IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAREER COLLEGE ASSOCIATION d/b/a ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,	)	
1101 Connecticut Avenue NW Suite 900 Washington, DC 20036,	)	
Plaintiff,	)	Case: 1:11-cv-01314 Assigned To : Boasberg, James E. Assign. Date : 7/20/2011 Description: Admn Agency Review
v.	)	
ARNE DUNCAN, in his official capacity as Secretary of the Department of Education,	)	
Office of the Secretary 400 Maryland Avenue SW Washington, DC 20202; and	)	
UNITED STATES DEPARTMENT OF EDUCATION,	)	
400 Maryland Avenue SW Washington, DC 20202,	)	
Defendants.	)	

COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff CAREER COLLEGE ASSOCIATION d/b/a ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES ("APSCU") for its complaint against Defendants the Honorable ARNE DUNCAN, in his official capacity as Secretary of the Department of Education ("Secretary"), and THE DEPARTMENT OF EDUCATION (the "Department") alleges, by and through its attorneys, as follows:

PRELIMINARY STATEMENT

1. This is an action under the United States Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), challenging three regulations recently adopted by the Department. The Department adopted two of these regulations, the "Program Approval" regulations, 75 Fed. Reg. 66,665, 66,676, and the "Reporting and Disclosure" regulations, 75 Fed. Reg. 66,832, 66,948, on October 29, 2010. The Department adopted the third set of regulations, the "Gainful Employment" regulations, 76 Fed. Reg. 34,386, 34,448, on June 13, 2011. The Program Approval and Reporting and Disclosure regulations form part of a sweeping regulatory regime given full force and effect through the recently issued Gainful Employment regulations.

2. As set forth more fully below, APSCU is a voluntary association of private sector educational institutions whose membership includes more than 1,500 accredited, private postsecondary schools, institutes, colleges, and universities. APSCU and its members fully support lawful, rational regulations governing federal financial aid, but the challenged regulations are neither lawful nor rational. Rather, they are contrary to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* ("HEA"); arbitrary and capricious and otherwise in violation of the APA; and, in certain respects, unconstitutional.

3. Notably, this is not an ordinary-course rulemaking. The regulations challenged in this lawsuit emerged out of a notoriously flawed regulatory process that has already led to an ongoing investigation by the Department's Inspector General; led Members of Congress to call for congressional investigations; and led Senator Michael Enzi to urge the U.S. Attorney for the Southern District of New York and the Securities and Exchange Commission ("SEC") to determine if investigations into allegations of insider trading involving Department officials are warranted. A report by the U.S. Government Accountability Office ("GAO"), cited by the

Department as support for its regulations, has been widely criticized. In fact, the GAO has formally admitted many errors and removed the lead author of the report from his position. Wholly apart from the additional legal flaws identified herein, no presumption of regularity should attach to rules adopted in these circumstances.

4. The Department's regulations invoke a simple, two-word phrase—"gainful employment"—to impose hundreds of pages of unprecedented new limitations on the use of federal financial aid at private sector colleges and universities. For 46 years, Congress has required by statute that certain postsecondary educational programs must "prepare students for gainful employment" in a recognized occupation or profession to be eligible to participate in Title IV financial aid programs. The Department has now concluded that programs prepare students for gainful employment in recognized occupations and professions *only if* they satisfy an entirely new and complex set of tests related to student debt-to-earnings ratios and loan repayment rates.

5. These regulatory tests are beyond the Department's statutory authority. In the HEA, Congress set forth in detail the Title IV eligibility requirements for institutions, programs, and students. Among other things, those statutory requirements specifically address maximum student debt levels and loan default rates. Nowhere within the HEA has Congress granted the Department authority to override these statutory requirements by regulation.

6. The statutory provision that the Department mistakenly relies on as authority for its far-reaching regulatory tests requires only that programs *prepare* students for employment that is gainful, not that the students actually secure employment at certain salary levels. The regulations impermissibly evaluate the quality of a school's enrollees, the wealth of those students, those students' labor market decisions, and other similar factors, like economic trends,

that are either beyond the school's ability to control or unrelated to the quality of the school's educational offerings.

7. Indeed, the regulations impose massive disincentives on private sector schools that currently seek to educate low-income, minority, and other traditionally underserved student populations, because it is those student populations who are the most at risk for failing the Department's arbitrary tests. Thus, instead of furthering the purpose of increasing the availability of higher education, the Department's regulations will compel schools to limit educational opportunities for traditionally underserved groups—leaving these students with diminished access to higher education and potentially causing them to forgo postsecondary education altogether.

8. The Gainful Employment regulations are also arbitrary and capricious and otherwise in violation of the APA in numerous other respects. For example, in the first years of their operation, the regulations will punish programs for outcomes achieved by students who graduated before the adoption of the standards. Punishing schools for outcomes that are already a matter of historical fact and utterly beyond their control makes no sense; doing so by measuring employment outcomes arising out of the largest economic downturn since the Great Depression is shocking.

9. Further, the regulations are premised on incomplete and unreliable data and create arbitrary formulas that lack any foundation in the record or economics. The regulations are further arbitrary because they deny schools adequate procedural protections, enabling the Department to deprive schools of financial aid eligibility on the basis of data schools are not permitted to review, and calculations schools are, by and large, not permitted to challenge.

10. In addition, the Department has not lived up to its basic obligation under the APA to provide interested parties with notice of its proposed regulations and the opportunity to comment on them. For example, the final Gainful Employment regulations include a new regime of severe sanctions that was not even hinted at in the proposed regulations.

11. Like the Gainful Employment regulations, the Program Approval and Reporting and Disclosure regulations are beyond the Department's statutory authority and are arbitrary and capricious in numerous respects. In particular, in the Program Approval regulations, the Department has asserted, without any foundation in the HEA, the authority to preempt institutions' decisions about which types of programs prospective students will find useful to their career aspirations. Moreover, the Department deprived regulated entities of their rights to notice and the opportunity to comment on the final Program Approval regulations by adopting final regulations that bear only a superficial resemblance, at best, to those the Department originally proposed. Finally, the Reporting and Disclosure regulations impose several disclosure obligations on schools that find no basis in the HEA.

12. Due to these legal deficiencies, both procedural and substantive, the Department's regulations have encountered strong criticism from the regulated community and other stakeholders, as well as bipartisan congressional opposition. In fact, 289 Members of the House of Representatives—231 Republicans and 58 Democrats—voted in February 2011 to deny the Department any funds to implement the Gainful Employment regulations. *See* House Roll Call Vote 92, H.R. 1 (Feb. 18, 2011) (adopted in the Committee of the Whole by a vote of 289-136).

13. For the reasons set forth herein, the Court should declare the Gainful Employment, Program Approval, and Reporting and Disclosure regulations unlawful, vacate the regulations, and remand them to the Department.

PARTIES

14. Plaintiff APSCU is a voluntary association of private sector educational institutions, incorporated under the provisions of the District of Columbia Non-Profit Corporation Act, D.C. Code Ann. §§ 29-301.01-.114, with its principal place of business at 1101 Connecticut Avenue, NW, Suite 900, Washington, DC 20036. APSCU represents more than 1,500 accredited, private postsecondary schools, institutes, colleges, and universities that annually provide educational opportunities to prepare more than 1.5 million students for employment in over 200 occupational fields. APSCU's members qualify as "institutions of higher education," 20 U.S.C. § 1002(a)(1), (b), eligible to participate in student-aid programs under Title IV of the HEA, 20 U.S.C. §§ 1070-1099d. Virtually all of APSCU's member schools will be—or already are—directly subject to the new requirements in the Gainful Employment, Program Approval, and Reporting and Disclosure regulations. Those schools face additional regulatory burdens and increased regulatory compliance costs as a result of the Department's promulgation of the challenged regulations. The regulations force schools to alter their admissions policies and the programs that they offer, causing irreparable changes in the make-up of their student bodies and limiting—and potentially eliminating—higher education opportunities for the traditionally underserved groups that are the most likely to fail the Department's arbitrary tests. Those injuries are directly and immediately traceable to the challenged regulations and would be remedied by a judgment vacating the challenged regulations. The interests that APSCU seeks to protect in filing this lawsuit on behalf of its members are germane to its organizational purposes to promote access to career education and to emphasize the importance of workforce development. Neither the claims asserted nor the relief requested in this lawsuit requires the participation of individual APSCU members.

15. Defendant Arne Duncan is the Secretary of the Department of Education. His official address is 400 Maryland Avenue, SW, Washington, DC 20202. He is being sued in his official capacity. In that capacity, Secretary Duncan has overall responsibility for the operation and management of the Department. Secretary Duncan, in his official capacity, is therefore responsible for the Department's promulgation of the challenged regulations and for related acts and omissions alleged herein.

16. Defendant Department of Education is, and was at all times relevant hereto, an executive agency of the United States Government, 5 U.S.C. §§ 101, 105, subject to the APA, *id.* § 551(1). The Department, in its current form, was created by the Department of Education Organization Act of 1979, 20 U.S.C. § 3401 *et seq.*, Pub. L. No. 96-88, 93 Stat. 668. The Department is headquartered at 400 Maryland Avenue, SW, Washington, DC 20202.

17. APSCU has also challenged other regulations that are part of the Department's recent regulatory overhaul. On January 21, 2011, APSCU filed a complaint in the United States District Court for the District of Columbia (No. 1:11-cv-00138) against the same defendants in this lawsuit, which challenged on constitutional and statutory grounds the Department's adoption of regulations governing compensation for persons engaged in student recruiting and admissions; regulations governing substantial misrepresentations by schools regarding, among other things, their educational programs; and regulations requiring particular forms of state authorization as a prerequisite for participating in Title IV programs. On July 12, 2011, the District Court granted in part and denied in part APSCU's motion for summary judgment and granted in part and denied in part Defendants' motion to dismiss, or in the alternative, motion for summary judgment. APSCU filed a notice of appeal on July 15, 2011, and the appeal is currently pending before the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION AND VENUE

18. This action arises under the Constitution of the United States, the HEA, the General Education Provisions Act ("GEPA"), and the APA. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331. The Court is authorized to issue the non-monetary relief sought herein pursuant to 5 U.S.C. §§ 702, 705, and 706.

19. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1), (2), and (3) because this is an action against officers and agencies of the United States; Defendant Department of Education resides in this judicial district; Defendant Secretary Duncan performs his official duties in this judicial district; a substantial part of the events or omissions giving rise to this action occurred in this judicial district; and Plaintiff resides in this judicial district and no real property is involved in the action.

FACTUAL ALLEGATIONS

I. THE ROLE OF PRIVATE SECTOR SCHOOLS.

20. As the Department has acknowledged, private sector educational institutions have "long played an important role in the nation's system of postsecondary education," 75 Fed. Reg. at 66,671, and are "a diverse, innovative, and fast-growing group of institutions," 76 Fed. Reg. at 34,386.

21. Private sector education expanded primarily to satisfy the educational needs of non-traditional students—low-income, first-generation, working-adult, and single-parent students—needs that public and other private schools had been unable or unwilling to meet. For example, among the students attending private sector schools: 76 percent live independently without parental support, 63 percent are over 24 years old, 54 percent delayed postsecondary education after high school, 46 percent have parents who did not go to school beyond high school, 47 percent have dependent children, 40 percent are minorities, and 31 percent are single

parents. Each year, hundreds of thousands of students enroll in programs offered by private sector schools to prepare for and to advance their careers and to improve the quality of life for themselves and for their families. Although their reasons vary, students are often attracted by private sector schools' flexible, innovative, and market-driven programs.

22. Private sector schools enroll students in a full range of educational programs: masters and doctoral programs, two- and four-year associate- and baccalaureate-degree programs, and shorter term certificate and diploma programs. Over the last decade, private sector schools have accounted for close to 30 percent of certificates and associate's degrees awarded in this country, and approximately half of the technically trained workers who enter the American workforce each year are educated at private sector schools. Private sector schools also meet an increased demand for retraining displaced workers and upgrading skills for a wide variety of public and private employers.

23. Notably, graduation rates are substantially higher at two-year private sector schools than at two-year public sector schools even though, compared to their public and non-profit counterparts, private sector schools' student populations are weighted more heavily toward non-traditional students who are, historically, less likely to graduate.

24. APSCU's members are also indispensable in providing the postsecondary educational opportunities necessary to satisfy the nation's rapidly growing need for a highly educated workforce that can compete in a globalized economy. As the Secretary has recognized, President Obama's declared goal that the United States have the highest percentage of college graduates in the world by 2020 "cannot be achieved without a healthy and productive higher education for-profit sector." 75 Fed. Reg. 43,616, 43,617 (July 26, 2010). Achieving the President's goal will require that approximately 8 million new students—including millions of

non-traditional students—graduate from college over the next decade. Private sector schools have the required infrastructure—both brick-and-mortar facilities and online capacity—to cater to the educational needs of millions of students. In fact, private sector schools, which consume far fewer taxpayer dollars than their public and non-profit counterparts, are investing their own funds to contribute to the necessary expansion of the nation's postsecondary educational opportunities; and private sector schools are increasing their capacity at higher rates than their public sector counterparts. Without the diverse, innovative, and agile educational programs offered by private sector schools to help meet rising demand, it will be exceedingly difficult, and perhaps impossible, to meet the President's goal.

II. THE STATUTORY FRAMEWORK.

A. Congressional Regulation Of Higher Education Funding.

25. Each year, millions of students pursue postsecondary educational opportunities, including those offered by private sector schools, using federal financial aid administered by the Department of Education under Title IV of the HEA, 20 U.S.C. §§ 1070-1099d. In Title IV, Congress established a detailed and comprehensive statutory framework for determining eligibility for that financial aid.

26. Under Title IV, federal funds are available for use only at an "institution of higher education." As relevant here, an "institution of higher education" includes "a proprietary institution of higher education." 20 U.S.C. § 1002(a)(1)(A). A "proprietary institution of higher education" is further defined to include only schools that (among other things) "provide[] an eligible program of training to prepare students for gainful employment in a recognized occupation," or provide a program at a regionally accredited institution that leads to a baccalaureate degree in liberal arts and that has been in existence since January 1, 2009. *Id.* § 1002(b)(1)(A).

27. In addition to imposing these threshold requirements, the HEA requires institutions to enter into "program participation agreement[s] with the Secretary" that condition initial and continuing Title IV eligibility upon, among other things, a requirement that private sector schools not derive more than 90 percent of their revenues from federal financial aid. *See id.* § 1094(a)(24) (the "90/10 rule").

B. Congressional Regulation Of Student Debt.

28. Congress has enacted several eligibility requirements that specifically address student debt and the cost of attending postsecondary educational institutions.

29. Of critical importance here, the HEA specifies that postsecondary institutions may not participate in Title IV programs if their students' federal loan default rates exceed certain specified limits. Those default rates—known as "Cohort Default Rates" or "CDRs"—measure the percentage of an institution's students' loans that have defaulted within a certain period of time after the loans first entered repayment. *See, e.g.*, 20 U.S.C. § 1085(m)(1) (Federal Family Education Loan ("FFEL") program); *id.* § 1087bb(g)(1) (Perkins loan program).[1] Currently, an institution's CDR for any given year is calculated based on the percentage of its students' loans that have defaulted within two years of entering repayment. If an institution has CDRs that are equal to or greater than 25 percent for three consecutive fiscal years, it "shall not be eligible to participate" in specified financial aid programs "for the fiscal year for which the determination is made and for the two succeeding fiscal years." *Id.* § 1085(a)(2) (FFEL eligibility); *see also id.* § 1070a(j)(1) (Pell Grant eligibility); *id.* § 1087c(d) (William D. Ford Federal Direct Loan ("Direct Loan") eligibility). In 2008, Congress altered the CDR calculation. *See* Higher

[1] The FFEL program has been terminated by Congress, and no new FFEL loans may be disbursed. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074. But the eligibility provisions for other programs cross-reference and still rely upon the FFEL CDR provision.

Education Opportunity Act ("HEOA") of 2008, Pub. L. No. 110-315, 122 Stat. 3078. Beginning in 2012, an institution's CDR for any given year will be calculated based on the percentage of its students' loans that have defaulted within three years of entering repayment, and beginning in 2014, institutions with CDRs equal to or greater than 30 percent for each of the three most recent fiscal years will not be eligible to participate in specified financial aid programs. *Id.*

30. In addition, each of the individual federal-assistance programs imposes a cap on the amount of money that can be borrowed each year and in the aggregate by a single student. *See, e.g.*, 20 U.S.C. § 1078(b)(1)(A)-(B) (FFEL program); *id.* § 1078-8(d)(2)-(4) (unsubsidized Stafford loan program); *id.* § 1087dd(a)(2)(A)-(B) (Perkins loan program).

31. Congress has also taken other specific, measured steps designed to address student debt burdens. The HEA provides debt relief for individual borrowers in the form of forbearance and repayment programs. Most recently, Congress created the income-based repayment program, which caps monthly loan payments at a percentage of the borrower's income during periods of financial hardship. *See* College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, § 493C, 121 Stat. 784, 792-95 (codified at 20 U.S.C. § 1098e). Individual loan programs similarly permit individualized debt relief options. In the Direct Loan program, for example, Congress outlined five potential repayment plans for student borrowers. *See* 20 U.S.C. § 1087e(d). Congress also requires that schools provide debt management education to their students. *See, e.g.*, *id.* § 1092(b)(1)(A). In addition, Congress mandates extensive disclosure of education costs to "allow[] parents and students to make informed decisions" about the costs of attending college. *See id.* § 1015(b).

32. Notably, however, Congress and the Department have strictly limited schools' ability to control student debt. For example, Department regulations require that schools inform

students of the maximum amount of federal debt they can incur. 34 C.F.R. § 685.301(a)(3)(i). At the same time, federal law generally forbids schools from restricting student borrowing to the amount needed to cover tuition and fees, 20 U.S.C. § 1087tt(c); 34 C.F.R. § 685.301(a)(8); *see also* Dep't of Educ., *2010-2011 Federal Student Aid Handbook*, 3-100, and counts federal student loans paid for by schools in any part as defaulted loans for purposes of CDR calculations, 20 U.S.C. § 1085(m)(2)(B); 34 C.F.R. § 668.183(c)(iii).

C. Congressional Regulation Of Educational Program Requirements.

33. The HEA imposes only very limited program—as opposed to institutional—eligibility requirements. The HEA defines several types of eligible programs. 20 U.S.C. § 1088(b). For example, programs that provide at least 600 clock hours, 16 semester hours, or 24 quarter hours of instruction and that admit only students who have not completed the equivalent of an associate's degree must "provid[e] a program of training to prepare students for gainful employment in a recognized profession." *See id.* § 1088(b)(1). Other eligibility criteria apply to shorter programs and programs that require the equivalent of an associate's degree for admission, and graduate and professional programs.

34. Further, Congress has expressly declared that the Department may not exercise any control, authority, and influence over the curriculum or administration of educational institutions. *See id.* § 1232a. The House Committee that oversees the Department has recognized that Congress has dictated a limited role for the federal government in this area, and in particular, has explained that the Department "does not currently have the authority to dictate tuition and fee rates for institutions of higher education." H.R. Rep. No. 109-231, at 159 (2005).

III. THE DEPARTMENT'S FLAWED AND TAINTED RULEMAKING PROCESS.

35. This was not a normal rulemaking: the regulatory process was marked by well-substantiated allegations of bias and misconduct and assertions that the Department lacked statutory authority to issue the challenged regulations. These concerns have led to a number of investigations, including an ongoing inquiry by the Department's Inspector General, referrals to the SEC and U.S. Attorney for the Southern District of New York, requests for congressional investigations, and substantial revisions to a GAO report relied upon by the Department to justify the challenged regulations.

A. The Department's Flawed Negotiated Rulemaking.

36. On May 26, 2009, the Department published a notice in the *Federal Register* of its intention to establish a negotiated rulemaking committee, as required by 20 U.S.C. § 1098a, to develop new regulations regarding Title IV eligibility. *See also* Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570a. Under 20 U.S.C. § 1098a, unless impracticable, unnecessary, or contrary to the public interest, the Department must subject all regulations pertaining to student financial aid programs to public negotiated rulemaking sessions before publishing any proposed regulations. By requiring such negotiations, Congress intended to guide the Department to produce final regulations that are workable and free of significant conflict. On September 9, 2009, the Department established a committee to develop new Title IV regulations. *See* 74 Fed. Reg. 46,399.

37. A number of the issues to be considered by the negotiated rulemaking committee—including issues regarding compensation for school employees engaged in recruiting and admissions and defining the statutory phrase "gainful employment in a recognized" occupation—were of unique importance to private sector institutions. Yet, of the 16

non-federal primary negotiators permitted to participate in the sessions, only one represented private sector institutions. *See* Team I—Program Integrity Issues, List of Negotiators, http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/2009-2/team-one-negotiators.pdf. Private sector schools requested additional representation, but those requests were rejected. In short, the regulatory process was flawed from the start.

38. The Department held three negotiated rulemaking sessions: November 2-6, 2009, December 7-11, 2009, and January 25-29, 2010. Notably, the Department short-circuited adequate debate on its gainful employment proposal by failing to even provide proposed regulatory language to the committee until the final negotiating session. *See* Session Two, Issue Summaries, Issue Paper # 6, http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html ("We are not providing regulatory language at this time.").

39. Unsurprisingly under these circumstances, the negotiated-rulemaking committee failed to achieve consensus in several areas, including the gainful employment rules and the associated new program approval requirements.

B. The Department's Inadequate Notice And Comment Rulemaking Process.

40. Two separate Notices of Proposed Rulemaking ("NPRMs") emerged out of the Department's decision to abandon negotiated rulemaking: one, published on July 26, 2010, contained proposed Gainful Employment and new Program Approval regulations, 75 Fed. Reg. at 43,616, and the other, published earlier on June 18, 2010, contained proposed Reporting and Disclosure regulations, 75 Fed. Reg. 34,806.

41. For each of these substantial NPRMs, the Department provided for abbreviated, 45-day comment periods instead of the standard 60-day periods. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821-

22 (Jan. 18, 2011). Nevertheless, a record number of commenters, more than 90,000, submitted comments on the proposed regulations.

42. Several commenters, including APSCU, submitted detailed comments to the Department explaining the myriad legal and other problems with each of the proposed regulations. *See, e.g.*, *Comments of the Career College Association*, Docket ED-2010-OPE-0004 (Aug. 2, 2010); *Comments of the Career College Association*, Docket ED-2010-OPE-0012 (Sept. 9, 2010).

43. Notably, several Members of Congress also submitted comments to the Department expressing disapproval of the Department's proposed regulations. These comments were amplified on February 18, 2011—before the Department published the final Gainful Employment regulations—when a large bipartisan majority of the House of Representatives approved an amendment to the Full-Year Continuing Appropriations Act, 2011 that would have prevented the Department from using any appropriated funds to promulgate or enforce the proposed regulations.

44. On June 13, 2011, the Department published the Gainful Employment regulations as a final rule with an effective date of July 1, 2012. 76 Fed. Reg. 34,386. On October 29, 2010, the Department published the Program Approval regulations as final regulations with an effective date of July 1, 2011. 75 Fed. Reg. 66,665. The Department also published the Reporting and Disclosure regulations on October 29, 2010, also with an effective date of July 1, 2011. 75 Fed. Reg. 66,832.

45. Although the final regulations differ—sometimes significantly—from the original proposals, these changes did not address the serious legal defects that commenters identified in each of the regulations. Indeed, in some instances, the changes introduced new legal defects.

For example, the final regulations are not "logical outgrowths" of the proposed regulations because many of their provisions were not included in the proposed regulations.

46. Notably, the Department justified the final Reporting and Disclosure and Gainful Employment regulations, in part, on evidence of problems in the private sector set forth in a GAO report that has been discredited. *See* 75 Fed. Reg. at 66,843; 76 Fed. Reg. at 34,392, 34,455-56; *see also For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices*, Aug. 4, 2010. On November 30, 2010, the GAO published a revised report that contained fifteen corrections, each of which revealed an error that had cast private sector schools in an unjustifiably unfavorable light. Nick Anderson, *GAO Revises Its Report Critical of Practices at For-Profit Schools*, Wash. Post, Dec. 7, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/07/ AR2010120706803.html. Shortly after the publication of the revised report, the GAO restructured its investigative unit and reassigned personnel, which included removing the lead author of the original report from his position. *See* Jonathan Strong, *GAO Replaces Top Official Behind Error-Riddled Report on For-Profit Colleges*, The Daily Caller, Mar. 3, 2011, *available at* http://dailycaller.com/2011/03/03/gao-replaces-top-official-behind-error-riddled-report-on-for-profit-colleges/print/. It has recently been reported that the GAO was put under political pressure by agenda-driven congressional staffers and "extreme short time frames" in drafting the report, which led to its many inaccuracies. *See* Jonathan Strong, *Political Pressure Tainted Error-Ridden GAO Report*, The Daily Caller, May 17, 2011, *available at* http://dailycaller.com/ 2011/05/17/political-pressure-tainted-error-ridden-gao-report/.

C. The Department's Consideration Of The Regulations Was Tainted.

47. It is clear that the Department's rulemaking was tainted. The Department had a pre-determined agenda to target private sector education. Documents produced through the

Freedom of Information Act ("FOIA") reveal that the Department in pursuit of that agenda, and after a perfunctory negotiated rulemaking process, cut private sector schools out of the discussion and turned instead, remarkably, to short sellers—Wall Street investors with a pecuniary interest in the decline of the sector—and non-profit groups with a history of animosity toward the sector. The influence of these short sellers and advocacy groups can be seen in the unfair and unworkable regulations adopted by the Department.

48. In fact, the public record assembled through FOIA requests reveals more than 100 communications and several in-person meetings between Department officials and short sellers, including discussions of the potential effects of new Gainful Employment regulations on stock prices of publicly traded private sector schools.

49. In light of this record, the Department has since conceded that "at least one short seller probably should have been banned from the meetings [with Department officials] because of his ties to Wall Street and community college officials who were involved in the rulemaking." Juila Edwards & Fawn Johnson, *Short-Selling Questions Raised on For-Profit College Rules*, Nat'l J. Daily A.M., Feb. 9, 2011.

50. FOIA documents further demonstrate that early on Department officials adopted a mentality that prevented them from engaging in an even-handed rulemaking process. For example, in May 2009, the Department organized two conference calls with various stakeholder groups regarding its regulatory objectives. One call was held with representatives of private sector schools and the Department published a transcript of that call on its website. *See* Conference Call with Robert Shireman, Deputy Undersecretary, Dep't of Educ. (May 29, 2009), http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/call-career-colleges.pdf. The other call was referred to in Department communications as the "friends/non-profits" call, and private

sector schools were not invited to participate. The Department never published a transcript of that call.

51. The irregularities in the rulemaking process have spurred requests for investigations—efforts that remain ongoing.

52. On November 17, 2010, Senators Richard Burr and Tom Coburn wrote to the Department's Inspector General, Kathleen Tighe, referring to the Department's collaboration with short sellers and noting that "it appears [that] Department officials may have leaked information to outside organizations, some of whom may stand to financially benefit from the failure of the proprietary school sector." Letter from Sens. Richard Burr and Tom A. Coburn to Kathleen Tighe, *available at* http://www.scribd.com/doc/54549531/Letter-from-Senator-Richard-Burr-Senator-Tom-Coburn-DOE-Inspector-Kathleen-Tighe-re-Gainful-Employment-11-17-2010. The Senators called upon the Inspector General to investigate this situation. *See also Preventing Abuse of the Military's Tuition Assistance Program: Hearing Before the S. Homeland Sec. & Governmental Affairs Subcomm. on Fed. Fin. Mgmt., Gov't Info., Fed. Servs., & Int'l Sec.*, CQ Transcripts, Mar. 2, 2011 (Senator Tom Coburn, noting that if these allegations are true some people in the Department "ought to be going to jail").

53. The Inspector General has since confirmed that an investigation is ongoing. *See* Peter Schroder, *Audit to Determine Whether College Reg Was Leaked to Wall Street*, The Hill, June 13, 2011, *available at* http://thehill.com/blogs/on-the-money/banking-financial-institutions/166087-dept-of-education-ig-looking-into-wall-street; *see also* Letter from Sen. Joseph I. Lieberman to Sec'y Arne Duncan, Apr. 27, 2011, *available at* http://www.scribd.com/doc/54549537/Letter-from-Senator-Joseph-Lieberman-Arne-Duncan-DOE-re-Gainful-Employment-Regulation-04-27-2011 ("I understand the [Department's] Inspector General is looking into

[these] allegation[s], and ask that you inform me of the outcome of that investigation."). The Inspector General has also publicly stated that "[i]f [her office] came to believe that insiders had traded on confidential information, we could refer it [to the SEC]." Schroder, *supra.*

54. On March 1, 2011, Citizens for Responsibility and Ethics in Washington ("CREW"), asked the SEC to investigate any market manipulation by short sellers who were in contact with the Department throughout the rulemaking. *See* Letter from Anne L. Weismann, Chief Counsel, CREW, to Robert Khuzami, Director of Enforcement, SEC, *available at* http://www.scribd.com/doc/49782567/Letter-to-Robert-Khuzami-CREW-SEC-New-Information-About-Short-Sellers-Efforts-to-Shape-Education-Regulations-3-1-11.

55. On April 28, 2011, Senator Michael Enzi wrote to Secretary Duncan to express his concern about documents that "indicate that several investors contacted the Department and met with officials involved in the development of the proposed rule while the rulemaking process was ongoing," and "suggest that non-profit groups advocating in support of the Department's proposed rule were in regular contact with Department officials, as well as investors interested in the outcome of the rulemaking." Letter from Sen. Michael B. Enzi to Sec'y Arne Duncan, Apr. 28, 2011, *available at* http://help.senate.gov/imo/media/doc/4-28-11%20-%20EnziLetter%20-%20GEDocuments.pdf. Days later, Senator Enzi wrote to Robert Khuzami, Director of Enforcement at the SEC, and Preet Bharara, U.S. Attorney for the Southern District of New York, to "direct [their] attention" to these issues and asked them to "review [the] materials to determine if further action by [their offices] is warranted." Letter from Sen. Michael B. Enzi to Robert Khuzami, May 2, 2011, *available at* http://www.scribd.com/doc/54549543/Letter-from-Senator-Mike-Enzi-Robert-Khuzami-SEC-re-DOE-investor-communication-05-02-2011; Letter from Sen. Michael B. Enzi to Preet Bharara, May 2, 2011, *available at* http://www.scribd.com/

doc/54549543/Letter-from-Senator-Mike-Enzi-Robert-Khuzami-SEC-re-DOE-investor-communication-05-02-2011.

56. On May 24, 2011, Representative Edolphus Towns wrote a letter to Representative Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, to ask him to "initiate an investigation . . . concerning the process by which senior officials at the Department of Education . . . drafted the proposed 'Gainful Employment'" regulation. Letter from Rep. Edolphus Towns to Chairman Darrell E. Issa, *available at* http://dailycaller.com/wp-content/uploads/2011/06/GE-letter-to-Issa-and-Cummings.pdf. In that letter, Representative Towns noted, among other things, serious allegations that the Department "allegedly drafted the [Gainful Employment] regulation with a predetermined agenda to harm career colleges" and "secretly held meetings with known short-sellers who stand to profit substantially by the [Gainful Employment] regulation." *Id.* Chairman Issa held a hearing on the Gainful Employment regulations on July 8, 2011.

IV. THE CHALLENGED REGULATIONS.

A. The Gainful Employment Regulations.

57. The Gainful Employment regulations impose dramatic new student debt limitations on programs of proprietary institutions of higher education based on an unprecedented and strained interpretation of the statutory phrase "gainful employment" found in 20 U.S.C. §§ 1001, 1002, and 1088.

58. Indeed, Congress incorporated the "gainful employment" phrase into the HEA in 1965, but the Department has never before promulgated regulations purporting to define that short, commonly used phrase. In adjudications, however, the Department had given the term some content by concluding that programs that teach, for example, cultural values rather than employable skills do not satisfy the gainful employment requirement. But the Department never

inquired into student income, debt levels, or loan repayment rates to measure "gainful employment."

59. That all will change under the Gainful Employment regulations: the Department has declared that it will "assess whether a program provides training that leads to gainful employment by applying two tests: One test based upon debt-to-earnings ratios and the other test based upon repayment rates." 75 Fed. Reg. at 43,618; *see also* 76 Fed. Reg. at 34,450 (to be codified at 34 C.F.R. § 668.7) [hereinafter 34 C.F.R. § 668.7].

1. The Debt-To-Earnings And Loan Repayment Rate Tests.

60. The *debt-to-earnings test* evaluates the ratio of (i) the estimated annual loan payment owed by students who graduated from a program to (ii) either the average annual earnings or discretionary income of those graduates. *See* 34 C.F.R. § 668.7(c)(1). This complex calculation requires three steps: *First*, the Department generally calculates the median loan debt of students who completed the program during the two-year period consisting of the third and fourth fiscal years prior to the most recently concluded fiscal year. *Id.* § 668.7(c)(2)(i); *id.* § 668.7(a)(2)(iv)-(v). *Second*, the Department computes an estimated annual payment from the median loan debt statistic by making two assumptions: (i) that the median loan debt of the *past* graduates is subject to "the current annual interest rate on Federal Direct Unsubsidized Loans," and (ii) that the median loan debt is being repaid on a 10-year, 15-year, or 20-year schedule depending on whether the program is a certificate or associate's degree program, a bachelor's or master's degree program, or a doctoral or first-professional degree program, respectively. *Id.* § 668.7(c)(2)(ii). Both federal and private loans are taken into account. *See id.* § 668.7(c)(4)(i). *Third*, the estimated annual loan payment is divided by two earnings formulas: (i) the mean (or median, whichever is higher) annual earnings for the same cohort of former students and (ii) the "discretionary income" for the same cohort or graduation year of former students, which is the