress knew how to create numeric eligibility criteria and either did so directly or gave the Department direct statutory authority to do so with respect to other Title IV program eligibility requirements. Here, Congress chose not to do so.

- The Department lacks the power to indirectly impose price controls on tuition and costs.

Third, the Proposed Regulation is arbitrary and capricious in a number of critical respects, including the following:

- The Department's unexplained departure from its previous well-settled interpretation of the "gainful employment" requirement renders its decision arbitrary and capricious.

- The Proposed Regulation irrationally uses a three or four year window to assess the value of a student's education rather than evaluating the value of the student's education over the student's entire lifetime.

- The use of average actual earnings under the Debt to Earnings Ratio is arbitrary and capricious because, among other things, (a) schools have no access to the underlying data, (b) the measure fails to consider that students may have a host of valid reasons for not seeking full-time employment following completion of their studies, (c) there is no mechanism under the Proposed Regulation to address economic downturns, like the country is currently experiencing, which impact former students regardless of the value of their education, and (d) the measure apparently would be based on earnings data from the Social Security Administration ("SSA") that is insufficient for the purposes for which it is proposed.

- The Debt to Earnings Ratio and Loan Repayment Rate are irrational because they improperly aggregate data across students and therefore penalize students who are doing well.

- The Debt to Earnings Ratio and Loan Repayment Rate improperly impose sanctions on institutions for conduct that occurred prior to the Proposed Regulation even being proposed in the NPRM.

- The Debt to Earnings Ratio (a) improperly includes all debt, (b) relies on arbitrary line-drawing with respect to the percentage metrics, (c) improperly treats the capitalization of unpaid interest, and (d) is based on fragmentary data limited to a single non-representative state.

- The Loan Repayment Rate improperly evaluates both graduates and non-graduates. It would also disproportionately impact minority students.

- The Loan Repayment Rate is impermissibly vague.

- The Proposed Regulation fails to consider the interaction between the 90/10 Rule and the Proposed Regulation. While the Proposed Regulation seeks to force for-profit schools to reduce tuition, the 90/10 Rule makes it extremely difficult, if not impossible, to do so.

- The Proposed Regulation could lead to a number of absurd results that are directly contrary to the purposes behind the HEA.

* * * * *

Despite these fundamental critiques of the Proposed Regulation, there are areas where CEC strongly agrees with the Department. Above all, CEC shares the Department's concern, which seems to be the main driver of the Proposed Regulation, that students are over-borrowing for their education. However, rather than attacking this issue through this complex and

misguided Proposed Regulation, CEC suggests that the Department and Congress tackle it in a more direct and effective manner: by giving institutions the power to limit borrowings by their students. Under Departmental regulation (34 C.F.R. § 685.301(a)(8)) and guidance (2009-2010 Federal Student Aid Handbook at 3-94), institutions have virtually no discretion to limit student borrowing even though many institutions (and certainly the CEC institutions) believe that their students would be well served to reduce their borrowings. If the Department truly wants to limit excessive student borrowing, CEC asks that the Department provide schools the tools they need to accomplish this purpose.

As the Department is aware, CEC also filed comments dated August 1, 2010, with respect to the portion of the Gainful Employment Rule that was proposed in a separate NPRM dated June 18, 2010, and which proposed expanded student and public disclosures related to student debt, tuition and fees, job placement and other matters, to be codified at 34 C.F.R. § 668.6. CEC reiterates its general support (with those caveats set forth in its August 1, 2010 comments) for the Department's efforts to address these issues through more robust and informative student disclosures, which should be required of all institutions and all types of educational programs. Despite CEC's critique of the formulaic approach to measuring gainful employment set forth in the current NPRM, CEC fully supports the Department's effort to address these issues through improved and expanded disclosures to students and prospective students.

SUMMARY OF REGULATION

The Proposed Regulation would impose complex and inconsistent new requirements on for-profit institutions and other institutions that offer non-degree programs that are required by law to "prepare students for gainful employment in a recognized occupation" for their students to qualify for federal student financial aid under Title IV of the HEA ("Title IV Programs").

If promulgated, the Proposed Regulation would put in place a number of onerous mandates that depart from the plain language of the HEA's gainful employment provisions and the consistent and longstanding interpretation of those provisions by the Department. In particular, the Proposed Regulation would terminate or limit the eligibility of programs that for-profit institutions offer that did not comply with one of a number of elaborate metrics. Programs that do not perform sufficiently well under these measures would suffer various penalties, including loss of Title IV eligibility for these programs and students enrolled in them and conversion of the institution's program participation agreements to provisional status. In addition, schools with any programs that do not meet certain metrics, but that exceeded certain minimum standards, would be placed in a restricted status and thus be subject to strict enrollment limits in those programs. Any school on restricted status would also be required to make certain warnings to prospective students and disclose information about its performance on the new metrics.

The Proposed Regulation is based on two separate formulas, which nowhere appear in the HEA, that would dictate the performance and continued Title IV eligibility of each educational program that for-profit and other covered institutions offer. Each of these formulas is based on information that an institution can neither access nor review, thereby making it impossible for an

institution to evaluate its performance or to appeal effectively any errors in the Department's calculations. In addition, both formulas rely on data that, for the most part, is already fixed, reflecting the historical performance of the institution's former students prior to the promulgation of a final regulation or even the publication of the Proposed Regulation.

The first new formula is the "Loan Repayment Rate." It would be calculated for each program that a for-profit institution offers, and it purports to measure the fraction of the relevant cohort of former students, including both students who graduated and withdrew, that had made a repayment of principal during the year in question. Only those Title IV loans where the former student had made a repayment of principal in the prior Federal Fiscal Year ("FFY") would be considered "Reduced Principal Loans" and therefore count in the school's favor under the Loan Repayment Rate. Students who are currently in school or have received a military deferment would not be considered in the calculation of the Loan Repayment Rate. However, students who had received another form of deferment or forbearance or who otherwise had made repayment arrangements, such as an income-based repayment plan that would not result in a reduction of principal, would be included in the calculation and therefore would count against the school by reducing the school's Loan Repayment Rate. In addition to the Loan Repayment Rate being arbitrarily skewed against schools in this manner, the Department is aware that institutions currently lack the ability to monitor the information on which the Loan Repayment Rate is calculated. The Proposed Regulation makes no provision for enabling institutions to obtain accurate information to calculate the Loan Repayment Rates on a current or going-forward basis. This information is essential for institutions to adjust their pricing and other policies on a real time basis to improve their Loan Repayment Rates.

The second formula that the Proposed Regulation imposes is the "Debt to Earnings Ratio." The Debt to Earnings Ratio would be calculated by determining the median debt level of the graduates of a particular program, determining the annual debt payments that such graduates would be expected to pay, and comparing that payment to the graduates' earnings. The Proposed Regulation would evaluate whether institutions can show that the annual debt payment for such graduates is 8% or less of actual earnings or 20% or less of total discretionary income (defined as income above 150% of the poverty line).

The earnings, which are the fundamental factor in the Debt to Earnings Ratio, would be based on the "actual, average annual earnings" of the relevant cohort of graduates. The Department states that these earnings would be obtained from another unspecified federal agency, which it expects to be SSA, but it provides no certainty that SSA would be the source and provides no explanation of exactly what income measure (e.g., gross income, income from earnings or other sources, etc.) will actually be used. In fact, the Proposed Regulation specifically bars schools from accessing the underlying data used to derive the average annual earnings of a given program's graduates. The Proposed Regulation further provides that in a termination proceeding the average annual earnings derived by the unidentified third party agency would be assumed to be accurate and that institutions would be barred from presenting any meaningful challenge to those calculations. Even if recent earnings were fully transparent, such an early snapshot would be far too early in a graduate's career to measure the true value of an education, notwithstanding the fact that the proposed earnings approach is not correlated with the graduate's loan repayment tenure.

Finally, the Proposed Regulation would also change existing regulations to require a for-profit institution to obtain the Department's approval for every new educational program before it would be Title IV-eligible.[1] Among the new requirements in the Proposed Regulation for obtaining approval, institutions would be required to provide enrollment projections and third party documentation of the demand for jobs in the area in which the new program would provide training. However, because the Proposed Regulation nowhere specifies the criteria that the Department would apply in the approval process, the Proposed Regulation would result in a standardless and hence totally arbitrary review process by the Department.

DISCUSSION OF REGULATION

CEC strongly believes that the Proposed Regulation should not be promulgated because it is fatally flawed in a number of critical respects. These material deficiencies cannot be addressed by revising the particular limits and calculations on which the Proposed Regulation is based. Rather, they constitute substantive failings at the heart of the Proposed Regulation that require its wholesale rejection.

As explained in detail below, the Proposed Regulation: (1) is unconstitutional because it would deny institutions due process in a number of material respects by depriving institutions of the ability to rebut the evidence to be used against them and to conform their actions to the dictates of the Proposed Regulation; (2) exceeds the Department's statutory authority to promulgate regulations relating to the HEA's gainful employment requirement; and (3) is arbitrary and capricious in numerous critical respects. Moreover, even in the absence of these material deficiencies, the Proposed Regulation raises so many unanswered questions regarding the treatment of for-profit and other affected schools that it must be rejected as hopelessly ambiguous and incomplete.

THE PROPOSED REGULATION INFRINGES INSTITUTIONS' CONSTITUTIONAL RIGHT TO DUE PROCESS

I. The Proposed Regulation Is Reviewable Under The Due Process Clause.

It is indisputable that the Proposed Regulation must satisfy the requirements of Due Process under the United States Constitution. Numerous cases have specifically held that schools have a liberty and property interest in continued Title IV eligibility that entitles them to due process protection before the Department takes any adverse action with respect to their ability to receive Title IV funding. *See, e.g., Cont'l Training Serv., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990) (school "had both a liberty and a property interest" sufficient to invoke due process protections); *Mildred Elley Bus. Sch., Inc. v. Riley*, 975 F. Supp. 434, 439 (N.D.N.Y. 1997) ("Plaintiff's eligibility to participate in the FFEL program is a property interest protected

[1] According to Imagine America Foundation, for-profit colleges currently enroll more students (44%) in high demand fields than do public (18%) and private, not-for-profit (13%) institutions. In fact, 17 of the 20 fastest-growing occupations are in the key focus areas of for-profit schools, including the healthcare and computer/data processing industries. Imagine America Foundation, "Economic Impact of America's Career Colleges" (2007). The proposed approval process does not address program approval for new and innovative industries.

by the Constitution."); *Pro Schs., Inc. v. Riley*, 824 F. Supp. 1314, 1321 (E.D. Wis. 1993) (same).

These principles apply foursquare here because the Proposed Regulation would result in the loss of eligibility for continued participation in Title IV for certain educational programs. The Proposed Regulation is unconstitutional because, as explained below, the formulas on which it is based, and other provisions regarding its implementation, violate several fundamental tenets of due process.

II. The Proposed Regulation Violates Due Process Because Institutions Cannot Monitor Their Own Performance Under The New Standards And Thus Have No Notice Of Any Pending Deficiencies.

The Proposed Regulation violates due process because it creates a regulatory structure that denies for-profit and other covered institutions the opportunity to monitor their performance under the metrics at issue and thus denies them notice of any pending deficiencies. It is fundamental that due process requires that a party subject to adverse agency action receive notice of the charges against it and have a meaningful opportunity to confront those issues before an impartial decision maker. *See Goldberg v. Kelly,* 397 U.S. 254, 270-71 (1970) (finding parties have due process rights in an administrative context); *see also Henry v. Gross*, 803 F.2d 757, 766 (2d Cir. 1986) (citing *Goldberg* for the proposition that "the recipient must be given information sufficient to put him in a position to defend the impending termination of benefits"). However, this right is hollow and thus is denied if the alleged deficiencies are a *fait accompli* by the time a party is even made aware of them, much less has the opportunity to defend itself against an adverse decision based entirely on those alleged deficiencies. *See generally Cooper v. Salazar*, 196 F.3d 809, 816 (7th Cir. 1999) (due process requires that an opportunity to be heard "be afforded at a 'meaningful' time"); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

As explained below, the Proposed Regulation subjects for-profit institutions to a potential loss of Title IV eligibility based on metrics that they have no power to control or monitor. The determination of each of the two relevant metrics, i.e., the Loan Repayment Rate and the Debt to Earnings Ratio, is predicated on information that is impossible for institutions to access at all, let alone to monitor effectively on a going forward basis.

The inability to access or monitor the information on which the Loan Repayment Rate and the Debt to Earnings Ratio are calculated not only make it impossible for schools to defend against any adverse or other actions that the Department may initiate based on them, but also frustrates the goals that are the stated basis for the Proposed Regulation. One perverse effect of this lack of information is that it discourages schools from taking proactive steps (such as reducing tuition) that the Proposed Regulation apparently is intended to encourage. If schools cannot assess how their programs would be measured under the Loan Repayment Rate and Debt to Earnings Ratio, they lack the information to plan to take steps to bring themselves into compliance before they are subject to sanctions.

A. The Loan Repayment Rate Violates Due Process Because Institutions Cannot Monitor Their Own Performance Under It.

The Loan Repayment Rate calculates the percentage of the Original Outstanding Principal Balance ("OOPB") of all Federal Family Education Loan Program loans or William D. Ford Federal Direct Loan Program loans (collectively, "Title IV loans") that are deemed to be in active repayment based on whether the borrower made a payment in the most recent FFY under measurement that reduced the principal of the OOPB at the beginning of that same FFY. Only such Title IV loans would be considered "Reduced Principal Loans" so as to count in the school's favor under this ratio.

Critically, schools have extremely limited access to data to determine if their former students are repaying their Title IV loans. Schools' primary source of data is the National Student Loan Data System ("NSLDS"), administered by the Department. Under the Proposed Regulation, specific data elements required to calculate repayment include accurately identifying principal balance at various points in time over the life of a loan, and those elements are not currently available within any of the current default/repayment/history reports offered by NSLDS, including DER001, DRC015, DRC035, SCHDF1, and FAT001. While the NSLDS provides a fairly broad range of information, it cannot provide the data elements that would enable a school to determine if a borrower has made a payment in the relevant period to reduce the outstanding principal balance of his or her Title IV loan such that the loan qualifies as a Reduced Principal Loan unless the school makes an incredibly burdensome manual effort to download and re-aggregate hundreds of thousands of NSLDS screens. We have estimated that CEC would have to reaggregate such data at least 400,000 times per year, and even then there is no assurance of success since NSLDS is not designed for this particular purpose and all the necessary fields to calculate the loan repayment rate are not readily accessible. Without this information being readily accessible, the school cannot monitor whether any one of its educational programs is or is not meeting the new standard, and therefore is or is not likely to be subject to adverse action or other sanctions under the Proposed Regulation. Rather, the school would only learn of the performance of its educational programs when the Department renders its decision on the eligibility of that program to continue to participate in Title IV, by which time the decision would be a "fait accompli."

CEC has attempted to work with the servicing companies that administer the NSLDS and other aspects of the Department's loan servicing and collection functions to obtain the necessary data in a form that CEC could use to track this data regarding its former students. These servicing companies declined to provide such data and directed CEC's queries to the Department, which (as of today) has declined to direct the servicers to produce the data in a usable form.

B. The Debt To Earnings Ratio Violates Due Process Because Institutions Cannot Monitor Their Own Performance Under It.

Like the Loan Repayment Rate, the Debt to Earnings Ratio turns on one critical data element that institutions have no ability to monitor. As explained above, the critical determinant of the Debt to Earnings Ratio is the "actual, average annual earnings" of the relevant graduates, which information is not available to schools or the Department.

First, the Department does not even identify the source of the earnings data that will be used to calculate the Debt to Earnings Ratio. While the Secretary of the Department of Education's ("Secretary") explanatory comments state that the Department "expects" to obtain such data from SSA, the body of the regulation merely states that such earnings would be derived from information maintained by another federal agency. However, there is no explanation in the NPRM of how this would be done, or any explanation of whether it is even feasible. Moreover, assuming the Proposed Regulation were adopted, nothing in the regulation itself would limit the Department from changing the source of earnings data unilaterally and without notice or explanation.

Second, the term "earnings" is not even defined in the Proposed Regulation. Thus, it is unclear what measure would be used to determine Title IV eligibility, which also means that the Department could change its definition unilaterally and without notice or explanation.

Third, although the body of the regulation states only that such earnings would be derived from information maintained by another federal agency, the Secretary's explanatory comments state that the Department expects to obtain such data from SSA. However, there is no explanation in the NPRM of how this would be done, nor any explanation of whether it is even possible. This raises a concern due to the Department's prior record of an inability to work with other agencies to secure data timely. For example, the Department previously introduced the idea of partnering with the Internal Revenue Service ("IRS") to obtain information for a FAFSA – IRS Data Match. Although this idea was introduced in legislation (H.R. 3613) in 2003 and discussed further at national financial aid conferences (NASFAA) beginning in 2004, the implementation did not actually occur until the 2009-10 award year (nearly 5 years later than its initial promised inception). Because it is unclear if the Department could actually partner with a federal agency to develop in a meaningful timeframe a workable system for determining the Debt to Earnings Ratio, it is all the more clear that institutions lack sufficient information to comply with the Proposed Regulation.

Fourth, even assuming that the Department ultimately made arrangements to obtain earnings data from SSA and defined what it meant by the term "earnings," institutions still would not have the ability to monitor their performance under the relevant metric. This is because one critical element of the proposed Debt to Earnings Ratio is the amount of earnings of the institution's graduates who would be counted in the relevant cohort of graduates from each educational program. However, schools do not have access to SSA data or other sources that would provide the "actual earnings" of their graduates. Indeed, institutions are legally prohibited from obtaining such data from any source, other than voluntary disclosures from the students. While schools can attempt to survey their graduates for this data, graduates are not obligated to reply and such surveys, at best, can only provide an approximation of the "actual earnings" of those few who do respond. Thus, schools are deprived of effective notice of the impact of the Debt to Earnings Ratio and cannot take effective action to improve their performance before they are subject to sanctions. Further, it is quite likely that the SSA data will have its own flaws and fail to cover all relevant students, such as culinary students working overseas.

Finally, these deficiencies in the proposed Debt to Earnings Ratio are even more apparent considering that the Department previously considered using data provided by the Bureau of Labor Statistics ("BLS"). We believe it is critically important that the data used for salary information is readily available, transparent, and a reasonable proxy for lifelong earnings. BLS data is readily available and thus has none of the concerns attributable to the use of secret individual earnings data that schools are barred from accessing under the Proposed Regulation. Because the BLS data is public and derived over a broader population, it is thus subject to less variation than individual earnings data that would not even be determined until some time in the future after students have incurred their debt. In addition, the use of BLS data would not pose privacy issues or require a complex process of coordination with other government agencies that is not even specified in the Proposed Regulation.

C. The Debt To Earnings Ratio And Loan Repayment Rate Stand In Sharp Contrast To Other ED Metrics.

These problems under the Loan Repayment Rate and Debt to Earnings Ratio are quite contrary to other ED metrics that allow a school to track its performance to assess its compliance on an ongoing basis, such as the 90/10 Rule, the Financial Responsibility Composite Score Formula, and CDRs. Particularly with respect to CDRs, ED has provided an extensive corrections and appeals process to afford schools the opportunity to review the data in preliminary form and seek corrections to inaccurate data. *See* 34 C.F.R. Part 668, Subparts M and N. Such a process is glaringly lacking for the Proposed Regulation, which is particularly troubling since the stakes are so high – the Proposed Regulation would be the basis for the Department to determine the eligibility of entire educational programs and potentially the viability of entire institutions. The stakes are even higher for students who depend on the availability of Title IV funding in order to complete their education and who may be forced to withdraw if the program in which they are enrolled loses Title IV eligibility.

III. The Proposed Regulation Violates Due Process Because It Does Not Provide For A Meaningful Opportunity To Confront The Evidence Upon Which The Department Relies.

A. Institutions Are Entitled To An Opportunity To Confront And Rebut The Evidence Against Them.

In situations where an agency's determination turns on resolution of disputed facts, a party has a right to confront and rebut the evidence against it. *See, e.g.*, *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 60-63 (D.C. Cir. 1999) ("It is well-established that a party is entitled . . . to know the issues on which the decision will turn and to be apprised of the factual material on which the agency relies for decision *so that he may rebut it*. Indeed, *the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.*") (internal citation omitted) (emphasis added); *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) (recognizing that "[a]n opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process" and holding that appellants' due process rights were violated since the agency's decision was based on evidence that was not available to the appellants); *cf. Atlanta Coll. Of Med. & Dental Careers v. Riley*, 987 F.2d 821, 830 (D.C. Cir. 1993) ("The district court found

that the Secretary could not deny a claim on the ground that the schools had not excluded possible scenarios that could affect the accuracy of the schools' submissions when those scenarios could only be eliminated with information unavailable to the schools. We believe the district court was correct in this conclusion.").

B. The Proposed Regulation Denies Institutions This Opportunity.

In sharp contrast to these due process requirements, the Proposed Regulation would create a situation in which an institution is subject to potential loss of Title IV eligibility and other serious sanctions based on information that it cannot confront. The Department seeks to legitimize this denial of due process in the Proposed Regulation by modifying 34 C.F.R. § 668.90(a)(3) to limit the discretion of the hearing official in any appeal of an action by the Secretary that finds that an educational program does not meet the standards under the Proposed Regulation. In such an appeal, the hearing official must:

> *accept[ ] as accurate the average annual earnings calculated by another Federal agency*, so long as the other Federal agency provided that calculation for the list of program completers identified by the institution and accepted by the Department. The hearing official may consider evidence from an institution about earnings from its graduates to establish a different amount for the average annual earnings of the program graduates, so long as that information is for the same individuals and determined to be reliable.

NPRM at 43640 (emphasis added).

By its plain terms, the procedure contemplated by this provision would deny schools any ability to review the earnings data for individual graduates. Indeed, in the NPRM (NPRM at 43629), the Secretary explains that the Department would also be precluded from reviewing such information due to the privacy of information regarding any individual's earnings. However, the fact that the Department might be as equally in the dark as the institution concerning the basis for and validity of a crucial determinant of the Debt to Earnings Ratio is no defense to the denial of due process to the school.

The critical point is that this procedure would deprive the appealing institution of any opportunity to challenge the data against which it is being measured. The fact that the Department itself is precluded from reviewing such information due to the privacy of information regarding any individual's earnings confirms the fact that the opportunity for an institution to provide its own "evidence" is completely hollow. The Proposed Regulation therefore creates a situation in which neither the school nor the Department knows whether the adverse action is based on inaccurate earnings data, yet the Proposed Regulation creates an unrebuttable presumption that data provided by a third party was correct. A more clear cut violation of due process is hard to imagine.

The Department's remarkable decision to conceal from the school itself the data that the school will be judged on creates still another problem. To conceal the earnings of graduates, the Department plans to "suppress small cell sizes" of data. NPRM at 43705. In such a situation, the Department apparently reserves the right to revise the universe of borrowers to be used for

this measure to consider graduates from a broader range of programs or aggregate years of data. If that is not sufficient, the Department claims that it "will not be able to assess an institution's performance against the debt measures." NPRM at 43705. Thus, some programs simply will not be measured under the Debt to Earnings Ratio, leaving it entirely unclear if these programs are therefore exempt or if they would just be measured under the Loan Repayment Rate.

Finally, despite the suggestion in the proposed language modifying 34 C.F.R. § 668.90(a)(3) that the hearing official will be able to consider a "list of program completers provided by the institution," it is not clear if and when an institution would prepare such a list for consideration by the Department and SSA, and ultimately the hearing official. The NPRM glosses over this point by stating this list would be derived from the information to be submitted by the institutions under another proposed regulation (34 C.F.R. § 668.6, as published for comment on June 18, 2010). But the information to be provided under this other regulation would not be filed until July 1, 2011, and would only seem to cover information for a single year, so it is not clear how ED or SSA or the hearing official could confirm that the lists are correct and consistent for a universe of students that spans three years. What is clear, however, is that the proposed revisions to 34 C.F.R. § 668.90 would completely deny affected institutions the opportunity to confront the evidence on which they are being judged.

IV. The Loan Repayment Rate Violates Due Process Because It Does Not Allow Institutions An Opportunity To Revise Their Policies And Procedures To Come Into Compliance Before Sanctions Would Be Imposed.

Basic principles of due process prevent an agency from imposing sanctions for conduct that occurred prior to the enactment of the regulation prohibiting the conduct. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122-23 (D.C. Cir. 2008) ("[T]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.") (citation omitted); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996) ("[D]ue process requires fair notice of what conduct is prohibited before a sanction can be imposed."); *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977) ("When the consequence of agency rule making is to make previously lawful conduct unlawful and to impose criminal sanctions, the balance of these competing policies imposes a heavy burden upon the agency to show public necessity.") (holding that defendants were not guilty of acts which occurred prior to the effective date of the regulation).

This is, however, exactly what the Proposed Regulation would do. Although the NPRM appears to assume that institutions could take steps to alter their performance under the metrics contemplated by the Proposed Regulation, the reality is that the data that would be available to the Secretary to calculate the Loan Repayment Rate on which sanctions would be based as of July 1, 2012, is already largely fixed. Thus, once the GE Regulation is promulgated, schools will have no opportunity to take any steps to bring themselves into compliance before sanctions are imposed.

Institutions first would be subject to sanction under the Proposed Regulation as of the award year beginning July 1, 2012. Although in this initial year there would be a 5% cap on educational programs that could lose eligibility, the Proposed Regulation places no limit on the

number of institutions that would be subject to extremely damaging restrictions or the student warning disclosure requirements. Moreover, beginning July 1, 2013, there would be no limit on the number of programs that could lose eligibility.

The Loan Repayment Rate is based on information for certain borrowers whose loans "entered repayment for the prior four [Federal Fiscal Years,]" with a FFY running from October 1 to September 30. The Proposed Regulation notes that, for the most recent FFY in the measurement period, the Department would exclude borrowers whose loans entered repayment after March 31. Thus, as of July 1, 2012, under the most optimistic scenario, the most recent four FFYs would be the three full FFYs ending September 30, 2008, 2009 and 2010, plus the six months ending March 31, 2011.

It appears that the Loan Repayment Rate for these borrowers would capture loan payments made in the FFY from October 1, 2010, to September 30, 2011, since that would be the most recent FFY prior to the July 1, 2012 date. Thus, by the time the Proposed Regulation is published in final form on or slightly before November 1, 2010, one month of the relevant 12-month payment period would have passed. When the GE Regulation actually takes effect on July 1, 2011, nine months of the relevant repayment period would have passed. Even assuming that a school can take steps to encourage its former students to repay their loans, schools would not have an opportunity to work with their students to do so during the full 12-month period that is most relevant to the measurement.

In addition, by definition, the period for borrowers in the most recent FFY (ending March 31, 2011, in this example) to make a payment to reduce principal would be less than a full 12 months, so that the data for these most recent students would inevitably be skewed.

Moreover, even this time period may be too optimistic. It is far from clear that, as of July 1, 2012, the Department will be able to review and organize the data reflecting all of the repayment activity for the FFY ending September 30, 2011. It is unlikely in the extreme that the Secretary can process all of that information with a sufficient degree of accuracy in such a short time frame. If that probability becomes the reality, and the Secretary has to reach back further in time to use data for the three FFYs ending September 30, 2009, and the six months ending March 31, 2010, that would amplify the due process violation because all of the conduct being measured would have occurred before the Department even issued the Proposed Regulation.

The Department's decision to impose the Proposed Regulation retroactively not only violates schools' Constitutional rights, but also is directly at odds with Congressional policy judgments incorporated in the HEA through the CDR provisions. In 2008, Congress amended the HEA through the Higher Education Opportunity Act, Pub. L. No. 110-315 (the "HEOA"). The HEOA extended the window used to calculate the CDR from two years to three years. However, because of the concern that institutions should not be subject to sanctions, including a loss of Title IV eligibility based on a new rule without having an opportunity to adjust to and come into compliance with the new requirements, Congress provided for an extended three-year transition period before the new provisions would take effect for purposes of sanctions. Here, however, the Proposed Regulation would impose new three and four year periods with only a minimal (and ineffective) transition period. Because its judgment in the Proposed Regulation is

fundamentally at odds with the policy reflected in the HEA and the will of Congress, the Department should withdraw the Proposed Regulation.

Similarly, the author of research on which the Department relies heavily in the NPRM has recently stated that the Proposed Regulation should be phased in after a three year delay rather than the current one year proposal:

> The gainful employment NPRM should be phased in after a three-year delay, as opposed to the current proposal for a one-year delay, to provide enough time for the colleges to adapt to the new regulatory requirements. Without such a delay, the scope of the current loan repayment rate proposal includes some borrowers who will have already separated from the colleges on the date the regulations become effective. It is much more difficult for a college to influence repayment behavior of borrowers after they have already left the college.
>
> Such a delay is not without precedent. For example, when Congress decided to switch from a 2-year cohort default rate to a 3-year cohort default rate as part of the Higher Education Opportunity Act of 2008, it delayed the effective date for sanctions until three years of official 3-year cohort default rates were available. Congress also delayed the switch to 3-year cohort default rates until FY2009 even though it could have started the switch in FY2007.

See Mark Kantrowitz, *The Impact of 'Persistence of Interest' on Loan Repayment Rate*, 2 (August 23, 2010), http://www.finaid.org/educators/20100823persistenceofinterest.pdf.

V. The Proposed Regulation Violates Due Process Because It Does Not Provide For Notice And Comment On The Related Program Eligibility Regulation.

The Proposed Regulation would set out new requirements for an institution to seek the Department's approval to add a new Title IV-eligible program, including requirements to provide enrollment projections and third party documentation of the demand for jobs in the area in which the new program would provide training.

While the proposed regulation (34 C.F.R. § 668.7(g)), references the current regulation (34 C.F.R. § 600.10(c)) that sets forth the requirements for an institution to add a Title IV-eligible program, it nullifies the continued effect of 34 C.F.R. § 600.10(c). It appears that the Department intends to override the existing regulation without any notice-and-comment procedures on that particular regulation, and without providing any specificity as to the standards the Department would use to determine if the relationship between the enrollment projections and job projections warrants approval.

ED already has regulations, codified at 34 C.F.R. § 600.10(c)(1)-(3), regarding the procedures for seeking ED approval for new educational programs. Significantly, subparagraph (c)(2) provides several specific exceptions for when a school does not have to apply to ED in advance of disbursing Title IV aid to students enrolled in such new programs. These exceptions provide that a school need not apply to ED in advance if it is adding a new educational program

that (a) leads to an associate or higher level degree or (b) is of sufficient length and is closely related to an educational program that has previously been approved by the Secretary.

Section 668.7(g) of the new GE Regulation references 34 C.F.R. § 600.10(c)(1) of this companion regulation. But, conveniently, it totally omits reference to 34 C.F.R. § 600.10(c)(2), which provides the exceptions referenced above. Thus, it appears that the Secretary intends to nullify the force and effect of § 600.10(c)(2) without any notice and comment rulemaking on the subject, which is contrary to due process and the notice and comment provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 553.

VI. The Proposed Regulation Is Unconstitutionally Vague.

A. Vagueness Standard.

A law or regulation violates due process if it is impermissibly vague. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"); *Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007) ("[T]he question of whether a statute or regulation is unconstitutionally vague is determined by whether it afforded fair notice to the plaintiff to whom it was applied."); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1084 (9th Cir. 2006) ("A government regulation may be unconstitutionally vague for two reasons. First, the regulation may fail to give persons of ordinary intelligence adequate notice of what conduct is proscribed; second, it may permit or authorize arbitrary and discriminatory enforcement.") (citation omitted).

Similarly, a failure to adopt standards under which a decision can be evaluated is a violation of due process. *Holmes v. N.Y.C. Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) ("where the Authority has adopted no standards for selection among non-preference candidates, [it has] thereby failed to establish [a] fair and orderly procedure . . . which due process requires"); *United States v. Atkins*, 323 F.2d 733, 741-42 (5th Cir. 1963) (failure of voter registration approval board to adopt "uniform objective standards" that enabled the decision maker to exercise "arbitrary power" violated due process); *Gen. Bond & Share Co. v. S.E.C.*, 39 F.3d 1451, 1458 (10th Cir. 1994) (requiring exchange to provide fair warning of how to comply with its rules).

B. The Proposed Regulation Is Unconstitutionally Vague Because It Does Not Establish Any Standards For The Department's Review Of Applications For New Educational Programs.

These vagueness principles bar the Proposed Regulation's requirement that covered institutions must obtain the approval of the Department prior to adding new Title IV eligible educational programs. The Proposed Regulation would establish new requirements for the addition of educational programs but does so without providing notice to institutions of the standards by which the Department will evaluate those programs or any of the reams of new information required to support an application for a new program. For example, among the multiple categories of data that have not previously been required for such applications are: (i) enrollment projections for five years for each location where the program will be offered; and (ii)

documentation from unaffiliated employers providing their projected vacancies in those job categories in the relevant five-year period or the demand for workers generally in those occupations.

Tellingly, although the Proposed Regulation also provides that the job vacancies must be "commensurate" with the projected enrollments and that any Departmental approval may include enrollment limitations based on projected enrollments and job vacancies, totally absent are any standards for the Department to evaluate the required projections or determine whether the job projections are "commensurate" with the enrollment plans. Nor is there any allowance or comment on how these standards would work for online programs where students are geographically dispersed. Nor is there any comment on how these standards would be applied to cutting edge programs (such as programs in green technologies) where job forecasts are less certain than is normally the case.

As a result, because these are truly "eye of the beholder" standards, not only is it impossible for institutions to know what standards their applications will have to meet and tailor their proposal accordingly, the Proposed Regulation is unlawful because it would permit or authorize arbitrary and discriminatory enforcement.

In short, the metrics required to obtain approval for a new program are impermissibly vague. Approval apparently will be based upon the Department's assessment of annual documentation from third party employers as well as enrollment estimates and market demand metrics that have not been defined. Among other undefined parameters are: who will be considered an employer; what will qualify as a reliable projection of future job demands; how the institution should determine expected demand; and what penalty will be imposed if approval is granted and the institution's estimate of expected demand is not realized. Moreover, the vagueness of the Proposed Regulation is exacerbated by the absence of any explanation as to the bases upon which the Department will conduct its assessment of the information it obtains. Accordingly, this portion of the GE Regulation should be declared void for vagueness.

C. The Proposed Regulation Is Impermissibly Vague In Numerous Other Respects.

There are a number of additional areas of the Proposed Regulation that fail to provide sufficient guidance to institutions regarding the requirements to which they will be subject. In this regard, it is well-settled that regulations must provide regulated entities with guidance that is "reasonably ascertainable."

> "[I]n the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability." We thus ask whether "by reviewing the regulations and other public statements issued by the agency, a *regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.*"

Trinity Broad. of Florida, Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *Gen. Elec. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)) (emphasis added).

Here, for-profit institutions would not be able to identify, with ascertainable certainty, the standards with which the Department expects them to conform in order to maintain the Title IV eligibility of their existing programs and obtain Title IV eligibility for new programs because of a number of important holes in the Proposed Regulation. For example, every one of the following is left vague and undefined by the Proposed Regulation:

- The method described in the NPRM to allocate the Title IV aid for restricted or ineligible programs that are being phased out is not clearly defined and would adversely affect current students. If aid is reduced, the Proposed Regulation nowhere specifies how that reduction would be allocated among the existing students.

- "Earnings" is not a defined term under the HEA or the Proposed Regulation. It is not clear whether the Department would use gross income, adjusted gross income, Social Security income, earnings from primary employment source (if multiple), earnings from all employment sources (if multiple), or earnings from just some employment sources (if multiple), and if only some, which ones. Moreover, would "earnings" include income from investment, dividends, winnings, or inheritance?

- Under the Proposed Regulation, it is not specified how the Department would calculate joint/household income, specifically if the primary wage earner is not the graduate (i.e., if the graduate is the primary care giver and is not employed by choice).

- Under the Proposed Regulation, it is not specified what federal agency will provide the actual earnings data. The Proposed Regulation provides only that the Department would "use[] the most currently available actual, average annual earnings obtained from a Federal agency . . . ." Thus, the Proposed Regulation appears to place emphasis on the fact that the data is the most recent, not that it is accurate or even the most reliable.

- Under the Proposed Regulation, it is unclear what precise statistical techniques and measures will be used (a) to determine the cohorts of students, and (b) to calculate the average actual earnings.

- Under the Proposed Regulation, an institution can use metrics over the Prior Three Year Period ("P3YP") if an institution can show that "students completing the program typically experience a significant increase in earnings after an initial employment period and explain[] the basis for that earnings pattern." However, the term "significant increase in earnings" is undefined, and there is no specification of what is required to show a "basis for that earnings pattern." Also, in reality this option is illusory because institutions have no ability to access the earnings data they would need to demonstrate the existence of this increase.

- Under the Proposed Regulation, there is no specified process to validate and finalize the list of students entering repayment over the last four fiscal years in time to calculate the current year's Loan Repayment Rate.

- Under the Proposed Regulation, there is no precise metric or criteria specified that will be used to determine who is included and excluded from the repayment cohort.

- Under the Proposed Regulation, there is no specified process to identify the definitive population of students entering repayment over the four federal fiscal year window.

- Under the Proposed Regulation, the treatment of consolidation loans is unclear. The Department has for many years aggressively encouraged borrowers to use consolidation loans. However, it appears that the Proposed Regulation may actually penalize institutions whose students chose to consolidate their debt.

THE PROPOSED REGULATION IS INVALID BECAUSE IT EXCEEDS THE DEPARTMENT'S STATUTORY AUTHORITY

I. The Proposed Regulation Is Ultra Vires Because Its Authorizing Statute Does Not Empower The Department To Penalize Institutions For Students' Post-Graduation Conduct.

In an effort to impose irrational and unreasonable restrictions on for-profit institutions and non-degree programs at other covered institutions, the Department has seized upon the phrase "prepare students for gainful employment" and attempted to transform it into carte blanche authorization for the GE Regulation. However, as demonstrated below, this effort is impermissible because the unambiguous language of the HEA, as consistently construed by the Department since its enactment, does not permit the Department to determine that an educational program either does or does not "prepare students for gainful employment" based on post-graduation metrics.

It is well-established that the Department's power is limited to its delegated authority and that regulations in excess of that authority are ultra vires and illegal:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). *See also Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) ("[A]dministrative agencies may [act] only pursuant to authority delegated to them by Congress."). "Secretary's regulations" that "exceed the statutory grant or are arbitrary, capricious or an abuse of discretion, may [] be set aside." *Paris v. Dep't of Housing & Urban Develop.*, 843 F.2d 561, 567 (1st Cir. 1988).

A. <u>The Statutory Language.</u>

The proposed "gainful employment" regulation is directly contrary to the statutory language of the HEA. First, in determining the meaning of a statute, "the starting point in every case" is the "language of the statute itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When there is no ambiguity, an agency, to discharge its obligation to follow the intent of Congress, must "assume that Congress said what it meant and meant what it said." *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 672 (9th Cir. 1978). Under such circumstances, the statutory language "must ordinarily be regarded as conclusive." *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Unambiguous language must be accorded "its plain, obvious and rational meaning." *Am. Trucking Ass'n v. United States*, 602 F.2d 444, 450 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). Congress is presumed to use terms as they are "commonly and ordinarily understood." *United States v. Yeatts*, 639 F.2d 1186, 1189 (5th Cir. 1981), *cert. denied*, 452 U.S. 964 (1981).

The statute upon which the Proposed Regulation is based requires an eligible institution to provide "an eligible program of training to prepare students for gainful employment in a recognized occupation" in order for the institution's students to qualify for Title IV aid. 20 U.S.C. § 1002(b)(1), (c)(1). Nothing in this statute even remotely empowers the Department to impose either the Loan Repayment Rate or the Debt to Earnings Ratio.

To "prepare" means "to provide with necessary means" or "to make ready." *Blacks Law Dictionary* (6th ed. 1990). "Gainful employment" is defined as "any calling, occupation, profession or work which one may profitably pursue." *Id.* Thus, the phrase "to prepare for gainful employment" looks to the education itself, not to the income derived from the education. There is nothing to suggest that the phrase "to prepare students for gainful employment" was meant to authorize the Secretary to impose a backward looking quantitative test comparing the debt incurred in the past to a student's earnings level during future periods or evaluating whether the student made principal payments during a certain post-graduate period. Rather, the common sense, unambiguous meaning of the phrase imposes a two fold inquiry: whether the program (1) "prepares" the student to obtain employment from which (2) the student can earn income.

B. <u>The Legislative History Relied Upon By The Department Does Not Support The Proposed Regulation.</u>

If the statutory language is not unambiguous, then resort may be had to the legislative history to glean Congressional intent. *See Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 541 (D.C. Cir. 2004) ("The legislative history can assist the court in identifying legislative intent where the statute is unclear"); *United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000) (finding that since the "language of the statute is less than clear," the court "may look to the legislative history for guidance in interpreting the statute") (citation omitted); *Envtl. Def. Fund v. Reilly*, 909 F.2d 1497, 1502 (D.C. Cir. 1990) (noting that if "the language leaves the meaning of a statute unclear, the court may enlist the aid of pertinent legislative history and other sources of legislative intent in an effort to resolve the ambiguity").

While resort to the legislative history is unnecessary here because the statutory language is unambiguous, the Department cites to the legislative history of a separate piece of legislation,

other than the HEA. Although the NPRM (NPRM at 43657) states that the Proposed Regulation is based on the "legislative history of the gainful employment requirement," the NPRM actually cites to a Senate Report which nowhere even mentions the words "gainful employment." In fact, this Senate Report does not even pertain to the HEA, but rather relates to the National Vocational Student Loan Insurance Act of 1965 ("NVSLIA"). The NVSLIA nowhere contains the term "gainful employment," instead using the phrase "designed to fit individuals for useful employment in recognized occupations."

From that Senate Report, the Department quotes testimony provided in hearings related to the NVSLIA. That testimony does not purport to address whether vocational programs "prepare students for gainful employment in a recognized occupation." In fact, in quoting from the Senate Report, the Department excludes the one reference to "useful employment," the phrase most similar to the HEA's gainful employment language and on which the NVSLIA conditioned institutional eligibility. In discussing "useful employment," the Committee explained that this language was intended to be read broadly to include a wide range of institutions and programs:

> With respect to the definition of "eligible institution," it was ***intended that the bill be as liberal as possible*** by including varieties of institutions authorized to provide, and providing, "a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations."

S. Rep. No. 89-758, at 10 (1965) (emphasis added). This Committee Report certainly carries more weight than the testimony of an individual witness.

Although irrelevant, in issuing the Proposed Regulation, the Department is even acting directly contrary to the purpose the Committee considering NVSLIA expressed in 1965. The Committee report nowhere indicated that Congress intended to authorize the Department (even under the NVSLIA) to require schools to establish that their former students' debt payments constituted a particular percentage of their income or that any particular percentage of former students were making repayments of principal after leaving school. Rather, the legislative history relied upon by the Department shows that Congress heard testimony that making loans available for vocational education was a good thing. One testifying witness had conducted a study of graduation and employment rates and salaries from which he concluded that "in terms of this sample of students, sufficient numbers were working for sufficient wages so as to make the concept of student loans to be [repaid] following graduation a reasonable approach to take," S. Rep. No. 89-758, at 7, and a representative of a vocational school stated that "students receiving loans will, in almost every case, be enabled to repay them out of the added income resulting from their better educational status." There was no ongoing role created for the Department to monitor debt repayment. Congress heard testimony and made a legislative judgment to extend eligibility to certain institutions; it did not delegate to the Department the authority to undo that judgment.

In sum, the Senate Report on which the Department relies is irrelevant and in addition is contrary to the approach that the Department has taken in the Proposed Regulation. For these reasons, the Department's contention that any legislative history supports its approach is false.

C. The Broader Legislative History Of Gainful Employment Under Educational Laws.

Congress has used the concept of training for "gainful employment" or "useful employment" in education-related legislation for more than 90 years, and there is no hint in any other legislation that Congress suggested those terms have the meaning that the Department now proposes.

Initially, the Vocational Education Act of 1917, Pub. L. No. 65-347 (the "VEA") promoted vocational education to prepare teachers for vocational subjects. *See* S. Rep. No. 97, at 1 (1916). The "controlling purpose of [trade, home economics and industrial] education shall be to fit for *useful employment*; that such education shall be of less than college grade and shall be designed to meet the needs of persons over fourteen years of age who are preparing for a trade or industrial pursuit or who have entered upon the work of a trade or industrial pursuit." H.R. Rep. No. 1495, at 7 (1917) (Conf. Rep.) (emphasis added). Building upon the VEA, Congress passed the Vocational Education Act of 1946, H.R. Rep. No. 2658 (1946), followed by the Vocational Education Act of 1963, Pub. L. No. 88-210. During passage of the 1946 legislation, Congress noted that the "public vocational schools, in peacetime and wartime, have demonstrated their ability to train people for gainful and useful employment." H.R. Rep. No. 2658, at 3 (1946).

These laws were followed by the Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346 (the "GI Bill"), in which Congress declared "its intent and purpose that there shall be an effective job counseling and employment placement service for veterans, and that, to this end, policies shall be promulgated and administered, so as to provide for them the maximum of job opportunity in the field of gainful employment." H.R. Rep. No. 1624, at 11 (1944).

The GI Bill was followed by the National Defense Education Act of 1958, Pub. L. No. 85-864 (the "NDEA") which was passed "to assist in the improvement and strengthening of our education system at all levels and to encourage able students to continue their education beyond high school." H.R. Rep. No. 2157, at 1 (1958). The NDEA provided, among other things, loan programs and fellowships for higher levels of study. Congress restricted fellowship recipients from engaging in "gainful employment other than part-time employment by the institution in teaching, research, or similar activity." H.R. Rep. No. 2157, at 14 (1958). In Conference, Congress explained that:

> the purpose of this title [is] to provide assistance to the States so that they may improve their vocational education programs through area vocational education programs approved by State boards of vocational education as providing vocational and related technical training and retraining for youths, adults, and older persons, including related instruction for apprentices, designed to fit them for *useful employment* as technicians or skilled workers in scientific or technical fields.

H.R. Rep. No. 2688, at 19 (1958) (emphasis added).

In each of these laws that preceded and paved the way for the HEA, Congress referred to educational programs that prepare students for useful or gainful employment in a way that is

consistent with the plain meaning of these phrases, which focuses on whether the educational programs prepared students for jobs that would pay. The Department cannot expand the meaning of those terms now in an attempt to find a basis in the HEA for its Proposed Regulation.

D. The Department's Longstanding Construction Of The Statutory Language.

The GE Regulation is wholly inconsistent with the Department's own longstanding interpretation of the phrase "to prepare students for gainful employment." The Department has previously construed that phrase to look only to the nature of the education itself, not to post-graduation consequences or effect of such education. This interpretation is set forth in the leading cases that the Department's administrative judges (hearing officers) have decided. For example, the Department's own decision states:

> It is implicit that the statutorily intended goal or result of such a program be *preparation* for gainful employment in such an occupation; *not that such a goal or result be potentially derived or incidentally available at the conclusion of the program.*

In re Academy for Jewish Educ., Docket No. 94-11-EA (March 23, 1994) at 3-4 (emphasis added); *see also In re Beth Jacob Hebrew Teachers Coll.,* Dkt. Nos. 94-43-ST and 94-80-ST (July 9, 1996) (teacher training programs were eligible under the HEA because they were designed to "prepare[] students for gainful employment in a recognized occupation"); *In re Bnai Arugath Habosem,* Dkt. No. 94-73-EA (June 16, 1994) (programs must "have as their aim or focus the preparation of students specifically for employment"). No case law supports the new definitions of "prepare students for gainful employment" that the Department manufactured for the GE Regulation. Moreover, the HEA has not been amended since these cases were decided in any way justifying the Department to completely change its approach on this subject.

E. Congress' Approval Of The Department's Construction.

Congress' decision not to amend the "gainful employment" provision of the HEA over many years despite numerous other amendments to the HEA establishes that Congress approved of the Department's previous construction of the section:

> It is well established that when Congress revisits a statute giving rise to a long-standing administrative interpretation without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (citation omitted).

Here, Congress has amended the HEA many times, but has never changed the "gainful employment" language. Indeed, in 2008, Congress specifically considered the definition of "gainful employment" and decided not to change it. Rather than change that definition, Congress added a further exception in the statute, permitting certain institutions to qualify for participation by administering a liberal arts program. *See* Pub. L. No. 110-315, tit. I, § 102(d)(1), 122 Stat. 3083, 3086 (effective July 1, 2010).

Indeed, the Managers' statement for the Higher Education Opportunity Act of 2008 explained that Congress did not intend to change the Department's longstanding approach to the interpretation of "gainful employment in a recognized occupation":

> In adding this provision, the Conferees do not intend to affect the eligibility of current programs or alter the method used by the Secretary in determining "recognized occupations" as required by 102(b)(1)(A)(i). The Conferees intend for the Secretary to continue to refer to the latest edition of the Dictionary of Occupational Titles published by the Department of Labor's Bureau of Labor Statistics in making this determination. Additionally, the Conferees understand that some programs offered by an institution may fit both the definitions in (A)(i) and (ii). The Conferees do not intend the terms "gainful employment in a recognized occupation" and "liberal arts" to be mutually exclusive.

See Joint Explanatory Statement Of The Committee Of Conference, H.R. Rep. No. 110-803, at 581 (2008) (Conf. Rep.).

By referring to the Dictionary of Occupational Titles as the core source for determining if programs "prepare students for gainful employment in a recognized occupation," Congress expressly affirmed that the term "gainful employment" is intended to evaluate an educational program by examining its nature and purpose, which is a prospective view, rather than importing post-graduation metrics (like those that the Department now seeks to mandate) or any other form of criteria based on what happens after the student graduates or withdraws, which is a retrospective view.

F. <u>Other Indicia Of Congressional Intent.</u>

"[W]here the [statutory] language is subject to more than one interpretation and the meaning of Congress is not apparent from the language itself, the court may be forced to look to the general purpose of Congress in enacting the statute . . . for helpful clues." *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002). *See also Conrad v. Phone Directories Co., Inc.*, 585 F.3d 1376, 1382 (10th Cir. 2009) ("The structure of [statute], however, offers a more substantial clue to the intent of Congress."); *United States v. Lee*, 317 F.3d 26, 37 (1st Cir. 2003) ("Where, as here, the text does not furnish decisive guidance, an inquiring court must comb the statutory language for clues, consider relevant legal traditions, look at the overall structure of the law, examine the statute's legislative history"); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1005 (10th Cir. 2001) (en banc) (court deciphers the meaning of a particular statutory provision "by considering the language and structure of the statute as a whole.").

There are a host of other specific requirements that Congress imposed in the HEA that specifically deal with the eligibility requirements for schools to qualify to participate in the Title IV Programs. These other requirements establish that when Congress intends a statutory provision to require institutions to satisfy a numeric standard to maintain eligibility for Title IV, Congress says so directly. For example:

- In 1992, Congress revised the definition of "eligible program" at 20 U.S.C. § 1088(e) to provide numeric measures for the quality of short-term educational

programs of 300 to 600 clock hours in length. In doing so, Congress directed the Secretary to "develop regulations" on this particular subject and, further, Congress directed the Secretary to set standards that would require a minimum of a 70% completion rate and 70% placement rate. This legislation is particularly significant since it relates to eligible educational programs, which is precisely the subject of the GE Regulation. Under 20 U.S.C. § 1088(e), there is no doubt that when Congress intends for the Department to fundamentally change the definition of an eligible educational program and apply a numeric measurement to the outcomes of those programs, as the Department proposed to do in the GE Regulation, Congress not only directs the Secretary to do so but also sets the basic standards for the Department to employ for that purpose.

- In 1992, Congress amended the HEA to require institutions to meet specific CDR requirements to maintain eligibility. *See Student Loan Default Prevention Initiative Act*, P.L. 101-508, § 3004 (Ineligibility Based on High Default Rates). These detailed provisions define the CDR with precision as a measure of the number of students defaulting on their loans over a certain period, 20 U.S.C. § 1087bb(g); 20 U.S.C. § 1085(m), and then condition continued Title IV eligibility on compliance with specific enumerated standards. *See, e.g.,* 20 U.S.C. § 1085(a)(2) (removing Title IV eligibility for institutions that fail to satisfy certain CDRs). Congress subsequently amended these provisions on several occasions. These actions demonstrate that when Congress wishes to establish specific numeric standards as a condition of continuing eligibility for Title IV funding, it takes specific (and often repeated) action to accomplish precisely that.

- In 1998, Congress amended the HEA to require that schools derive only ten percent of their revenues from non-federal sources. *See Higher Education Amendments of 1998*, Pub. L. No. 105-244, § 102(b)(1)(F), 112 Stat. 1581, 1588 (1998) (amending then existing 85/15 Rule established in 1992). This "90/10 Rule," codified at 20 U.S.C. § 1002(b)(1)(F), modified the previous "85/15 Rule," which again demonstrates that Congress sets (and then sometimes adjusts) the numeric standards for continuing Title IV eligibility when Congress intends to set such a standard.

- Subject to certain exceptions, 20 U.S.C. § 1002(a)(3)(A) generally excludes most institutions from the definition of institution of higher education if the institution "offers more than 50 percent of such institution's courses by correspondence," excluding telecommunications courses.

In contrast to this stream of examples of explicit Congressional mandates, the statutory language that a Title IV eligible program "prepare students for gainful employment in a recognized occupation", which has stood unchanged for 45 years, does not even hint that Congress intended to authorize the Department to establish a complex system of numeric metrics to evaluate, retrospectively, whether a given program does or does not "prepare students for

gainful employment in a recognized occupation" as the Department has set forth in the Proposed Regulation.[2]

G. Congress And Other Regulatory Agencies Have Employed The Plain Meaning Of "Gainful Employment" In Other Laws.

In proposing the GE Regulation, the Department is attempting to inject extraneous meaning into the term "gainful employment" that is contrary to the plain meaning of the term as it is used in many other laws and by many other federal agencies.

The SSA defines "gainful work" as "work performed for pay or profit."[3] This simple straightforward definition applies to the multi-billion dollar federal funding programs that the SSA administers. The Department has indicated that it hopes to rely on the SSA to provide earnings data for the Debt to Earnings Ratio because of SSA's expertise and central role in administering federal benefits, and CEC suggests the Department must also follow the SSA in its definition of gainful employment.

The term "gainful employment" or closely related terms are also defined in laws related to income taxation,[4] veterans benefits,[5] vocational rehabilitation,[6] and disability benefits,[7] to name a few. The term gainful employment as set forth in the Social Security Act has also been relied upon by the courts for its plain meaning in determinations related to the grant of assistance

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[2] Moreover, where Congress otherwise employed the phrase "gainful employment" in Title 20, it did so in a way that shows it intended to use the plain meaning of the phrase. *See, e.g.*, 20 U.S.C. § 1135c(d)(2) (barring certain awards if "student is engaging in gainful employment other than part-time employment involved in teaching, research, or similar activities"); 20 U.S.C. § 1134c (same). By recognizing that "gainful employment" even extends to part-time employment, Congress shows that the plain meaning of the term "gainful employment" does not authorize debt repayment or debt to earnings comparisons.

[3] Definition of "gainful work," Social Security Handbook § 603.1(A), http://www.ssa.gov/OP_Home/handbook/handbook.06/handbook-0603.html (last viewed September 2, 2010).

[4] "Work as a volunteer or for a nominal consideration is not gainful employment." Treas. Reg. § 1.21-1(c)(1) (2007).

[5] "The term "vocational goal" means a gainful employment status consistent with a veteran's abilities, aptitudes, and interests." 38 U.S.C. § 3101(8).

[6] "Congress finds that work is . . . a valued activity . . . and . . . the purpose of this subchapter is to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation, each of which is . . . designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that such individuals may prepare for and engage in gainful employment . . . [further] it is the policy of the United States that such a program [shall be consistent with the principle that] individuals with disabilities must be provided the opportunities to obtain gainful employment in integrated settings." 29 U.S.C. 720(a).

[7] "[S]uch regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines . . . ." 30 U.S.C. 902(f)(A).

under the former Aid to Families with Dependent Children for the care of children enrolled in educational programs or training preparing students for gainful employment.[8]

In connection with general assistance payments made to Native Americans, Congress addressed this concept from the perspective of whether gainful employment would disqualify a student from federal benefits and stated:

> The Secretary of the Interior shall not disqualify from continued receipt of general assistance payments from the Bureau of Indian Affairs an otherwise eligible Indian for whom the Bureau is making or may make general assistance payments…because the individual is enrolled (and is making satisfactory progress toward completion of a program or training that can reasonably be expected to lead to gainful employment) for at least half-time study or training in [(1) a Bureau-assisted college or (2) an institution of higher education or a vocational school].[9]

Where Congress has provided for a person's qualification or disqualification for a federal benefit, if the determination is to be based upon gainful employment, Congress has relied upon the plain meaning of the term, which is work in exchange for pay. The Department's proposed definition is contrary to the definition that Congress and many federal agencies have used in similar settings, and therefore is ultra vires.

H. The Department Cannot Indirectly Impose Price Controls.

The GE Regulation also is ultra vires because its stated purpose is not even remotely found in the authorizing statute. The intended effect of the GE Regulation is to force institutions to reduce their tuition costs to maintain eligibility for their programs:

> Because a large proportion of the for-profit institutions have low repayment rates on their loans, we anticipate that at least half of the industry will adjust prices downward by an average of 10 percent as one way of complying with the proposed regulations. If this 10% adjustment were made, it could lead to significant ongoing tuition savings.

NPRM at 43668; *see also id.* at 43672 ("[M]any [schools] will adjust prices to attempt to bring programs into compliance.").

However, it is well established that an agency cannot accomplish by indirect means that which it lacks the statutory authority to accomplish by direct means. *See United States v. Hagan*, 521 U.S. 642, 697 (1997) (Thomas, J., concurring in part and dissenting in part) ("[T]he Commission may not seek to prevent indirectly conduct which it could not, under its current

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[8] *See Lopez v. Vowell*, 471 F.2d 690, 692 (1973) (quoting § 406 of the Social Security Act, 42 U.S.C.A. § 606, in pertinent part: "The term 'dependent child' means any needy child…who is (A) under the age of eighteen, or (B) under the age of twenty-one and . . . [is] a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment . . . .").

[9] 25 U.S.C. § 13d-2(a).

theory, prohibit directly."); *Richmond Power & Light of City of Richmond, Ind. v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) ("What the Commission is prohibited from doing directly it may not achieve by indirection.").

Congress has addressed the issue of rising tuition costs many times over the years. It has never authorized the Department to impose price controls to achieve this goal. In fact, the House of Representatives has recognized that the Department lacks the ability to regulate pricing. *See* H.R. Rep. No. 109-231, at 159 (2005) (House report on unenacted College Access and Opportunity Act of 2005 stating that "*the Federal government does not currently have the authority to dictate tuition and fee rates for institutions of higher education*") (emphasis added).[10]

Because Congress nowhere gave the Department the power to regulate tuition levels, it cannot do so directly or indirectly. Accordingly, the Proposed Regulation, which the Department admits is intended to force down tuition levels, is outside the scope of the powers allocated to the Department by the HEA, and should be withdrawn.[11]

II. The Proposed Revision To The Provisional Certification Regulation Is Contrary To The HEA.

The Proposed Regulation also exceeds the Department's authority under the HEA because it would revise the regulations regarding provisional certification (codified at 34 C.F.R. § 668.13(c)) impermissibly to authorize the Department to place an institution on provisional certification status if it has a single educational program that is subject to restrictions or loss of eligibility under the Proposed Regulation.[12] This expansive use of provisional certification status is contrary to the HEA's language and intent.

Congress set forth specific reasons and occasions when the Department can certify an institution on a provisional basis. *See* 20 U.S.C. § 1099c(h)(1). Congress directed that the Secretary would have this power *only* when the Secretary is considering an institution for initial certification, is reviewing the institution's administrative capability and financial responsibility

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[10] Moreover, Congress has also rejected the imposition of a maximum cost-to-earnings ratio on institutions of higher education. In the Higher Education Amendments of 1992 (Pub. L. No. 102-325), Congress required states to establish standards for the review of all institutions of higher education that met certain at-risk criteria. One of the factors to be considered was "the relationship of the tuition and fees to the remuneration that can be reasonably expected by students who complete the courses or programs." *Id.* § 494C(d)(7). In 1998, Congress repealed the section of the U.S. Code (former 20 U.S.C. § 1099a-3) containing the requirement that States review the cost of tuition relative to expected earnings. *See* Pub. L. No. 105-244 § 491, 112 Stat. 1581, 1758-59 (1998). The report of the Committee on Education and the Workforce of the House of Representatives stated that the reason for the removal of this (and other) requirements was that they were "unnecessary and overly burdensome." H.R. Rep. 105-481, at 148 (1998). Congress did not transfer this specific requirement to the Department for enforcement, but rather removed it entirely.

[11] While the Department purports to rely on several other provisions of the HEA to support the Proposed Regulation, none of these provisions even remotely authorizes it.

[12] The Proposed Regulation suggests this change would be codified at 34 C.F.R. § 668.13(c)(1)(i)(F). This appears to be a typo since section (c)(1)(i) does not include any subparagraphs.

for the first time, is reviewing an institution in connection with a change of ownership, or is reviewing the institution's application to renew its certification.

None of those events would be triggered if an institution has one or more educational programs that are restricted or lose eligibility under the Proposed Regulation, and therefore such an event would not be a sufficient basis to transfer an institution to provisional certification. The Department appears to recognize this point since it notes (NPRM at 43628) that this would just be one factor the Department would consider at the time the Department is reviewing an institution's application for recertification. However, the consideration of the proposed regulation as even a factor in provisional certification is impermissible.[13]

* * * * *

It is apparent that the Department has far exceeded its statutory authority under 20 U.S.C. § 1002(b)(1) and (c)(1) in proposing the GE Regulation. In its eagerness to hamstring for-profit institutions, it has launched an illegal measurement system that violates the plain language of the HEA, is directly contrary to its own previous construction of the statutory language, and flies in the face of Congressional intent. The Proposed Regulation is therefore ultra vires.

[13] Even if this were a permissible factor when a school is applying for recertification, CEC suggests that this factor should have relatively little weight in the Department's review of the school's administrative capability and no bearing on its financial responsibility. The HEA, 20 U.S.C. § 1099c(h)(1)(B)(iii) provides that, in reviewing such an application, the Department can consider if the school is "in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities" under the Title IV Programs. The focus is clearly on the school's ability to meet its financial obligations, which the Department regularly measures under its financial responsibility composite score system. Further, under the Department's administrative capability regulation at 34 C.F.R. § 668.16, the Department references several dozen separate areas of performance to be considered in this evaluation. Based on this analysis, CEC believes it would be unreasonable for the Department automatically to place an institution on provisional certification because it has one or more programs that are subject to restriction or loss of eligibility under the GE Regulation. In addition, based on the multitudinous factors that are considered in reviewing an institution's administrative capability and financial responsibility, CEC suggests that these factors under the GE Regulation should not be over-weighted in such an analysis. CEC would appreciate the Department's comment on this issue in the preamble.

THE PROPOSED REGULATION IS ARBITRARY AND CAPRICIOUS

I. Introduction.

Even if Congress had delegated to the Department the authority to impose the Proposed Regulation, which it clearly did not for the reasons explained above, the Proposed Regulation is arbitrary and capricious for multiple reasons set forth below. Accordingly, the Proposed Regulation cannot stand.

II. Arbitrary And Capricious Standard.

For agency action to survive scrutiny under the arbitrary and capricious test, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). When an agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency," or is unsupported by substantial evidence, its decision is "arbitrary and capricious." *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 305 (3d Cir. 1986).

Moreover, the Supreme Court has instructed that when an agency undertakes a change in policy, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Thus, "an agency that departs from its 'former views' is 'obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.'" *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (3d Cir. 2004) (citation omitted). *See also Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 298 (5th Cir. 2007) (failure to "articulate reasons" for change in policy rendered change arbitrary and capricious); *Nat'l Coal. Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883-84 (D.C. Cir. 1987) (agency's "about-face" was "arbitrary and capricious").

Finally, "an agency rule would be arbitrary and capricious if [it] . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. *See also BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003) (same); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."); *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1028 (10th Cir. 2010) (same). The proposed revision violates these principles for multiple reasons.

III. The Department's Unexplained Departure From Its Previous Construction Of The Statute Renders The Proposed Regulation Arbitrary And Capricious.

As noted above, "an agency that departs from its 'former views' is 'obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.'" *Prometheus*, 373 F.3d at 390 (citation omitted). Here, for many years, the Department construed the requirement to "prepare students for gainful employment in a

recognized occupation" as being met where the educational program was designed to prepare the student for a job that provides income. Hence the holding quoted above that "[i]t is implicit that the statutorily intended goal or result of such a program be *preparation* for gainful employment in such an occupation; *not that such a goal or result be potentially derived or incidentally available at the conclusion of the program.*" *In re Academy for Jewish Educ.*, Docket No. 96-11-EA (March 23, 1994) at 3-4 (emphasis added).

Tellingly, the Department has offered no explanation for its sudden realization 45 years after it was first enacted that the statutory language actually authorizes it to impose the backward-looking Loan Repayment Rate and Debt to Earnings Ratio to determine whether a program does or does not prepare students for gainful employment in a recognized occupation. The absence of any rational explanation is because the Department has no explanation other than its impermissible and unauthorized goal of instituting price controls on for-profit schools. The Department's failure to explain its abrupt about-face renders the Proposed Regulation arbitrary and capricious.[14]

IV. The Department's Three And Four Year Windows For Calculating Compliance With, Respectively, The Debt To Earnings Ratio And The Loan Repayment Rate Are Irrational And Contrary To Basic Economic Theory.

At the heart of the arbitrary and capricious standard is the "reasoned analysis" requirement. Agency action that is irrational cannot stand. Here, the Department's imposition of three-year and four-year windows after graduation in which to measure compliance with, respectively, the Debt To Earnings Ratio and the Loan Repayment Rate is irrational.

Based on the legislative history of a statute other than the HEA and one that does not even contain the words "gainful employment,"[15] the Department claims that in enacting the HEA's gainful employment provision, "Congress was concerned that the availability of Federal student aid, particularly in the form of loans for some types of programs and institutions might lead to students taking on more debt than is reasonable given the earnings that could be expected . . . . The concept of the training leading to gainful employment was intended to ensure that this connection between debt and earnings would not be lost." NPRM at 43657.

However, there is no rational connection between this supposed Congressional purpose (unsupported by any relevant legislative history or anything else) and the Proposed Regulation. As explained in the expert report prepared by Professor Bradford Cornell (submitted herewith as Appendix I), basic economic theory provides that in measuring the value of a given investment,

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[14] The Proposed Regulation is also arbitrary and capricious (and ultra vires) because it is based in part on the definition of "eligible program" contained in 20 U.S.C. § 1088(b)(1) but is not consistent with that definition. This definition is not limited to for-profit schools, but rather requires all eligible institutions that offer training or degree programs that do not require an associate degree or above for admission to "provide[] a program of training to prepare students for gainful employment in a recognized profession." 20 U.S.C. § 1088(b)(1)(A)(i). Without explanation, the Department has chosen to interpret this generally applicable language in such a way that it applies only to for-profit schools and certain non-degree programs offered by non-profit and public institutions, but not traditional colleges and universities. The Department's disregard of the plain meaning of the definition of an "eligible program" is clearly arbitrary and capricious.

[15] As noted previously, the statutory history the Department relies relates to the National Vocational Student Loan Insurance Act of 1965. *See* Section I.B *supra*.

one looks to the stream of income to be provided *as a result of the investment over its lifespan*. Thus, to appropriately measure the value of an educational program, one would examine the difference between (a) the income over their working lives of those who did not obtain the additional education and (b) the income over their working lives of those who did. In this regard it is worthy of note that even the Department concedes that "[s]tudent loan debt is worth having if it makes it possible to gain the education and training that enhances productivity as a citizen, civic leader, worker or entrepreneur." NPRM at 43646. However, to properly measure this enhancement, it is this delta in lifetime income that should have been compared to the debt incurred, but the Department wholly failed to employ this basic methodology in the Proposed Regulation. As explained by Professor Bradford Cornell:

> The correct approach according to finance theory would be an NPV [net present value] based approach that considers the present value of ***all incremental lifetime earnings*** due to the educational program and compares this to the present value of the total costs of the program. If the present value of the benefits is higher than the present value of the costs, it makes economic sense for the student to enroll in the program and for the federal government to provide access to title IV funding ***even if in the first three years the debt repayments might exceed 12 percent of the student's annual income or during the first four years the student might not be able to make a repayment on the principal amount of the loan***.

Cornell Report ¶ 21 (emphasis in original).

The Department offers no explanation for its irrational selection of an artificially curtailed period that is not reflective of the value of the education that students obtain, and in fact is totally unreflective of that value because it takes a truncated snapshot in which the student is at the entry level and hence his or her income is the lowest. Indeed, the Department itself admits that its selection of these windows is questionable:

> Some would argue that a more appropriate income measure would occur a few years after completion of the degree or certificate, since incomes increase with age and experience. Data shown in Chart F from the Michigan Survey Panel on Income Dynamics show that incomes increase by as much as 43 percent between the first few years out of postsecondary education and the sixth to tenth years out.

NPRM at 43666.

The Department attempts to justify its self-evidently flawed selection of the three and four year windows by claiming that "this increase is true for high school diplomas as well as postsecondary education; in other words, the income gaps measured in the early years generally serve as good indicators of the income gaps in the later years." *Id.* However, as Professor Cornell notes:

> But this observation is beside the point. The Loan Repayment Rate Test and Debt to Income Ratio Test do not (as a rational NPV methodology would) even purport to evaluate the additional income attributable to post-secondary education over the working life of the student. Rather, both of these tests take a snapshot of

> certain metrics during a specific short term period. The fact that salaries rise for high-school graduates over time does not mean that students who have obtained post-secondary education at for-profit schools should be assessed solely on the basis of their lower salaries over the period immediately following completion of their programs of study.

Cornell Report ¶ 30 (emphasis in original).

Finally, the loss of value to the nation each year that the implementation of the Proposed Regulation would cause are very significant. Professor Cornell explains that the "the actual amount of value lost will depend upon the total number of students who discontinue or limit their education as a result of the proposed regulation, the percentage of those students that would have graduated but for the proposed regulation, and the net present value of the education these students would have received but for the proposed regulation." Cornell Report ¶ 35. Even applying conservative assumptions and the Department's own unrealistically low estimates of the number of students that the Proposed Regulation would impact yields a very significant net loss each year, primarily inflicted on lower income and minority students. Accordingly, as Professor Cornell notes, "the Department's proposed regulation is not only potentially ruinous to the lives of tens of thousands of students, it is economically irrational on a macro-economic scale as well." Cornell Report ¶ 36.

V. The Department's Use Of Average Actual Earnings Under The Debt To Earnings Ratio Is Arbitrary And Capricious.

As previously described, the Department has determined to use average, actual income data for students in conducting its calculations. While the Proposed Regulation does not identify the source of this information, the Department has suggested that it intends to obtain it from SSA. The use of such data is arbitrary and capricious for multiple reasons, including the following.

First, the schools have no access to this data, and thus have no way of determining whether they are in compliance or not. *See generally Atlanta Coll. Of Med. & Dental Careers v. Riley*, 987 F.2d 821, 830 (D.C. Cir. 1993) (Department's action was arbitrary and capricious where it relied on data to which schools had no access).

Second, students have a whole host of reasons for not seeking employment or seeking only part time or lower paying employment that have nothing to do with the value of their education. These reasons, individually or in combination, include illness or disability; caring for young children; caring for a sick parent or other family member; seeking an apprenticeship or internship to further develop skills; family relocation to an area without jobs in a chosen field; travel; public service; acceptance of part-time work for a period; or primary reliance on a spouse's income. Thus, there is no "'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

Third, under the Proposed Regulation, there is neither a mechanism nor tools to address macro-economic conditions that could dictate national unemployment rates. It makes no sense to penalize institutions based on generally applicable economic factors (particularly those linked to

the business cycle) that are likely to negatively impact the average actual earnings of graduates within the windows utilized by the Department.

Fourth, the Department's reliance on SSA earnings data is unreasonable given the host of problems that are inherent in using that data. In the absence of any detailed explanation of the average actual annual earnings calculation in the NPRM, it appears reasonable to assume that the Department intends that the calculation will be an average calculation performed by the SSA from its Master Earnings File ("MEF") for the applicable students. The MEF for each individual consists of that individual's social security wages reported on IRS Form W-2 or self-employment earnings reported on Schedule SE of IRS Form 1040. Simply relying on the MEF income amounts to measure the earnings attributable to an individual's education is seriously flawed and the adjustments necessary to correct the flaws are effectively unworkable. The flaws in relying on the MEF arise because individuals in some occupations are more likely to be employees while others are likely to be self-employed. Relying on the MEF skews the results among occupations and therefore measures an individual's earnings unfairly and/or inaccurately. In addition, the MEF entirely fails to capture the corporate earnings of entrepreneurs who conduct business in corporate form, thus understating the economic benefits of such individuals' education. In addition, graduates employed outside of the United States may not report their earnings to the SSA at all.

Despite the existence of all of these flaws, schools have no way to challenge the individual earnings data. Unlike the CDR challenge process, which allows the school to take an active role in correcting flawed data through an initial review and appeal process, the Proposed Regulation would specifically bar institutions from even seeing, much less correcting, the data relied upon by the Department to determine their eligibility. In fact, the Proposed Regulation does not even specify how the earnings measure will be determined. In the absence of a transparent and predictable process, the Department's decision to rely on an actual earnings data is arbitrary and capricious.

VI. The Debt To Earnings Ratio And The Loan Repayment Rate Are Irrational Because They Improperly Aggregate Data.

The stated purposes of the Department's Proposed Regulation are: (1) to prevent "inefficient use of the borrower's resources"; (2) to minimize inappropriate "taxpayer subsidies" for educational programs that are not valuable; and (3) to minimize "default cost." NPRM at 43646. There is no rational connection between the Proposed Regulation as designed and the achievement of these purposes because the Proposed Regulation imposes punitive measures based on aggregate data, not on the basis of the individual student data. Thus, the Proposed Regulation is arbitrary and capricious because it would penalize students who, even under the Department's egregious metrics, are doing well.

VII. The Debt To Earnings Ratio And The Loan Repayment Rate Are Arbitrary And Capricious Because They Improperly Impose Sanctions On Institutions For Conduct Prior To The Regulation's Enactment.

The retroactive application of a regulation is arbitrary and capricious if an institution is incapable of bringing itself into compliance before it is deemed in violation of the regulation.

See, e.g., *Rosenau v. Farm Service Agency*, 395 F. Supp. 2d 868, 874 (D.N.D. 2005) (agency's retroactive application of recently approved assessment model to determine whether farmers' prior wetland conversions qualified for minimum effect exemptions was abuse of discretion); *City of Rochester v. EPA*, 496 F. Supp. 751, 769 (D. Minn. 1980) (agency barred from "giv[ing] retroactive effect to a significant change in the substantive law" regarding participation in federal program).

The Proposed Regulation is scheduled to go into effect on July 1, 2012, but the data being measured for the Debt to Earnings Ratio will be for the years 2008, 2009, and 2010, and for the Loan Repayment Rate will be for the years 2007, 2008, 2009, and 2010. Moreover, because the GE Regulation is aimed in large part to force for-profit schools to reduce their tuition levels, and the tuition for students who were enrolled during any part of the years being measured for either formula was set long ago, the retroactive effect of the Proposed Regulation is even more apparent. Thus, the Proposed Regulation is arbitrary and capricious because it would punish institutions for conduct that occurred prior to the enactment of the final rule, and indeed, for the most part prior to the NPRM having been issued.

VIII. The Debt To Earnings Ratio Is Arbitrary And Capricious.

A. Inclusion Of All Debt.

The Debt to Earnings Ratio is arbitrary and capricious because it irrationally includes all the debt the individual student incurs, instead of only the debt associated with the school-related costs such as tuition and books. The institution has no control over this debt in excess of tuition and books ("Excess Debt"), and the institution has no power to limit the Excess Debt that a student chooses to incur, so long as the student is eligible to incur such debt under the Department's guidelines. The Excess Debt varies depending on the circumstances of the individual student, not the education program itself. Thus, there is no rational connection between the Proposed Regulation's inclusion of this Excess Debt in the Debt to Earnings Ratio and the achievement of the Department's (albeit impermissible) stated goal.

B. The Debt To Earnings Ratio Percentage Metric Is Arbitrary.

The Debt to Earnings Ratio is arbitrary and capricious because the Department improperly selected an 8% or 12% limit of earnings (or alternatively, a 30% limit of discretionary income) that was based on the allegedly appropriate level of "manageable debt," but does not appropriately consider that such debt enhances the individual's ability to earn an income. Thus, the Department's line-drawing at those percentages is irrational. While a federal agency is typically due some deference in its determination of where to draw a particular line, that discretion is not unfettered: "[W]hen an agency has engaged in line-drawing determinations . . . its decisions may not be 'patently unreasonable' or run counter to the evidence before the agency." *Prometheus*, 373 F.3d at 390 (citation omitted). Courts will "not affirm" agency action when a line is drawn in a "seemingly inconsistent manner." *Id.* at 411.

Moreover, while the Department cites research conducted by, for example, Dr. Sandy Baum and Mr. Mark Kantrowitz, as support for the Proposed Regulation, these sources in fact do not support the Department's arbitrary use of the 8% metric. Instead, these sources show that the

use of such a metric, improperly borrowed from other types of consumer debt metrics, is wrong for higher education. Rather than base the Proposed Regulation on the evidence, the Department apparently formulated the Proposed Regulation and then sought to support it through misuse of sources.

For example, a 2006 College Board report prepared by Dr. Sandy Baum and Dr. Saul Schwartz concludes that "[t]he percentage of income that borrowers can reasonably be expected to devote to student debt repayment increases with income."[16] The authors of the report did not adopt an 8% measure, as one might have expected from the Department's reliance on their research. Rather, in their 2006 College Board Report "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt," Drs. Baum and Schwartz found a number of distinct weaknesses in the use of 8% as a Debt to Earnings Ratio.

Drs. Baum and Schwartz state that because the 8% metric arose from mortgage underwriting standards, it is based on lenders' mortgage default experience, not on any analysis of what may be "affordable" debt levels for students. *See* Baum & Schwartz at 3. Second, even if the so-called mortgage underwriting standard of 8%, based on the difference between the so-called "front-end" ratio (of mortgage payments to current gross income) and the "back-end" ratio (of total credit commitments to gross income), were a reasonable benchmark, underwriting guidelines currently allow a much greater range based on credit scores than the traditional spread between front-end and back-end ratios. *See id.* Third, the 8% rule implies that a single percentage is applicable to all students, even though students with higher incomes self-evidently could be expected to use higher proportions of their incomes to pay down debt. *See id.* Moreover, the proposed 8% debt to earnings ratio not only reflects empirical analyses from a whole other field (defaults of homeowners on their mortgages, rather than defaults of students on their Title IV loans), but also fails to account for the fact that student borrowers are likely to have much higher incomes over time. *See id.* In summary, Drs. Baum and Schwartz explain that "we believe that using the difference between the front-end and back-end ratios historically used for mortgage qualification as a benchmark for manageable student loan borrowing has no particular merit or justification." *Id.*

Likewise, Mr. Kantrowitz writes in opposition to the 8% debt-to-income threshold in his article "*What is Gainful Employment? What is Affordable Debt?,*" asserting that the 8% threshold is "arbitrary and only weakly justified." *See* Mark Kantrowitz, *What is Gainful Employment? What is Affordable Debt?*, at 11 (March 10, 2010; revised March 11, 2010; addendum April 27, 2010), http://www.finaid.org/educators/20100301gainfulemployment.pdf. Kantrowitz explains that the 8% threshold is too strict and would eliminate all bachelor degree programs at for-profit colleges. *See id.* at 14. He describes how the Department claimed that "Eight percent is the standard that has appeared the most frequently in the literature," despite the fact that this claim is based only on the Baum and Schwartz report cited above, which in fact criticizes the 8% threshold. *Id.* at 11. While the 8% threshold seems to be based on mortgage underwriting standards, Kantrowitz asserts that transferring mortgage underwriting standards to the student loan context is based on the faulty assumption that "home ownership is a measure of

[16] Sandy Baum & Saul Schwartz, *How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt*, College Board, at 12 (2006), http://professionals.collegeboard.com/profdownload/pdf/06-0869.DebtPpr060420.pdf.

the affordability of student debt." *Id.* at 11 n.30. And he says that mortgaging underwriting standards are extreme and "not reflective of typical or average borrowing patterns." *Id.* at 11. Instead, Kantrowitz explains, the most common standards promoted by personal finance experts are 10% and 15% of income. *See id.* In fact, on Kantrowitz's own public service financial aid website (FinAid.org), which has won awards from the College Board, the National Association of Student Financial Aid Administrators, the National Association of Graduate and Professional Students and the American Institute of Public Service, he uses a loan payment calculator with both the 10% and 15% standards, and has done so for over a decade. Instead of the 8% threshold, Kantrowitz proposes that ED rely on a 10% or 15% threshold.

Further, Kantrowitz suggests that the Department extend the 10-year repayment term to a 20-year repayment term, which would radically modify the Department's ratio. *See id.* at 18-20.

Other studies that the Department relies upon similarly do not support the Department's debt measures. For example, the chart on the Ohio State University webpage cited by ED does not say what ED claims. In the NPRM (at 43667 n.22) ED states that "many campuses have used the 8 percent rule; for example, see the chart on this page from Ohio State University…" However, the chart ED references states that Ohio State University identifies only a debt burden of 10% or above as a "red zone" that should be avoided. Debt levels up to 10% are not identified as problematic on the chart. And, specifically, the chart does not use an 8% debt to earnings ratio, as ED claims it does.

Moreover, the Department's reliance on a Florida study purportedly concluding that for-profit institutions were more expensive for taxpayers on a per-student basis is misplaced. NPRM at 43618. The following are only some of the defects of that study. First, the program areas studied represented less than 10% of the total enrolled population in Florida. Second, the adjusted comparisons between public and for-profit program costs are flawed or incomplete based upon the findings detailed below. For example, the average subsidy for public students in Florida is approximately $6,499. Florida Office of Program Analysis & Gov't Accountability, *Public Career Education Programs Differ from Private Programs on Their Admission Requirements, Costs, Financial Aid Availability, and Student Outcomes: Rpt. No. 10-18*, January 2010. However, the implied subsidy for the public student in the sample set ranged from approximately $200 to $5,700. Thus, it appears that the methodology employed for determining subsidies given to public students is either incorrect, or the low sample size disproportionately affects the conclusion. Third, the analysis ignores the meaningful difference in federal subsidies between public and for-profit programs. Fourth, the study ignored the federal and state taxes that for-profit programs pay. Fifth, the analysis ignored outcomes. Specifically, far fewer students enrolled in public programs graduate. If the analysis were corrected to account for these issues, it would result in a much different conclusion.

Finally, and most significantly, a sister federal agency, the General Accounting Office ("GAO"), has stated that ED itself considers the correct debt payment metric to be up to approximately 10% of income. In their report entitled "Monitoring Aid Greater Than Federally Defined Need Could Help Address Student Loan Indebtedness" (GAO-03-508), published just seven years ago, the GAO indicates that the Department has done some internal work to establish this 10% rate to be the appropriate "performance indicator." The GAO (page 7) states that the Department:

> has established a performance indicator of maintaining borrower indebtedness and average borrower payments for federal student loans at less than 10 percent of borrower income in the first year of repayment. This indicator was established based on the belief that an educational debt burden of 10 percent of income or higher will negatively affect a borrower's ability to repay his or her student loans.

We are surprised the Department does not reference its own "performance indicator" in the NPRM since it would seem to be directly relevant to the subject, and certainly more relevant than mortgage underwriting data. For the Department to ignore its own internal data on this subject is one more indication of the Department's arbitrary and capricious rulemaking.

C. Improper Capitalization Of Unpaid Interest.

The Debt to Earnings Ratio is arbitrary and capricious because it incorrectly capitalizes unpaid interest as principal, thereby improperly inflating the cost of the education. The increased debt resulting from capitalizing unpaid interest as principal is not within the control of the institution, bears no relationship to the value of the education, and should not be used in the determination of whether an institution complies with the Department's metrics.

Mr. Kantrowitz, cited by the Department in the NPRM, characterized this issue as the "persistence of interest."

> This *persistence of interest* problem means that a borrower could be making full monthly payments and yet not be counted as repaying the loans . . . [b]orrowers who are making payments that exceed the new interest that accrues should be counted . . . they are making progress in paying down the total loan balance.

Mark Kantrowitz, *The Impact of 'Persistence of Interest' On Loan Repayment Rates*, 1 (August 23, 2010), http://www.finaid.org/educators/20100823persistenceofinterest.pdf.

The increased debt should not be used in the determination of whether an institution complies with the Department's metrics because it disregards the effect when a student is making consistent payments, even if they only apply to interest, does not reflect the value of the education, and is not within the control of the institution. Because the Debt to Earnings Ratio fails to take into account the persistence of interest for a variety of factors, it is irrational.

D. Improper Inclusion Of Students In In-School Deferment.

The Debt to Earnings Ratio is also irrational because it includes students who are in an in-school deferment in the calculation of median loan debt and in the calculation of average annual earnings. NPRM at 43623. This is wholly inconsistent with the treatment of these students under the Loan Repayment Rate, which excludes students in an in-school deferment from the calculation. NPRM at 43619, 43623. Obviously, the inclusion of these students in the calculation of the Debt to Earnings Ratio is improper because it cannot be expected that students

in school have started their careers so as to increase their earnings. The Department's decision to exclude these students from the Loan Repayment Rate is a tacit admission of this fact.

E. Improper Limitation Of Data To A Single Non-Representative State.

The Debt to Income Ratio is arbitrary and capricious because it improperly relies upon data from a single state, Missouri. This data is not representative of the nation as a whole. For example, minorities are represented at a much lower rate in the Missouri completion data. While 27.5% of the students in the Missouri sample were non-White, 41.0% of those students were minorities in the national sample. These differences are even more pronounced among Latinos in Missouri. Moreover, the Missouri data omits any data relating to cosmetology schools, making it necessarily incomplete. Indeed, MaryEllen McGuire, the former Senior Advisor for Education on the White House Domestic Policy Council, recently stated that the drafters of the Proposed Regulation knew that the Missouri data is "not the best proxy, necessarily, because of the racial difference in particular …" *See* Transcript of August 12, 2010 Morgan Stanley Conference Call on Regulatory and Legislative Issues in the For-Profit Education Sector at 16.

IX. The Loan Repayment Rate Is Arbitrary And Capricious Because It Evaluates Both Graduates And Non-Graduates.

The Loan Repayment Rate is arbitrary and capricious because it improperly includes data for students who never graduated from the program that is being considered. Using data attributable to these non-graduates is irrational for at least four reasons.

First, evaluating schools based on the debt repayment rates of students who did not complete a program is inconsistent with the statutory focus of the gainful employment requirement. The HEA refers to programs that "prepare students" for gainful employment. The clear focus is on the preparation provided by the educational program. Including students who have not completed the program is irrational; it is impossible to measure whether the program of training adequately prepares non-graduating students for gainful employment because they have not actually completed the program.

Second, including non-graduates is irrational because non-graduates cannot be expected to gain the enhanced income that results from receiving the training and completing the program. These students will not be able to establish to prospective employers that they have the additional training that the program would provide.

Third, including non-graduates in the Loan Repayment Rate is punitive. It is well-known that students who do not complete their programs of study at for-profit institutions are much more likely to default on their student loan obligations. Including these students, despite the fact that it is inconsistent with the HEA and logic, is thus irrational and punitive.

Finally, the inclusion of non-graduates in the Loan Repayment Rate is arbitrary and capricious because it is inconsistent with the Department's decision to exclude non-graduates from the Debt to Earnings Ratio. The Proposed Regulation is irrational because it would include non-graduates in the Loan Repayment Rate but exclude them from the Debt to Earnings Ratio, even though both measures are intended to address student debt levels.

X. The Loan Repayment Rate Would Disproportionately Impact Minority Students.

The Proposed Regulation is also objectionable because it will adversely impact minority students disproportionately. Based on the repayment data released by ED on August 13, 2010 and analysis conducted by Dr. Jonathan Guryan of the University of Chicago (submitted to the Department by the Career College Association on April 2, 2010) it is quite clear that as institutions' percentage of minority students (relative to their total population) increase, their repayment rates decrease substantially.[17] Institutions with 60% to 70% minority enrollment had on the average an estimated repayment rate of 31.9% or less, and institutions with higher minority enrollment similarly failed on average to meet the 35% repayment threshold. In contrast, where minority enrollment was 30% or less, institutions on average exceeded the 45% threshold. Given that minority students are currently underserved, the Proposed Regulation would prevent the higher education community from meeting the goals of the current administration.

XI. The Loan Repayment Rate Calculation Is Irrational Because It Fails To Take Into Account The Direct Relationship Between Pell Grant Recipients And Low Repayment Rates.

The Proposed Regulation is also irrational because it fails to take into account the fact that low loan repayment rates are largely a function of the percentage of Pell Grant recipients at an institution, rather than educational quality. An analysis by Mr. Kantrowitz entitled "*The Impact of Loan Repayment Rates on Pell Grant Recipients* (September 1, 2010),"[18] shows an almost linear relationship between the percentage of Pell Grant recipients and the average loan repayment rates at all institutions. His analysis indicates that colleges serving a greater number of at-risk students, as measured by their Pell Grant recipient population, have lower loan repayment rates, regardless of whether the colleges are public, non-profit or for-profit.

Kantrowitz analyzes loan repayment rate data published by the Department on August 13, 2010 to show that institutions with more than 40% of students receiving Pell Grants are likely to fail the 45% Loan Repayment threshold. Kantrowitz concludes that loan repayment rates are likely significantly driven by the demographics of the students without measuring

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[17] While the NPRM entirely failed to address this issue, its preamble attempted to disparage Dr. Guryan's report by asserting that "the industry's own report found that only about half of the difference in defaults could be explained by student characteristics . . . ." NPRM at 43654. This criticism fails because this "industry report" in fact states that "*at least half* of the difference in default rates between for-profit and not-for-profit schools is because they serve different types of students . . . ." Jonathan Guryan and Matthew Thompson, "Report on Gainful Employment: Executive Summary," Charles River Associates for the Career College Association, April 2, 2010 (emphasis added). Obviously, "at least half" is a significant percentage, for which ED did not account in the Proposed Regulation or the discussion in the NPRM. Further, the report states "We estimate that if all schools served students with moderate family resources, loan default rates at for-profit schools would be cut by more than half and the difference in default rates between for-profit and not-for-profit schools would also be cut approximately in half . . . . It is possible that controlling for additional student characteristics, if data were available, would reduce the default rate gaps even more." Finally, while the preamble asserted that the study overstated the role of socioeconomic factors, the NPRM fails to provide any evidence supporting this assertion.

[18] *See* http://www.finaid.org/educators/20100901gainfulemploymentimpactonpell.pdf.

educational quality. *See The Impact of Loan Repayment Rates on Pell Grant Recipients*, at 1. However, the Proposed Regulation is predicated on the notion that low loan repayment rates are caused in large part by low-quality programs and that terminating programs with low repayment rates will serve students' best interests. As Kantrowitz explains, the Proposed Regulation would incentivize for-profit schools to reduce admissions of low-income students in order for the schools to bolster their Loan Repayment Rates. *See id.* at 5.

Because the Loan Repayment Rate is not a reliable indicator of the quality of an educational program, the Proposed Regulation runs a high risk of reducing educational opportunity for low- and middle-income students while also failing to improve educational quality, all in its misguided effort to minimize taxpayer expense. Kantrowitz recommends that a more effective method for ED to assess colleges according to educational quality would be to disaggregate loan repayment rates by Pell Grant recipient status and determine loan repayment rates without factoring in Pell Grant recipients. What is clear is that the Department's one-size-fits-all approach is illogical and disregards clear evidence that the socio-economic status of the borrowers largely drives repayment rates.

XII. The Proposed Regulation Is Arbitrary And Capricious Because It Is Impermissibly Vague.

A regulation that is impermissibly vague is necessarily arbitrary and capricious because the agency promulgating the regulation cannot know the result of the regulation and therefore cannot have adequately supported the regulation through reasoned consideration. Here, for the same reasons that the Proposed Regulation is void for vagueness on Constitutional grounds, it is also arbitrary and capricious.

XIII. The Proposed Regulation Is Arbitrary And Capricious Because The Department Has Failed To Properly Consider The Interaction Between The 90/10 Rule And The Proposed Regulation.

An agency acts arbitrarily and capriciously when it fails to consider an important aspect of the problem that its proposed regulations address. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency failure to consider an important aspect of the problem renders the agency's action arbitrary and capricious). Here, the Department has failed to give proper consideration to the impact of the 90/10 Rule (codified at 34 C.F.R. § 668.28) in determining the effects of the Proposed Regulation. In this regard, the Department has stated that it expects that schools will decrease their tuition levels to comply with the Proposed Regulation because this will bring debt levels down and result in better performance on the relevant metrics under the Proposed Regulation.

However, the Proposed Regulation, in conjunction with the existing 90/10 Rule, causes a perplexing problem that indirectly establishes a narrow window of acceptable tuition levels. Through the combination of the 90/10 Rule (which effectively establishes a tuition floor) and gainful employment (which effectively establishes a tuition ceiling) the Department will be setting in place price controls. This will force schools to limit the students they can enroll based in large part on the student's income and ability to pay with private funds.

The existing 90/10 Rule impacts an institution's ability to lower tuition. When an institution lowers tuition, there is less reason for the student to use her own funds to pay for the education and, as a result, the institution will draw a higher percentage of Title IV funds on a relative basis. This places the institution at risk under the 90/10 Rule because an institution cannot have more than 90% of its revenue come from Title IV sources. The Title IV Programs provide up to $16,000 per year per student, which the school cannot limit or control. The only action a school can take to comply with the 90/10 Rule is to set tuition levels at or above this level. If tuition is too low, and all students are able to fund 100% of their education using Title IV sources, the students will ultimately lose access to the educational programs because the institution will lose eligibility. Replacing Title IV sources with personal funds is not a likely scenario because for-profit institutions serve non-traditional students who often lack the financial support of traditional students. Without financial support from families or other sources, the student population at for-profit institutions is more reliant upon federal support to fund their education.

At the same time that the 90/10 Rule makes it difficult to substantially reduce tuition, the Proposed Regulation would indirectly set a cap on tuition levels. As Mr. Kantrowitz has recognized in analyzing the Proposed Regulation:

> The main tool for compliance with the affordable debt restrictions of the gainful employment NPRM will involve tuition reductions. However, the main tool for institutional compliance with the 90/10 rule is to increase tuition rates. These statutory and regulatory requirements are in conflict with each other.

Mark Kantrowitz, *Summary and Analysis of Gainful Employment NPRM*, 3 (August 15, 2010), http://www.finaid.org/educators/20100815gainfulemploymentanalysis .pdf.

Based upon the Proposed Regulation, if an institution had access to the earnings data for its graduates, it generally could set tuition at a level that would enable its programs to meet the Debt to Earnings test. If tuition is higher, then income must be higher or student Stafford debt must be lower. This effectively sets a ceiling on tuition or prevents an institution from allowing students with higher debt needs to enroll.

These two rules establish a very narrow (if not impossible) corridor for acceptable tuition levels. Furthermore, because the institution cannot limit the amount that its students borrow under the Title IV Programs, as institutions are not able to restrict student borrowing to the direct cost of attendance (*see*34 C.F.R. § 685.301(a)(8)), the Proposed Regulation is unlikely to have its desired effect of reducing student debt levels. The conflict between the Proposed Regulation and the 90/10 Rule is an important aspect of the problem that the Department has failed to consider, rendering the Proposed Regulation arbitrary and capricious.

Indeed, MaryEllen McGuire, the former Senior Advisor for Education on the White House Domestic Policy Council, recently confirmed that the drafters of the Proposed Regulation failed to consider this complex interaction when drafting the Proposed Regulation:

> [C]ertainly there's an understanding that if this rule certainly makes it to the process and once it is announced, they may need to go back and look at 90/10, but *I don't think they're willing to sort of think ahead quite yet.* They're sort of taking it one day at a time.

See Transcript of August 12, 2010 Morgan Stanley Conference Call on Regulatory and Legislative Issues in the For-Profit Education Sector at 5 (emphasis added).

XIV. The Proposed Regulation Could Lead To Unintended Results.

The Proposed Regulation is also arbitrary and capricious because it could lead to a number of unintended and absurd results that are directly contrary to the policies Congress has sought to foster and enhance since 1965 in authorizing the Title IV Programs. The general purpose of the HEA was, and continues to be, "to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education." Pub. L. 89-329, 79 Stat. 1219 (1965). The original purpose in enacting Title IV was "to provide, through institutions of higher education, educational opportunity grants to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families would be unable to obtain such benefits without such aid." *Id.* Subsequent amendments and reauthorizations of the HEA confirm that Title IV funds exist "to assist in making available the benefits of postsecondary education" to students in institutions of higher education. 20 U.S.C. § 1070(a) (2006). The following are just some of the most egregious outcomes from the Proposed Regulation that are directly contrary to these Congressional purposes:

- One effect of the Proposed Regulation is that education and financial assistance will be available to fewer students. Because the Department itself predicts that many programs will fail to satisfy the metrics set forth in the Proposed Regulation, the result is that it will be more difficult for students to obtain the education they seek when and where they want to. This is all the more absurd given the Obama Administration's stated policy favoring the expansion of higher education.

- The Proposed Regulation will result in the exclusion of low-income students. The Department intends that for-profit schools reduce their tuition levels to comply with the metrics imposed in the Proposed Regulation. At the same time, for profit schools must continue to comply with the 90/10 Rule. Because low-income students rely on Title IV funding much more than higher income students, the Proposed Regulation not only incentivizes for-profit schools to seek out higher-income students and exclude lower income students, but also reduces the ability of lower income students to finance their education.

- The Proposed Regulation will discourage for-profit schools from providing innovative new programs. While the NPRM lauds the innovative nature of for-profit schools and the advances that they have made, the Proposed Regulation would stifle this creativity. The Proposed Regulation would impose new and standardless requirements for the approval of new programs intended to prepare

students for gainful employment in a recognized occupation. These requirements offer no timelines for the Department to conducts its reviews and issue approvals. Nor does the Proposed Regulation explain the criteria the Department would apply. Thus, the ability of for-profit schools to work with employers to provide valuable job training in new fields would be severely limited.

THE PROPOSED REGULATION IS UNCLEAR AND INCOMPLETE

As CEC has made clear above, it believes the Proposed Regulation is fundamentally flawed and should be withdrawn in its entirety. In addition to the basic legal deficiencies in the Proposed Regulation that would lead a court to overturn it, the Proposed Regulation also suffers from a large number of inconsistencies and vague terminology and concepts that would need further consideration and clarification before (even ignoring its myriad deficiencies highlighted above) it could even be hoped to be put into effect. These inconsistencies and vagaries are outlined below.

A. Debt To Earnings Ratio—Actual Average Annual Earnings Data.

The proposed Debt to Earnings Ratio is based upon average actual earnings for completers. Institutions do not have access to this information and are not likely to have access to this information in the future based upon information provided in the NPRM.

As a matter of fair and transparent rulemaking, we would suggest that the use of publicly available data would be more appropriate and would mitigate at least some of the issues that arise when using actual data, such as partial year earnings or unemployment by choice (i.e., due to the person's status as primary care giver, travel, public service, etc.). We note that the Department previously considered the use of such data in the form of average national income figures for particular occupations as published by the BLS. While we believe the BLS approach also has flaws, we would suggest that the Department reconsider this approach and, further, that the Department reconsider the appropriate percentile measurement for particular types of programs to ensure the salary data is a reasonable proxy for lifelong earnings. For instance, while the 25th percentile of BLS average national income figures may be the appropriate metric to judge certificate and diploma programs, degree programs are so different that it would be logical to use a different metric, such as the 50th percentile, for programs that lead to an associate degree or higher.

Specifically, as it relates to current or future access to earnings data:

1. Under the Proposed Regulation, how does ED plan to obtain current/actual earnings data that is not available due to state and federal income tax extensions filed by students? How would ED account for such federal income tax extensions in its Debt to Earnings and Debt to Discretionary Earnings ratio calculations? Would data come directly from the SSA via payroll tax data?

2. Under the Proposed Regulation, what is the most recently available earnings data that will be used in the calculation: prior tax year, second prior tax year, or both? If actual earnings are to be used, we would prefer data from the most recent earnings period.

3. Under the Proposed Regulation, what student level information will be required of educational institutions for ED to obtain income information: social security number, current or last known address, etc.? We support using social security numbers to track student information, but require clarification as to the precise data points that will be required such that we can respond timely and accurately if the Proposed Regulation is implemented.

Specifically, as it relates to the method that ED will use to identify the actual average annual earnings figures:

1. Under the Proposed Regulation, what federal agency will provide the actual earnings: SSA, IRS or a combination? If actual earnings are to be used, we would prefer income data from the IRS be used, because the SSA omits income outside of income reported via payroll tax and we believe all of a graduate's income should be considered.

2. Recent legislative changes made it possible for ED to have access to IRS data for aid applicants. Since there is no relationship established for the non-aid applicants, what authority will ED have to access their information? Will this result in the Debt to Earnings Ratio being calculated only on aid applicants?

3. Under the Proposed Regulation, what income figure will ED use: gross income, adjusted gross income, Social Security income, earnings from primary employment source (if multiple), or earnings from all sources (if multiple)? If actual earnings are to be used, we would prefer that all earnings be considered. We believe that earnings outside of those simply earned from work are important given the student's likely consideration of all his or her income sources prior to incurring debt. Further we believe it is important to consider joint income for graduates that are married as it is very likely that joint earnings were considered prior to incurring student debt.

4. Under the Proposed Regulation, how will income from investment, winnings or inheritance be treated? If actual earnings are to be used, we would prefer that all earnings be considered.

5. Under the Proposed Regulation, how will ED handle joint/household income, specifically if the primary wage earner is not the graduate (i.e., if the graduate is the primary care giver)? If actual earnings are to be used, we would prefer that all earnings be considered.

6. How does ED justify affording institutions a challenge process for the CDR process, but not for the Debt to Earnings Ratio calculations?

7. When the Proposed Regulation states that the Department will calculate the average annual earnings for students who completed the program in the three most recently completed award years prior to the Earnings Year, does it mean the most recent award year must be completed before the first day of the Earnings Year? In other words, if the

Department is using calendar year 2011 as its Earnings Year, it would identify students who completed the program in the three award years ending June 30, 2010?

8. Under the Proposed Regulation, how will ED factor into the actual average annual income calculation those situations where employment was for less than a full calendar year? We believe that an annualized figure should be used in instances where less than twelve months of income has been earned.

9. Under the Proposed Regulation, how will ED handle situations where the graduate is within the 3YP or P3YP, but is not currently employed due to circumstances unrelated to availability of suitable jobs (i.e., disability, pregnancy, family needs, etc.) or due to choice (i.e., travel, public service, etc.)? We believe such graduates should be excluded from the average annual earnings calculation.

10. Under the Proposed Regulation, will ED have any mechanism or tools to handle or account for macro-economic conditions that could potentially contribute to or drive national unemployment or unemployment in specific occupations? We believe that adjustment factors should be applied in circumstances when macro economic factors are likely to negatively impact the average actual earnings of graduates.

11. Under the Proposed Regulation, if the institution prefers to use the P3YP method, what additional information will be required by ED? We believe it may be difficult to evaluate current programs based upon data three to six years old.

12. Under the Proposed Regulation, what are the specific criteria to determine whether students experienced a "significant increase in earnings" after the first three years? Please clarify how ED defines what is "significant." What must institutions provide to ED to demonstrate such "significant increase"?

13. Under the Proposed Regulation, "Earnings Year" is defined, but other than to define the 3YP and P3YP, there is no other reference to Earnings Year. How will Earnings Year be used in the calculations?

14. Under the Proposed Regulation as part of the Debt to Discretionary Earnings Ratio calculation, the average annual earnings will be reduced by 150% of the poverty line, and ED states in the Proposed Rule that it will use the "most current Poverty Guideline." How does ED intend to account for discrepancies that arise when the earnings year and the most current Poverty Guideline correspond to different years? For example, the earnings year might be the 2009 tax year, but the poverty line data used could be for the 2010 year. We believe that the mismatch of terms has the potential to negatively impact the debt-to-income calculation, as the benefit of obtaining the education will not be observed if historical earnings are used.

B. Loan Repayment Rate Test— Definition Of A Reduced Principal Loan.

Within the NPRM there appears to be ambiguity around the definition of a "Reduced Principal Loan." It is possible that there could be instances where payments made within the last Federal Fiscal Year reduced the loan's principal balance, but (for a variety of reasons, such as capitalization of additional interest charges) the loan's principal balance is greater at the end of the fiscal year than at the start. In such an instance would the loan be considered in repayment or not? The incomplete definitions of the components of the Repayment Rate calculation give rise to many similar ambiguous and unclear situations.

We believe that if the graduate makes payments within the prior Federal Fiscal Year that reduce the outstanding principal balance (regardless of situations/occurrences where the loan may have additional capitalized interest that increases the outstanding principal balance of the loan during), then that loan should be treated as a Reduced Principal Loan ("RPL").

Research conducted by Mark Kantrowitz concluded that the loan repayment rate calculation should be based on comparison of the sum of the principal balance and the accrued but unpaid interest on the loans as opposed to comparisons of just the principal balance. *See* Mark Kantrowitz, *The Impact of 'Persistence of Interest' on Loan Repayment Rate*, (August 23, 2010), http://www.finaid.org/educators/ 20100823persistenceofinterest.pdf.

Kantrowitz goes on to say in his policy paper "*Summary and Analysis of Gainful Employment NPRM*," dated August 15, 2010 that:

> The definition of the loan repayment rate should be based on reductions in the principal and accrued but unpaid interest balance of a loan, as opposed to just reductions in the principal balance of the loan. Reliance on just reductions to principal causes significant delays in the recognition of borrowers who have resumed making full voluntary monthly payments on their loans.

See http://www.finaid.org/educators/20100815gainfulemploymentanalysis.pdf.

We agree with Mark Kantrowitz that ED is improperly calculating the Loan Repayment Rate due to an inappropriate treatment of accrued interest.

Specifically, as it relates to the method that ED will use to define a Reduced Principal Loan:

1. Under the Proposed Regulation, does the student need to make one or multiple payments that reduce the outstanding principal balance of the loan within the most recent federal fiscal year? Specifically, if the student makes two payments within the most recent federal fiscal year, and only one payment reduces the principal balance, does the loan count as an RPL loan or do both payments need to reduce the principal balance? In other words, does the use of the plural ("payments") in the Proposed Regulation mean that ED requires at least two payments? Would one payment made during the year suffice?

2. Under the Proposed Regulation, how is accrued interest treated after the loan enters repayment? Is interest that is accrued after the loan enters repayment added to the outstanding principal balance being measured in the most recent year, or not? How are late fees treated after the loan enters repayment? We believe that the original outstanding principal balance should not be increased following the start of the most recent Federal Fiscal Year, regardless of subsequent situations/occurrences where the loan may have additional capitalized interest added to the principal balance of the loan.

3. Under the Proposed Regulation, are individual loan balances treated separately or combined within the repayment calculation? In other words, if a student has two loans and one is in repayment while the other is not in repayment, does one or both of the balances count as RPL? For example, it is possible that a student may have multiple loans for the same program and that, on one loan, the student makes appropriate payments and reduces the outstanding principal, but on the other loan, the student makes interest only payments. Can both loans be included as RPL loans?

4. If a student has made payments within the most recently completed Federal Fiscal Year that reduced the outstanding principal balance, but then went into deferment, would the loan count as a RPL? We believe that if the student reduced the outstanding principal balance, then the loan should be considered a RPL.

5. If a student makes a payment that reduces principal in the first month of the most recently completed Federal Fiscal Year but later utilizes a deferment option that capitalizes interest that causes the principal balance to be greater at the end of the year than at the beginning, would that loan be considered a Reduced Principal Loan and be counted in the numerator of the repayment calculation? We believe that the loan in this situation should be considered a Reduced Principal Loan.

C. Loan Repayment Rate Test— Metrics Related To The OOPB.

The Department (through James Kvaal) stated publically on the New America Foundation panel that ED used NSLDS to access loan level information to calculate repayment rates. Having reviewed NSLDS, this information is not currently available on a mass scale.

We strongly believe that institutions should have full and transparent access to all of the detailed payment information that will be required to execute the calculation through a medium that is efficient to obtain large data sets.

Specifically, as it relates to current or future access to repayment data:

1. Under the Proposed Regulation, specific data elements required to calculate the repayment rate include accurately identifying principal balance at various points in time over the life of a loan, and those elements are not currently available within any of the current default/repayment/history reports offered by NSLDS, including DER001, DRC015, DRC035, SCHDF1, and FAT001. How are institutions expected to obtain this

information? We would like access to data on par with what ED had to run the initial calculations.

2. To formulate the Proposed Regulation, what NSLDS reports did ED utilize in calculating the repayment rates? We would like access to data on par with what ED had to run the initial calculations.

3. To formulate the Proposed Regulation, if an existing report was not used, what ad hoc data extract(s) did ED use from NSLDS to calculate repayment rates? We would like access to data on par with what ED had to run the initial calculations.

4. To formulate the Proposed Regulation, what data sources beyond NSLDS were used to calculate the repayment rates? Specifically, did industry loan servicers provide information to the Department to estimate repayment rates? Furthermore, will ED work with NSLDS and/or industry servicers to provide a report to measure the repayment rate, as defined by the NPRM? We would like access to data on par with what the Department had to run the initial calculations.

D. Loan Repayment Rate Test— Identification Of Students Entering Repayment.

Both the CDR calculation and the Loan Repayment Rate calculation in the Proposed Regulation rely on data from prior federal fiscal years. As with the CDR calculations, the full population in repayment for the purposes of calculating the repayment rate will not be known at the time when the Loan Repayment Rate calculation is conducted under the Proposed Regulation.

We strongly believe that there should be a challenge process (similar to that used for CDRs) where institutions have a chance to validate the information that will be used within the repayment rate calculation.

Specifically, as it relates to the definitive identification of students entering repayment within the window of four Federal Fiscal Years:

1. Under the Proposed Regulation, how will ED validate and finalize the list of students entering repayment over the prior four fiscal years in time to calculate the current year's Loan Repayment Rate? We believe there should be a process to validate all repayment information.

2. As the CDR process also follows the Federal Fiscal Year window, the final definitive list of students who make up a cohort is not finalized for several years. Specifically, the current 2-year CDR cohort with the repayment window from October 1, 2007 through September 30, 2008 is still in draft status until September 13, 2010 and the CDR cohort with the repayment window from October 1, 2008 through September 30, 2009 will not have a draft percentage available until February 2011. Under the Proposed Regulation, how will ED identify and finalize the definitive population of students entering repayment during the prior four federal fiscal year window? How will the process to identify the population for calculation of the repayment rate be similar to (and differ

from) the process to identify the CDR population? We believe there should be a process to validate all repayment information.

3. Under the Proposed Regulation, what are the precise metrics/criteria that will be used to determine who is included or excluded from the repayment cohort? We believe there should be a process to validate all repayment cohort information.

4. Under the Proposed Regulation, for students who transfer programs will all of the debt be assigned to the most recent program (regardless of completion)? We believe that only the loans associated with the individual enrollment should be included within the repayment calculation. Specifically, loans from prior or subsequent enrollments should be excluded.

E. <u>Loan Repayment Rate Test— Consolidation Loans.</u>

The NPRM states that loans paid off through a consolidation loan are not considered paid in full for the purposes of the Loan Repayment Rate calculation until the consolidation loan is paid in full. Each institution is expected to identify and track the payment history of the consolidated loan. However, NSLDS currently does not consistently capture or report the historical performance of consolidated loans. Source consolidated loans appear as paid in full (PC or PN), and destination loans (i.e., post consolidation) are not systematically tracked. ED guidance itself states, "In some instances, because of timing or coding problems by lenders and guaranty agencies, all of the loans that made up a consolidation loan will not be included in the NSLDS. Schools will be responsible only for the data contained in the NSLDS and are not expected to research further or to make assumptions regarding other non PC loans contained in NSLDS." 2009-10 Federal Student Aid Handbook at 3-124.

We strongly believe that the Department should reconsider its treatment of consolidation loans. Precedent established in ED's own guidance shows that ED has historically treated consolidation loans as positive. For example, a student who inadvertently receives Title IV loan funds in excess of annual or aggregate limits is ineligible to receive further Title IV funds unless the student repays or makes arrangements to repay the excess loan amount. However, the student can avoid losing eligibility for Title IV funds if the student consolidates the underlying loan, which ED states is a satisfactory arrangement to repay the excess loan amount. 2009-10 Federal Student Aid Handbook at 5-15. Similarly, a student in default on a federal student loan may not receive further Title IV aid until the default is resolved. ED considers a student who consolidates a defaulted loan to have resolved the default, and counts that loan as paid in full. 2009-10. Federal Student Aid Handbook at 1-52. While ED has thus historically ensured consolidation loans would be in the best financial interests of students, ED has contradicted this policy in the Proposed Rule by appearing to treat consolidation loans unfavorably under the Loan Repayment Rate calculation.

Specifically, as it relates to current or future access to consolidation loan repayment data:

1. As loan information is not tracked post-consolidation, how are institutions reasonably expected to identify the performance of consolidated loans for the purpose of the repayment calculation? We believe that the lack of full transparency surrounding

consolidation loans causes a fundamental issue with how ED proposes to treat such loans. Specifically, consolidation loans appear to be considered to have a negative connotation within the repayment calculation, which contradicts the prior edict of the Department.

2. If information on loans (post consolidation) is not available, would the default treatment for the loan be positive (RPL) or negative (not in repayment)? Meaning, are the loans considered in (or not in) repayment until proven otherwise? Or are consolidated loans (where information is not available) excluded from the calculation until such time as principal repayment can be determined? Due to the lack of full transparency surrounding consolidation loans, we believe that consolidation loans should be treated positively (assumed to be in-repayment) until proven otherwise.

3. Under the Proposed Regulation, if an institution knows that the outstanding principal on a consolidation loan has been reduced can the consolidation loan be considered as "in-repayment," and included as a RPL, within the calculation? We would expect that in this situation, the loan would be considered in-repayment (until proven otherwise).

4. To formulate the Proposed Regulation, how did ED assess performance of consolidated loans during their analysis of repayment rates? We would like access to data on par with what the Department had to run the initial calculations, as there appears to be a fundamental lack of transparency with regard to consolidation loans.

5. How does ED plan to treat instances where a consolidation loan included debt that was incurred at a prior institution? We believe that debt from a prior institution should be excluded.

6. If a borrower consolidates loans from more than one institution, will the loans attributable to attendance at the other institution be considered an increase in the borrower's principal balance? Will the Loan Repayment Rate calculation disaggregate the loans in a consolidation loan according to source institution? In evaluating a consolidation loan, we recommend that the Department evaluate payments made on loans based on the specific institution under review. If a payment is made on the portion of the consolidation loan related to the institution under review, that portion of the consolidation loan should be counted as a RPL and treated in the numerator. Given the fact that the Department has clearly acknowledged the need to exclude prior debt from the debt to earnings calculations, it is clear that debt obtained at institutions prior to that under evaluation is not relevant to the preparation for gainful employment.

7. We believe ED should provide full transparency on how consolidation loans are calculated and computed under the repayment rate calculation.

F. Loan Repayment Rate And Debt To Earnings Ratio Tests— Varying Test Windows.

The Loan Repayment Rate window considers four federal fiscal years of former students (completers and non-completers) and the Debt to Earnings Ratio window considers three federal

fiscal years of completers only. A fundamental challenge arises when attempting to definitively identify the programs that are under review.

We believe that observing two populations of students and programs using two separate and distinct methodologies (loan repayment and debt to earnings) over varying timeframes will cause confusion.

Specifically, as it relates to the method that ED will use to identify the programs that are under review considering the separate and distinct windows:

1. As the program structure within an institution is dynamic, how will ED treat programs that meet one, but not both, of the repayment and debt-to-income windows? We believe that if a program does not meet the criteria to be evaluated with both the Loan Repayment Rate and Debt to Earnings Ratio calculations, that program should be excluded from the test until such time when enough data exists to evaluate it under both metrics.

2. How will ED handle programs that have been closed or merged during either or both of the Debt to Income Ratio or Loan Repayment Rate windows? We believe discontinued programs should be excluded from the calculation and that merged programs should be considered in the aggregate.

G. Loan Repayment Rate And Debt to Earnings Ratio Tests— Program Definition.

Within the NPRM, limited guidance has been provided on what constitutes a program in the eyes of ED. Without specific guidance, would it be appropriate to group like educational offerings in instances where they are (1) mapped to like CIP codes, as well as (2) lead to like degree outcomes? We would prefer to receive specific guidance from the Department on how to classify a program.

Specifically, as it relates to the method that ED will use to define a program:

1. Under the Proposed Regulation, would a program contain multiple degree levels? We believe that a program for purposes of these calculations should be separated by CIP code and degree level.

2. Under the Proposed Regulation, could a program contain multiple (potential) student outcomes, i.e., CIP codes? We believe that a program for purposes of these calculations should be separated by (potential) student outcome.

3. Once the definition of a program is specifically defined, will ED evaluate a program at the institutional or branch level? If an institution has like offerings at two branches within one Office of Postsecondary Education Identification Number, will these programs be evaluated independently or collectively?

4. Under the Proposed Regulation, can a program contain multiple areas or concentrations of study? We believe that a program for purposes of these calculations can include

multiple areas/concentrations of study, as long as the program is similar in degree level and (potential) student outcome.

H. New Program Approval Requirements — Approval Criteria.

Within the NPRM there is a lack of clarity surrounding the specific criteria that will be required by ED to start a new program.

Specifically, as it relates to the methodology and criteria the Department will use to approve new programs:

1. Under the Proposed Regulation, in what ways does ED consider employers qualified to determine education quality or appropriate content of educational programs? How will ED verify that employers have sufficient knowledge and background to make such determinations? The addition of an employer to evaluate the quality of education adds another gatekeeper (and possibly an unqualified gatekeeper) to the existing triad-based review process. Although employers hire graduates, they are not qualified to determine education quality or content of education programs.

2. Under the Proposed Regulation, what would constitute a local employer when education is delivered through the online medium? We believe any national employer should be considered as a qualifying institution.

3. Under the Proposed Regulation, what type of existing relationship would exclude an employer from being a qualified employer? Specifically, what is the precise definition of an employer "affiliated" with the institution? Would employers who provide externship opportunities with the institution be considered "affiliated"? We believe that the assessment of an existing relationship should be a consideration of ownership (i.e., the educational institution may not have an ownership stake in the employing organization). However, we believe that the employer should be allowed to have a relationship with the educational institution along the lines of providing internships and externships to current and graduated students.

4. Under the Proposed Regulation, what are the specific criteria that would allow an employer to qualify as an acceptable institution that is not affiliated with the institution under review? We believe that any employer that is not owned (either a minority or majority stake) by the educational institution should qualify.

5. Under the Proposed Regulation, how do the ED requirements to approve new programs align/diverge with competing existing requirements? The Proposed Regulation is intended to prescribe the actions an institution must take in order to establish a new program to be eligible for Title IV program funds. The Proposed Regulation would override and directly contradict the current requirements already in place for establishing new programs. Additionally, it is unclear what number of employers must affirm the curriculum and projected employment and the extent of the documentation needed.

6. Under the Proposed Regulation, what criteria will be used to approve or reject requests for new programs?

7. Under the Proposed Regulation, what are the prescribed metrics that would align the size of employers' projected needs with the size of the program? What method would be used to assess the appropriate relationship between the employers' projected employment needs and the size of the program?

8. Under the Proposed Regulation, how does ED want institutions to determine projected enrollment? If it is to be based on similar programs then how similar must the program be? How are enrollment projections to be calculated and substantiated?

9. Under the Proposed Regulation, what is the process to manage the inevitable variation between the forecasted enrollment and the actual enrollment?

10. Under the Proposed Regulation, how will the enrollment projections be used, in other words, what are the consequences when enrollment is higher or lower than projected?

I. Debt To Earnings Ratio— Definition Of Loan Amount.

There have been comments that the debt amounts used in the Debt to Earnings Ratio would include capitalized interest. This was not mentioned anywhere within the recent NPRM, and we seek clarification on whether the Department plans to consider capitalized interest for this purpose (as with the Loan Repayment Rate).

Specifically, as it relates to the method that the Department will use to define loan debt:

1. Under the Proposed Regulation, does the loan debt include capitalized interest or is loan debt the amount of funds that were originally disbursed? We believe that the disbursed amount is the appropriate figure to be used within the Debt to Earnings calculation.

J. Restricted Programs — Requirements Placed Upon Restricted Programs.

Requirements placed upon restricted programs are not explicit within the NPRM. It is unclear how ED would measure the enrollment of prior award years.

Specifically, as it relates to the requirements that the Department will place upon restricted programs:

1. In considering students enrolled in an award year, would the Department count students enrolled for a single day in the award year? How would the Department count students who are enrolled in multiple award years?

2. Under the Proposed Regulation, would the limited/restricted Title IV HEA population be determined on a first come/first served basis or would there be a process to determine which segment of the student population would remain eligible for Title IV financial aid?

3. Under the Proposed Regulation, how would a restricted program regain eligibility? This is not specifically addressed in the NPRM.

4. Under the Proposed Regulation, when a program is restricted, the institution must inform all current and prospective students that they may have difficulty repaying loans that they are taking out to fund their studies. Are these disclosures to be included with all other required disclosures or separately? Also, are all current students notified annually or only when a program is designated as restricted?

K. Ineligible Programs — Requirements Placed Upon Ineligible Programs.

From reading the NPRM, it is unclear how a student (in all situations) would be affected if a program was made ineligible during the course of the student's studies.

1. Under the Proposed Regulation, if a student has more than two award years left to complete a degree and the program is made ineligible, would the student be eligible to receive financial aid through the completion of the program? How does ED suggest institutions handle students in this situation?

2. Under the Proposed Regulation, why has ED chosen to disallow disbursement of Title IV funds to students who "begin attending" an ineligible program after the date specified in the Secretary's notice? Under current regulations, and even if the Proposed Regulation is enacted as drafted, there may be schools that are not required to take attendance.

3. Under the Proposed Regulation, how would leave of absence and re-enroll students be treated in those situations in which they began attendance when the program was eligible, but upon return the program is ineligible?

4. Under the NPRM, the Department says it "may" place an institution on provisional certification if it has one or more programs that are "subject to eligibility limitations." How would the Department weigh this factor among the dozens of factors that are considered for provisional certification? Does the Department believe that an institution that has one among many programs that are subject to eligibility restrictions under the Proposed Regulation should be placed on provisional certification?

5. Under the Proposed Regulation, if a program becomes ineligible, how would the program regain eligibility? How much of the program must the institution change to be able to resubmit it under the same CIP code?

L. Transition Year — Structure Of The Restrictions During The Transition Year.

From reading the NPRM it is unclear how the cap will be structured, and further clarification surrounding the treatment of restricted programs is required.

1. Similar to the questions posed for restricted programs, would the limited/restricted Title IV HEA population be determined on a first come/first served basis or would there be a process to determine which segment of the student population would remain eligible for Title IV Federal financial aid?

M. Established Cohort Default Rate Metric— Existing Measure Of Quality.

ED already has a measure of quality (the CDR mandated by Congress) in place that tracks the default/repayment performance of all former students who enter repayment within a given timeframe.

We strongly believe that the Department should use the CDR process as the primary measure of quality when evaluating educational institutions. This will eliminate the unnecessary redundancy in metrics and avoid the conflicts that arise from handling various repayment options differently.

1. As the CDR window was recently extended to cover a three year repayment period, has ED had a reasonable chance to measure the effectiveness of the new and enhanced CDR metric? We believe ED should use the three year CDR metric or expand its use of the CDR process to evaluate the quality of student outcomes at educational institutions instead of imposing a new repayment rate metric on institutions.

N. Gainful Employment's Ability To Limit Student Over-Borrowing.

The current Proposed Regulation does nothing to address the core issue of over-borrowing, as students are (and will remain) entitled to borrow up to the maximum federal limits.

We think this is a fundamental flaw in the Gainful Employment metrics. None of the current or potential action steps available to educational institutions address (in any way) the student's ability to over-borrow while pursuing his/her education. We find this to be a fundamental flaw with the Proposed Regulation if the purview of the Proposed Regulation is to limit the debt that a student assumes when attempting to further his/her education.

1. How does ED propose to allow institutions to limit over-borrowing? Institutions have long sought support from ED in providing means to limit over-borrowing.

2. Where, within the Proposed Regulation, is the issue of over-borrowing addressed, if at all?

3. Will affordable programs (i.e., those charging low tuition) that enroll students who make their own choice to take on high debt loads be treated as an exception within the

Proposed Regulation, given the fact that institutions can not limit students' borrowing to tuition and fees costs?

O. **Impact Of Combined Gainful Employment And 90/10 Regulatory Requirements.**

Institutions are facing conflicting regulations wherein compliance with one will make it nearly impossible to comply with the other. The "90/10 Rule" places upwards pricing pressure on tuition, while the Proposed Regulation places downwards pricing pressure on tuition. There will be a very limited operating zone in which both regulations may be satisfied concurrently. Therefore, it will not be possible for both requirements to reasonably coexist. We suggest that an alternative requirement would be for an institution to pass one, but not both of the tests.

1. Given that the 90/10 Rule was created to ensure program quality and that it directly conflicts with the Proposed Regulation, will passage of one suffice for both tests (i.e., will one regulation trump the other)?

2. Has ED conducted analyses to model the combined impact of both regulations?

3. Will ED grant exceptions if shifts in a program to satisfy one regulation adversely affect the outcome in the other regulation?

P. **Debt To Earnings Ratio Taken From Missouri Study.**

On the recent New America Foundation call, the Department (through James Kvaal) communicated that the Debt to Earnings Ratio in the NPRM was derived from data from a single state (Missouri). The NPRM asserts that Missouri is generally representative of the Unites States with regards to the distribution of educational institutions as well as population demographics. We strongly disagree. In its analysis, ED does not address the fact that for-profit institutions serve a higher proportion of minority students (or students known to have risk factors associated with default) than those institutions in the state of Missouri.

1. How does ED support its assertion that the data set from Missouri is representative of borrowing habits of the United States at large? What grounds and evidence does ED use to establish that a federal regulation based off of the performance of a single state is fair and representative when no broader debt analysis has been conducted? The reference data set(s) that ED uses should be representative of the population being held to the tests in the Proposed Regulation.

2. How does ED support its assertion that the demographics of the state of Missouri are comparable to those of the population being held to the tests in the Proposed Regulation? We believe that any referential data be comparable to and representative of the population being held to the tests in the Proposed Regulation.

Q. Retroactive Application Of The Gainful Employment Regulation.

The rules would go into effect in July 2012 under the Proposed Regulation, but are based upon program data prior to the Proposed Regulation being published. Specifically, there is no opportunity to adjust programs to adhere to the new rules as debt levels are already set. Retroactive laws are typically seen as a violation of the rule of law as it applies in a free and democratic society, and are subject to rigorous Constitutional scrutiny.

In the event it determines to go through with the Proposed Regulation, we strongly believe that ED should delay implementation of the Proposed Regulation until it has had time to collect and analyze additional data. Also, we believe that the implementation date should be extended into the future to allow institutions time to adjust programs to adequately comply with the Gainful Employment rules that are ultimately enacted.

1. Will programs where the graduate population and repayment history was complete prior to day one of the enactment of the new regulation be held to the full standard or will they be allowed to gradually incorporate the rules through a transition period?

2. Specifically, if a program significantly reduces tuition after November 1, 2010 how will ED handle this situation, given the fact that the debt associated with the July 1, 2012 effective date will have already been set (prior to November 1, 2010)?

3. Based on the way some students attend school, it is possible to have different sets of loans enter repayment at different times. How will these older loans and older debts be used in the repayment calculations?

APPENDIX I

EXPERT REPORT OF
PROFESSOR BRADFORD CORNELL
REGARDING PROPOSED GAINFUL EMPLOYMENT REGULATION

EXPERT REPORT OF
PROFESSOR BRADFORD CORNELL
REGARDING PROPOSED GAINFUL EMPLOYMENT REGULATION

I. RETENTION AND QUALIFICATIONS

1. I have been retained by Career Education Corporation to analyze certain proposals contained in the Department of Education's notice of proposed rulemaking ("NPRM") dated July 26, 2010 from the perspective of a financial economist. Specifically, I have been asked to focus on the concept of 'gainful employment' and the related benchmarks proposed by the Department to determine the eligibility of for-profit educational institutions for access to student financial assistance programs authorized under title IV of the Higher Education Act of 1965 ("title IV funds").

2. I am currently a Visiting Professor of Financial Economics at the California Institute of Technology ("Caltech"). Previously, I was a Professor of Finance and Director of the Bank of America Research Center at the Anderson Graduate School of Management at the University of California, Los Angeles for 26 years.

3. I earned a master's degree in Statistics from Stanford University in 1974 and earned my doctorate in Financial Economics from Stanford in 1975. I have served as an editor of numerous journals relating to business and finance and have written more than 70 articles and two books on finance and securities, including *Corporate Valuation: Tools For Effective Appraisal and Decision Making* (1993), published by McGraw-Hill, and *The Equity Risk Premium and the Long-Run Future of the Stock Market* (1999), published by John Wiley and Sons. To complement my academic writing, I have also authored articles for *The Wall Street Journal* and the *Los Angeles Times*.

4. My research has been widely recognized. In 1988, I was cited by the Financial Management Association as one of the ten most prolific authors in the field of finance. I have received prizes and grants for my research from the Chicago Board of Trade, the Chicago Mercantile Exchange, and the Institute for Quantitative Research in Finance.

My article, “Corporate Stakeholders and Corporate Finance,”[1] received the 1987 Distinguished Applied Research Award from the Financial Management Association. In 1999, I was awarded the I/B/E/S prize for empirical work in finance and accounting (with Wayne Landsman and Jennifer Conrad). Richard Roll and I received a Graham and Dodd Scroll Award in 2006 from the Financial Analyst Society for our work on delegated agent asset pricing theory. Recently, my paper entitled "Luck, Skill, and Investment Performance" won an Outstanding Article prize from the 11th Annual Bernstein, Fabozzi/Jacobs, Levy Awards in The Journal of Portfolio Management.

5. I have also been active in my profession. I have served as a Vice President of the Western Finance Association. I am also a past director of both the American Finance Association and the Western Finance Association. I have served as an associate editor of numerous professional journals including: The Journal of Finance, The Journal of Futures Markets, The Journal of Financial Research and The Journal of International Business Studies. I have served as a reviewer for nearly a dozen other professional journals.

6. My teaching and writing have focused on a number of different financial and economic issues, many of which are relevant to the subject matter of this report. I currently teach Applied Corporate Finance and Investment Banking at Caltech. Examples of other classes I have taught over the course of my academic career include Corporate Valuation, the Law and Finance of Corporate Acquisitions and Restructurings, Corporate Financial Theory, and Security Valuation and Investments. I have drawn upon this experience in formulating my opinions in this case.

7. In addition to my teaching, writing, and research studies, I serve as senior consultant to Charles River Associates (“CRA”), an international consulting firm. In my position as a senior consultant, I advise business and legal clients on financial economic issues. Prior to my affiliation with CRA, which began in March of 1999, I operated FinEcon, a financial economic consulting company, through which I also advised business and legal clients on financial economic issues.

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[1] Journal of Portfolio Management, 35, (2009).

8. I have served as a consultant and given testimony for both plaintiffs and defendants in a variety of securities, regulatory and commercial lawsuits. During my many years of experience as an expert witness and consultant, I have provided economic analyses and expert testimony (again, for both plaintiffs and defendants) related to valuation, corporate finance, portfolio management and damages issues. I have been engaged as a damages expert in numerous high-profile cases which revolved around complex financial and securities transactions.

9. My background is described more fully in my curriculum vitae, which is attached as Exhibit 1 to this declaration. A list of my publications may also be found as part of Exhibit 1.

II. FINANCE THEORY UNDERLYING INVESTMENT DECISIONS

10. To place my opinion on the proposed rules to determine the eligibility for access to title IV student financial assistance programs in the proper context, it is helpful to introduce the finance theory underlying capital project investment decisions. My reason for doing this is that finance theory, more specifically Capital Budgeting or Investment Appraisal theory, teaches that a more useful way to analyze the decision to undertake higher education (and the related decision to provide financial assistance for higher education) is by considering education to be a capital project undertaking, similar to a firm deciding to build a factory or a University deciding to fund the construction of new classrooms. Capital Budgeting theory is a long-established sub-field of Economics and Finance theory that considers the problem of allocating limited capital to competing projects and investment opportunities. In making such investment decisions or in deciding whether to undertake further education, the essential issue is the same: is the investment or additional education likely to produce benefits that exceed the cost.

11. Education can be thought of as a special type of capital investment project, aimed at building human capital, which requires substantial expenditures (tuition, opportunity cost of attending school, etc.) in a fairly short period (one to four years) at the start of the project. The benefits from education typically accrue over a lengthy period following the

conclusion of the formal coursework. The direct benefits to education are the increased earnings potential of the student throughout his career, a period that could span decades, but there are also other intangible benefits to the student and society.

12. Capital Budgeting theory has guided capital investment decisions for decades through the concept of net present value ("NPV"). The NPV of a project is the sum of the present values of all incremental cash flows (current and future) related to that project (where cash outflows are treated as negative and cash inflows are treated as positive). To arrive at the NPV, these cash flows are discounted to their present values using the appropriate discount rate. In the example of a firm deciding to build a new factory, NPV would equal the sum of the initial capital outlay, future cash inflows from the factory production, future maintenance costs, etc., all expressed in terms of their present values.

13. Capital Budgeting theory demonstrates the appropriate rule for undertaking projects is to proceed with the project if its NPV is positive. As expressed in a leading finance text book:

> *Firms can best help their shareholders by accepting all projects with positive net present values and rejecting projects with negative net present values. The net present value of a project measures the wealth created by the project.*[2]

14. Although the NPV investment rule is straightforward, there are two factors one should be sure to take account of:

- The NPV calculation must include *all incremental* cash flows arising from the decision to undertake a project in calculating the NPV. The Brealy, Myers and Allen textbook emphasizes this point by stating: "*Estimate the project's incremental cash flows – that is, the difference between the cash flows with the project and those without the project.*"[3] Another leading text book states, "*In calculating the NPV of a*

[2] Brealy, Richard A., Stewart C. Myers and Franklin Allen, "Principles of Corporate Finance", 9th edition, page 29.

[3] Brealy, Richard A., Stewart C. Myers and Franklin Allen, "Principles of Corporate Finance", 9th edition, page 161.

project, only cash flows that are incremental to the project should be used. These cash flows are the changes in the firm's cash flows that occur as a direct consequence of accepting the project. That is, we are interested in the difference between the cash flows of the firm with the project and the cash flows of the firm without the project."[4] This is an especially important factor as in many cases, such as the rules proposed in the NPRM, decision makers fail to take into account the full period over which the incremental benefits accrue, in this case the full working career of the student.

- The discount rate used to calculate the present value must be consistent with the nature of the project.

15. The above short introduction to Capital Budgeting theory is important for understanding the critique I have of the tests proposed by the Department of Education ("Department") in their NPRM to be eligible for access to title IV student financial assistance programs.

III. PROPOSED TESTS TO DETERMINE ELIGIBILITY FOR TITLE IV STUDENT FINANCIAL ASSISTANCE PROGRAMS

16. It is my understanding that the proposed regulations that the Department has outlined in the NPRM aim to assess the question of whether an educational program or provider offers courses and training to students that leads to their gainful employment after the program. Under the proposals, the eligibility of the educational provider to access title IV student financial assistance programs is in the Department's view based on how successful the program is in providing gainful employment to its students under measures defined by the Department. The Department proposes two tests to measure whether students are gainfully employed following their educational program:

    a. The first test is based upon the debt-to-income ratios of students following completion of the program ("Debt to Income Ratio Test"). Specifically, the test

[4] Ross, Stephen A., Randolph W. Westerfield and Jeffrey Jaffe, "Corporate Finance", 7th edition, page 179.

states that students should not devote more than 8 percent of their annual earnings towards repaying their student loans, with the loan amount calculated as the median loan among all students of the program. Further, a 12 percent or higher ratio of repayments to earnings is considered excessive. Alternatively, the Department proposes that the debt repayment cannot exceed 30 percent of the discretionary income of the student, defined as the amount of total income above 150 percent of the poverty level for the applicable year. If the Department permits the use of earnings data from four to six years out, the debt cannot exceed 20 percent of the discretionary income. These ratios are calculated based on a 10-year loan repayment plan and the average annual earnings, in the most recent year for which post-completion data are available, for the program's graduates from the previous three years.[5]

b. The second test is based upon repayment rates, i.e., what percentage of students who enrolled in the program (regardless of whether they completed the program or dropped out) in the previous four years have repaid some portion of the principal in the most recent fiscal year ("Loan Repayment Rate Test"). Under the proposal, a repayment rate of 45 percent and higher leads to eligibility for title IV funds while a rate of below 35 percent may lead the program to become ineligible for title IV funding.

17. The two proposed tests summarized above are applied in tandem, for example a program could have a repayment rate of below 35 percent and still qualify for title IV funding if the ratio of student loan repayments to earnings of its recent students is less than 8 percent. A matrix of the relationship between these two tests and their outcomes leading to eligibility for title IV funding is included in the NPRM on page 43621.

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[5] Under the proposed regulation, an institution may seek to measure earnings of earlier graduates (four to six years prior) if graduates typically experience "large earnings increases" after an initial period of employment. NPRM at 43661.

IV. THE DEPARTMENT'S PROPOSED METHODOLOGY IS ECONOMICALLY IRRATIONAL

18. Neither the Debt to Income Ratio test nor the Loan Repayment Rate Test is based on the NPV methodology. Consequently, both tests are economically irrational and will lead to sub-optimal decisions and outcomes whereby students who would benefit from educational programs will be denied access to funds that would help them enroll in such programs.

19. As pointed out earlier, education is an investment whose benefits typically accrue over a lengthy period that could span three to four decades. Neither of the Department's two tests takes into consideration the increase in the lifetime earning capacity of a student who is deciding whether to enroll in a program.

20. The Debt to Income Ratio Test is based on ratios calculated using the average annual earnings in the most recent year for which post-completion data are available, for the program's graduates from the previous three years. This approach introduces two errors in the estimate of cash flows arising from the proposed rule:

    a. A very significant amount of the positive incremental cash inflows to the student are ignored. The increase in lifetime earnings of the student after the three year period is not taken into consideration in deciding whether to the fund the education or not. This is a significant distortion since the Department's own figures demonstrate that substantial increases in earnings occur after the first three years. *See* Chart F, NPRM at 43666.

    b. By focusing on the total earnings for the first three years and not the incremental lifetime earnings, errors can be made that hurt effective programs and/or help under-performing programs. That is, certain programs may not affect the already high earnings of their students and yet have access to title IV funding under the proposed tests, while other programs that dramatically increase the much lower earnings of their students could be denied access to the funding.

21. The correct approach according to finance theory would be an NPV based approach that considers the present value of ***all incremental lifetime earnings*** due to the educational program and compares this to the present value of the total costs of the program. If the present value of the benefits is higher than the present value of the costs, it makes economic sense for the student to enroll in the program and for the federal government to provide access to title IV funding ***even if in the first three years the debt repayments might exceed 12 percent of the student's annual income or during the first four years the student might not be able to make a repayment on the principal amount of the loan***.

22. To illustrate this point with an example, consider a hypothetical average student who is considering enrollment in a 2-year associate degree program that will have a total present value cost equal to $30,000.[6] This program will enhance the earnings capacity of the student throughout his working life, and assume that the present value of the ***entire stream of incremental earnings*** is equal to $150,000.[7] After deducting tuition costs of the education of approximately $30,000, and allowing for additional opportunity costs (assumed to be approximately $20,000), the degree still represents a net present value in excess of $100,000.[8] Thus, financing the education is clearly an easy investment decision to make under the NPV rule – the student should go ahead with the enrollment and the

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[6] College Board, a membership association composed of more than 5,700 schools, colleges, universities and other educational organizations, estimates the annual tuition and fees at for-profit institutions to equal $14,174 for the 2009-10 academic year. See College Board's Trends in College Pricing 2009, page 6.

[7] Data from US Census indicates that students with associate degrees earn $1.6 million over their lifetimes, whereas students with high school diplomas make $1.2 million (See, "The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings" by Jennifer Cheeseman Day and Eric C. Newburger). The present value of the $400,000 of incremental earnings is approximately $150,000, assuming a 40-year period and 6% discount rate. The discount rate accounts for the interest costs attributable to loans used to finance the education. As noted previously, under the proposed regulation, an institution may seek to measure earnings of earlier graduates (four to six years prior) if graduates typically experience "large earnings increases" after an initial period of employment. NPRM at 43661. However, the Department could not have intended this proviso to apply to the average additional earnings of $400,000 noted above, since these represent average cumulative figures over the full working career of a student.

[8] The NPV calculation should also include opportunity costs. While opportunity costs might include income lost due to attending school, many students attending for-profit schools are unemployed at the time they commence their education, many continue to work while attending school, and many may be able to augment their income during the course of their school attendance by virtue of their increased skills. I assume the opportunity costs for students enrolling in an associate degree program to be approximately $20,000.

associated costs and the government should provide access to funding through loans if the student requires it.

23. But under the proposed test, there will be cases where such a student is denied access to funds/loans. Extending the example, suppose that the student borrowed $20,000 at 6.8 percent[9] from the federal government under the title IV program to partially fund the associate degree program and found a job after the program with a salary of $25,000. Under the proposed Debt to Income Ratio Test, based on a 10-year repayment plan, the ratio of student loan repayments to total earnings equals 13.4 percent, which is higher than the maximum 12 percent permissible under the NPRM. Similarly, under the Department's alternative Debt to Income Test relating to discretionary income, the ratio is 38.4%, again higher than the proposed mandate of 30%.[10] If this example is extrapolated to the entire program, many worthwhile educational programs will be denied access to title IV funding under the proposed rules.

24. Similarly, applying the Loan Repayment Rate test to the same hypothetical example leads to equally irrational results. In our example, even though the direct benefit of the education is approximately $400,000 of average incremental earnings over the working life of the student ($150,000 in present value terms) and has an NPV of approximately $100,000, if the repayment rate is below 35 percent for students enrolled in the program (regardless of whether they completed the program or dropped out) in the previous four years, the program is ineligible.

25. Therefore, in my opinion the proposed rule is arbitrary and capricious from an economic point of view. If the Department wants to implement a regulation addressing the economic value of an educational program, the rule should be based on an NPV based

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[9] The current interest rate charged on Stafford Loans is 6.8%. See http://www.staffordloan.com/stafford-loan-info/interest-rates.php. Also, the 6.8% rate is suggested in the NPRM on page 43662.

[10] The HHS poverty level for a single-person-family in 2010 is $10,830. Discretionary income equals earnings minus 150% of the poverty level i.e. discretionary income with earnings of $25,000 equals $8,755.

benchmark.

V. THE USE OF THREE TO FOUR YEAR DATA TO EVALUATE GAINFUL EMPLOYMENT IS ABRITRARY, CAPRICIOUS, AND UNREASONABLE

26. The Department's proposed regulation is arbitrary, capricious, and unreasonable for another reason. Even if it were economically rational to base the regulation on a non-NPV basis (which it is not), the Department's proposed regulation is economically irrational because the Debt to Income Ratio Test and the Loan Repayment Rate Test are based on an arbitrary three and four year period respectively that is unreflective of the value of the education because it takes a truncated snapshot in which the student is at the entry level and hence his or her income is the lowest.

27. This period is too short to fairly reflect the benefits of education to earnings potential (as explained in section IV). The data contained in the NPRM itself demonstrates that the Department's arbitrary selection of a three to four year period in which to measure the Debt to Income Ratio Test and Loan Repayment Test is economically irrational even under the Department's flawed methodology.

28. In this regard, Chart F demonstrates a substantial increase "by as much as 43 percent between the first few years out of post secondary education and the sixth to tenth years out." NPRM at 43666. Thus, it makes little sense to artificially limit the period to the first three or four years.

29. Furthermore, the Department's explanation for its selection of such a short period makes no economic sense. The Department states that: "Some would argue that a more appropriate income measure would occur a few years after completion of the degree or certificate, since incomes increase with age and experience." NPRM at 43666. But it claims that "this increase is true for high school diplomas as well as postsecondary education; in other words, the income gaps measured in the early years generally serve as good indicators of the income gaps in the later years." *Id.* The Department thus seeks to justify these very short time periods on the basis that the relative income gap between

high school graduates and those students who receive post-secondary education remains relatively constant.

30. But this observation is beside the point. The Loan Repayment Rate Test and Debt to Income Ratio Test do not (as a rational NPV methodology would) even purport to evaluate the additional income attributable to post-secondary education over the working life of the student. Rather, both of these tests take a snapshot of certain metrics during a specific short term period. The fact that salaries rise for high-school graduates over time does not mean that students who have obtained post-secondary education at for-profit schools should be assessed solely on the basis of their lower salaries over the period immediately following completion of their programs of study.

31. A simple hypothetical is sufficient to demonstrate the fallacy in the Department's reasoning. Assume, consistent with our prior hypothetical example, that a student has total loans of $20,000 at 6.8 percent from the federal government under the title IV program and has found a job after the program with a salary of $25,000. As previously noted, under the proposed test, based on a 10-year repayment plan, the ratio of student loan repayments to total earnings equals 13.4 percent, which is higher than the maximum 12 percent permissible under the NPRM.

32. However, if the student obtains the associate degree, assume that his income reaches $42,000 by his tenth year following completion of the program (consistent with data presented in NPRM's Chart F), at which point his loan repayments would constitute 8 percent of his annual income (assuming no principal repayment in the years 1 to 10 after the completion of the program). Similarly, under the Department's alternative Debt to Income Test, the ratio of debt payments to discretionary income by the tenth year is only 13%, far below the proposed threshold of 30%. This is true despite the fact that the income differential between high school graduates and associate degree students remains constant. Thus, the Department's proposed rationale for selecting the truncated three year period on the basis that it does not make any difference to the application of the Debt to Income Ratio Test because the income gap remains relatively constant is demonstrably false.

33. Moreover, the period is too short to smooth out externalities such as recessions and periods of high unemployment including the current downturn. While the cost of enrolling in a particular education program and the assumed 10-year loan repayment costs are relatively constant, the employment opportunities available to students and their earnings levels are adversely impacted in the short term by recessions and labor markets with high unemployment. Furthermore, it is during periods of slow economic growth, when opportunity costs are less that many students contemplate getting further education to expand their skill set and gain access to more employment opportunities.

34. Because the proposed rules ignore external factors such as the state of the economy, wage growth and the rate of unemployment, they could in effect be counter-productive in that programs would be denied access to title IV funding during periods of slow economic growth – exactly the time when society should be encouraging education and re-training of the workforce.

VI. LOSS OF SOCIETAL BENEFITS

35. As explained above, the average direct benefit per student for an associate degree in my hypothetical example is approximately $400,000 of incremental earnings over the working life of the student ($150,000 in present value terms) and the NPV of the degree is approximately $100,000 (considering the cost of tuition and other opportunity costs faced by the student). Other educational programs are also likely to have substantial benefits and NPV associated with them. By excluding a large number of students from access to funding for these educational programs, the excluded students and society as a whole will suffer substantial losses in value (the actual amount of value lost will depend upon the total number of students who discontinue or limit their education as a result of the proposed regulation, the percentage of those students that would have graduated but for the proposed regulation, and the net present value of the education these students would have received but for the proposed regulation).

36. Thus, the Department's proposed regulation is not only potentially ruinous to the lives of tens of thousands of students, it is economically irrational on a macro-economic scale as well.

Bradford Cornell

September 09, 2010

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Senior Consultant

Ph.D. Financial Economics, Stanford University, 1975

M.S. Statistics, Stanford University, 1974

A.B. (Interdepartmental) Physics, Philosophy and Psychology, Stanford University, 1970

Academic And Professional Positions

1999–Present *Senior Consultant*, CRA

2005–Present *Visiting Professor of Financial Economics*, California Institute of Technology

1987–2005 Professor of Finance and Director of the Bank of America Research Center, Anderson Graduate School of Management, UCLA

1990–1999 *President*, FinEcon: Financial Economic Consulting

1988–1990 Vice-President and Director of the Securities Litigation Group, Economic Analysis Corporation

1979–1986 *Assistant and Associate Professor of Finance*, UCLA

1983–1984 *Visiting Professor of Finance*, California Institute of Technology

1977–1979 *Assistant Professor of Finance*, University of Southern California

1975–1977 *Assistant Professor of Finance*, University of Arizona

Courses Taught

- Applied Corporate Finance and Investment Banking
- Corporate Valuation
- The Law and Finance of Corporate Acquisitions and Restructurings
- Corporate Financial Theory
- The Theory of Finance (in the UCLA Law School)
- Security Valuation and Investments
- A wide variety of executive and community education programs

Special Education Programs Include

- The U.S. Business School in Prague—Special Finance Program, Summer 1991

- The Lead Program for Business Education of Minority High School Students, 1987–1997

Consulting and Professional Activities

Selected Service at UCLA

- Twice Chairman of Finance Department
- Twice Vice Chairman of the Anderson School
- Three-time member of the staffing and promotion committee

Service to Scholarly Journals and Organizations

Served as an associate editor for a variety of scholarly and business journals, including *Journal of Finance*, *Journal of International Business Studies*, *Journal of Business and Economics*, *Journal of Financial Research*, *Journal of Futures Markets*, and the *Investment Management Review*.

Served as a reviewer for numerous finance and economics journals, including *American Economic Review, Journal of Political Economy, Journal of Financial Economics, Journal of Business, Journal of Financial and Quantitative Analysis,* and the *Review of Economics and Statistics.*

Memberships in Professional Societies

- American Finance Association, 1973–Present
  - Member of Board of Directors, 1987–1989
- Western Finance Association, 1973–Present
  - Member of Board of Directors, 1982–1985
  - Vice President, 1987
- American Economic Association, 1973–Present
- American Bar Association, 1995–1999
- American Statistical Association, 1992–1999
- International Association of Financial Engineers, 1993–2003
- American Law and Economics Association, 1995–2000
- Human Behavior and Evolution Society, 1995–2000

Research Evaluation

- Project reviewer for the National Science Foundation, 1979–Present
- Program committee for the Western Finance Association, Various years

Selected Board and Committee Memberships

- Pension Policy Board, The Aerospace Corporation, 1985–2008
- Chairman, Mayor's Blue Ribbon Commission on Los Angeles' Municipal Investments, 1995
- Director, Forms Engineering Corporation, 1976–1997
- Trustee, Kellow Trust, 1982–1991

Expert Witness

Numerous cases involving the application of financial economics

Media Experience

- Occasional contributor to *The Wall Street Journal* and *The Los Angeles Times*
- Occasional commentator for local television and radio stations
- Lecturer on valuation theory, appraisal practice, and securities pricing

PUBLICATIONS

Books and Book Chapters

"Stock Repurchases: Tradeoffs and Trends." *Dividends and Dividend Policy*, H. Kent Baker, ed., Blackwell Publishing, New York, 2009.

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"Statistical Analysis of Price and Basis Behavior: October 12–6, 1987," *The Stock Market: Bubbles, Volatility, and Chaos*, E. Dwyer and R. Hafer, eds., Kluwer Academic Publishers, 1990.

Review of *Futures Markets*, *Journal of Monetary Economics*, M. Streit, ed., Vol. 16, July 1985, pp. 133–135.

Review of *Exchange Rates and International Macroeconomics*, *Journal of International Money and Finance*, J. Frenkel, ed., Vol. 4, 1985, pp. 212–214.

Review of *Exchange Rate Policy*, by Ray A. Batchelor and Geoffrey Wood, *Journal of Economic Literature*, Vol. 21, 1983, pp. 1027–1029.

Working Papers

"Assessing the Risk of Securities Lending Transactions." 1999.

Social Decoding and Ethnic Discrimination, 1996, book length manuscript.

"Using the DCF Method to Estimate the Cross-Sectional Variation of Expected Returns." With S. Cheng. 1995

"Testing the Tax Timing Option Theory: A New Approach." 1984.

"Determinants of Corporate Capital Structure: An Empirical Analysis." With J. Dietrich. 1979.

Awards and Honors

Bernstein, Fabozzi/Jacobs, Levy Award for outstanding research from T*he Journal of Portfolio Management*, 2010.

Graham and Dodd Award for research on securities analysis and valuation (with Richard Roll), 2006.

I/B/E/S award for research in empirical finance (with W. Landsman and J. Conrad), 1999

Cited as one of the ten most prolific research authors in the field of finance, in "Most Frequent Contributors to the Finance Literature," by Jean Louis Heck and Phillip L. Cooley, *Financial Management*, autumn, 1988

Financial Management Association Prize for Applied Research, 1987

Institute for Quantitative Research in Finance, Research Grant, 1984

Center for the Study of Futures Markets, Research Grant, 1983

Center for the Study of Futures Markets, Research Grant, 1981

Chicago Mercantile Exchange, Research Grant, 1979

Phi Beta Kappa, Stanford University, 1970