May 27, 2014

VIA ELECTRONIC SUBMISSION

Ashley Higgins
U.S. Department of Education
1990 K Street N.W., Room 8037
Washington, D.C. 20006-8502


Dear Ms. Higgins:

The Association of Private Sector Colleges and Universities ("APSCU") respectfully submits these comments in response to the request for comments from the Department of Education (the "Department") on its proposed rule on Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426, Dep’t of Educ. Rulemaking Docket Matter No. ED-2014-OPE-0039 (Mar. 25, 2014). In addition to our comments, we have attached an expert report prepared by Charles River Associates ("Expert Report") that analyzes some of the flaws and erroneous economic and behavioral assumptions underlying the proposed rule.

The proposed rule is unlawful and will needlessly harm millions of students who attend private sector colleges and universities. The Department has evidently prepared the rule to circumvent the district court’s decisions to strike down the prior version of these regulations; but the proposed rule contravenes the teachings of those cases. Accordingly, APSCU respectfully requests that the Department withdraw the proposed regulations and instead engage in meaningful dialogue with private sector schools and other stakeholders, in an effort to reach shared, attainable goals. We renew our longstanding offer to work with the Department on these important issues, if the Department is prepared to engage in good faith.

If you have any questions or would like to discuss these issues further, please contact me at 1101 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036, 202-336-6701.

Respectfully submitted,

Steve Gunderson
President and CEO
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Appendix


Attachments
EXECUTIVE SUMMARY

The Association of Private Sector Colleges and Universities (“APSCU”) submits these comments in response to the request for comments from the Department of Education on its proposed rules on Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426, Dep’t of Educ. Rulemaking Docket Matter No. ED-2014-OPE-0039 (Mar. 25, 2014). APSCU is a voluntary membership organization of more than 1,400 accredited, private postsecondary schools, institutes, colleges, and universities that provide important, career-focused educational opportunities to millions of students each year—many of whom are underserved by traditional schools.

APSCU shares the goals of helping students receive a quality education, enter into programs with a full understanding of the costs, and avoid excessive debt. Unfortunately, the proposed regulations will not achieve these goals. Rather, the proposed regulations will drastically harm private sector students and schools. APSCU respectfully requests that the Department withdraw the proposed regulations and instead engage in meaningful dialogue with private sector schools and other stakeholders, in an effort to reach shared, workable goals.

The Department has already tried and failed to construct a regulatory regime on the basis of the statutory phrase “gainful employment.” That fruitless attempt spanned several years, left policymakers, schools, and their students facing uncertainty and needlessly imposed costs on taxpayers. The United States District Court for the District of Columbia struck down the Department’s 2011 gainful employment rule because a central feature of those regulations—the loan repayment test—lacked any reasoned basis. See APSCU v. Duncan, 870 F. Supp. 2d 133 (D.D.C. 2012) (“APSCU I”). The Department now concedes that there is no reasoned basis for that test, admitting that it “has found no expert studies or industry practice,” nor any other

The Department has stubbornly proposed another set of punitive “gainful employment” regulations that repeat these flaws. What is worse, in many ways the proposed regulations are more biased and irrational than the 2011 regulations. Among other things, the proposed regulations lack any statutory authorization and propose debt metrics that are arbitrary and capricious. This renewed regulatory effort comes despite continued claims by the Administration that it seeks to *expand* access to postsecondary education, and even though the House of Representatives has expressed its clear view that the Department should not proceed with this rulemaking. See, e.g., H.R. 2117 (2012) (passing the House by a vote of 303-114).

The proposed rule will hurt millions of students served by private sector institutions. As explained below, private sector schools educate a disproportionate number of students that otherwise would not have access to postsecondary education, including low-income students, minority students, working adults, and single parents. The proposed rule could leave millions of these students without access to a college education, and could result in some students not completing an educational program they have already started. The Department actually touts this deprivation as a benefit, pointing to the “savings” the federal government will reap when some “students who would have attended programs that fail the GE measures . . . elect not to pursue postsecondary education.” 79 Fed. Reg. at 16,609. This disregard for private sector students and schools characterizes the Department’s regulatory approach as a whole.
In Part I of this comment, APSCU discusses the legal and regulatory background against which the Department seeks to regulate.

In Part II, APSCU explains how the proposed regulations lack any statutory basis. The plain language of the statute makes clear that programs must prepare students for a job that pays; they need not guarantee that students secure high-paying jobs in order to satisfy the Department’s arbitrary debt metrics.

In Part III, APSCU highlights how the proposed regulations violate the letter and spirit of the district court’s opinions invalidating the prior rule.

In Part IV, APSCU explains how the proposed regulations unfairly target private sector schools. The Department relies on flawed and biased data to justify its attack on the private sector. The proposed regulations are a means of shuttering some private sector schools, not a well-reasoned way of measuring what the Department purports to measure.

In Part V, APSCU presents some of the many additional ways in which the proposed regulations are arbitrary and capricious, in violation of the Administrative Procedure Act.

Finally, in Part VI, APSCU discusses how the proposed reporting and disclosure requirements violate the First Amendment and several statutes.

I. Background

A. Congress’s Comprehensive Legislation Governing Financial Aid For Postsecondary Education

The Higher Education Act (“HEA”) sets out a reticulated, comprehensive scheme for providing millions of students with federal financial aid to pursue postsecondary education. See 20 U.S.C. §§ 1070-1099(d). The central purpose of the HEA is “to assist in making available the benefits of postsecondary education to eligible students.” 20 U.S.C. § 1070(a). The
Administration has repeatedly recognized the importance of a postsecondary education, describing it as a “prerequisite for the growing jobs of the new economy.”¹

Under the HEA, students may use Title IV funds only at an “institution of higher education.” 20 U.S.C. § 1070. The term includes private sector “proprietary institution[s] of higher education” and public sector “postsecondary vocational institution[s].” Id. § 1002(a)(1). These institutions generally must “provid[e] an eligible program of training to prepare students for gainful employment in a recognized occupation.” Id. § 1002(b), (c).

Congress has imposed a host of requirements on schools that receive Title IV funds. As an initial matter, the State in which a school operates must authorize it to provide postsecondary education, and the school ordinarily must be accredited by an accrediting agency recognized by the Secretary of Education. See 20 U.S.C. § 1001(a)(2), (5); id. § 1002(b)(1)(B), (D); id. § 1002(c)(1)(B). The HEA also imposes limitations on subjects such as the qualifications of students that the schools may enroll, the types of programs that schools may offer, how long each program must last, and how a school is managed. See, e.g., id. § 1002(a)(3); id. § 1088(b); id. § 1002(a)(4). Section 1094 of the HEA alone requires that schools comply with twenty-nine separate requirements. This section also imposes one requirement that is unique to proprietary


The attached Appendix contains a list of the articles, reports, letters, and other authorities cited in this comment, along with the web addresses of those authorities (if available). Authorities without web addresses are attached.
schools—the so-called “90/10” rule—which requires that at least 10 percent of a school’s revenues from tuition, fees, and other institutional charges be attributable to sources other than federal Title IV student aid. See id. § 1094(a)(24).

As part of the statutory framework, Congress has also enacted a number of provisions that specifically address student loan debt and costs. These provisions apply to all postsecondary institutions and do not single out private sector schools for disfavored treatment.

Congress has addressed concerns about loan defaults using specific thresholds on an institutional level that are carefully calibrated to reflect Congress’s primary goal of expanding access to higher education. The HEA specifies that any otherwise eligible institution may participate in certain Title IV programs if their students’ federal loan default rates do not exceed specified limits known as “cohort default rates” or “CDRs.” Those rates measure—on an institutional basis—the percentage of an institution’s borrowers that have defaulted within a certain period of time after their loans first entered repayment. See, e.g., 20 U.S.C. §§ 1085(m)(1); id. § 1087bb(g)(1).

Congress does not curtail eligibility for an institution with high cohort default rates if at least two-thirds of its students are eligible for certain need-based Pell Grants or have an income below the poverty level. Id. § 1085(a)(5)(A)(i). And, in considering the default rate on all loan types, Congress does not count against schools those students who use congressionally created deferment or forbearance options to manage loan obligations during times when, for whatever reason, they are having difficulty meeting their debt obligations. See 20 U.S.C. §§ 1085(m)(2)(d), 1087bb(g)(1)(e)(i)(IV).
In short, Congress has already established a comprehensive scheme for tying an institution’s eligibility for federal funding to the performance of its students on prescribed institutional debt measures. Critically, this regime recognizes that student demographics and economic forces that are unrelated to program quality can and do affect default rates, and therefore should be taken into account with regard to eligibility.2

With regard to costs, Congress has never set any caps on tuition. Indeed, in 2005, the House of Representatives passed the College Access and Opportunity Act and explained in an accompanying House Report that “the Federal government 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) (emphasis added). Rather than meddle in pricing decisions, Congress has mandated the disclosure of certain education costs so as to enable parents and students to make informed decisions. See 20 U.S.C. § 1015(a), (b).

B. Summary Of Prior Gainful Employment Regulations And The District Court’s Vacatur Of Those Regulations

1. In 2011, The Department Pushed Through Gainful Employment, Reporting And Disclosure, And Program Approval Regulations

Nearly a half century after initial passage of the HEA, the Department in 2009 initiated a negotiated rulemaking process ostensibly to measure whether a program prepared students for "gainful employment.” The rulemaking was rife with irregularities, leading to an inquiry by the Department’s Inspector General, requests for congressional investigations, and referrals to the

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2 Congress has also taken other steps to help schools and students to manage debt. For example, schools with high cohort default rates must establish a “default prevention task force” and establish steps to improve their default rates. 20 U.S.C. § 1085(a)(7). Congress also requires eligible schools to provide exit counseling for borrowers, during which they must provide their students with strategies for managing debt. 20 U.S.C. § 1092(b)(1)(A)(ii).
U.S. Attorney for the Southern District of New York and the Securities and Exchange Commission. Unsurprisingly, the flawed negotiated rulemaking failed to reach consensus, but the Department pressed on, publishing two separate NPRMs containing three related sets of regulations, each of which purported to be authorized by the phrase “gainful employment.”

The final gainful employment regulations that resulted from this flawed process claimed to measure program performance based on two complex debt measures—one based on debt-to-earnings ratios and one based on loan repayment rates. 76 Fed. Reg. at 34,448. The debt-to-earnings test supposedly evaluated the ratios of (1) the estimated annual loan payment owed by students who graduated from a program to (2) either the average annual earnings or average discretionary income of those graduates. See 34 C.F.R. § 668.7(c)(1). The loan repayment test purported to evaluate the percentage of former students that had paid their loans in full or reduced the outstanding balance of their loans. Id. § 668.7(b). A program satisfied the gainful employment regulations if a defined cohort of students had: (1) a loan repayment rate of at least 35 percent, or (2) a debt-to-earnings ratio of 12 percent or less, or a debt-to-discretionary income ratio of 30 percent or less. Id. § 668.7(a)(1)(i)-(iii), (d)(2). A program failing both tests faced increasing sanctions, and, after failing three out of four years, would be declared ineligible. Id. § 668.7(h)-(j).

The regulations also required programs to report to the Department, among other things, personally identifiable information regarding “[t]he amounts [each] student [completing the program] received from private education loans and the amount from institutional financing plans that the student owes the institution upon completing the program.” 34 C.F.R. § 668.6(a)(1)(i)(C)(2). Programs were also required to disclose certain information to
prospective students, including “[t]he on-time graduation rate for students completing the
program.” Id. § 668.6(b)(1)(ii), (v).

The final program approval regulations required institutions to notify the Department if
they planned to offer new programs, and allowed the Department to require institutions to seek
Department approval of new programs before disbursing Title IV funds. 34 C.F.R. § 600.20(c)-(d).

2. The District Court Vacates The Regulations

On July 20, 2011, APSCU filed suit in the United States District Court for the District of
Columbia, challenging the regulations as exceeding the Department’s authority under the HEA,
constituting an arbitrary and capricious exercise of the Department’s authority, and violating
constitutional protections, among other things. See Complaint, APSCU v. Duncan, No. 1:11-cv-

On June 30, 2012, the district court vacated almost the entire regulatory regime, including
the gainful employment regulations, the program approval regulations, and the reporting aspect
of the reporting and disclosure regulations. See APSCU I, 870 F. Supp. 2d 133. The district
court concluded that the loan repayment test lacked a reasoned basis because it “was not based
upon any facts at all. No expert study or industry standard suggested that the rate selected by the
Department would appropriately measure whether a particular program adequately prepared its
students.” Id. at 154. Although the district court viewed the phrase “gainful employment” as
ambiguous and observed that the debt-to-earnings thresholds had reasoned bases, it also
explained that the gainful employment regulations fell in their entirety because the defective loan
repayment test was inextricable from the other metrics. *Id.* at 154.3 Without deciding the issue, the court also expressed concern that the mandated warning for programs failing the debt metrics in any single year—that a student enrolling in the program “should expect to have difficulty” repaying loans—violated the First Amendment. *Id.* at 154 n.7.

The court also held that the reporting provisions of the rule—requiring programs to provide the Department with student information necessary to calculate the debt measures—violated 20 U.S.C. § 1015c, which prohibits the collection of personally identifiable information from students receiving Title IV assistance. *APSCU I*, 870 F. Supp. 2d at 155. The court upheld the disclosure provisions, however, because they did not violate 20 U.S.C. § 1015c, they fell “comfortably” within the Department’s general authority to regulate program operation, and they could be severed from the invalid disclosure requirements. *Id.* at 156-57.

In short, the district court vacated the entire regulatory framework, save for the disclosure regulations, which could be severed.4

On July 30, 2012, the Department moved to amend the judgment, arguing that certain aspects of the reporting requirements and the procedures for calculating the debt metrics should be revived to allow schools to make the required disclosures under the still-intact disclosure provisions. The district court denied the Department’s motion, clarifying its previous holding that, under the HEA, the Department cannot force schools to collect and report student

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3 As explained further below, the district court’s reasoning regarding the statutory ambiguity and the debt-to-earnings metrics was not necessary to the judgment and therefore has no preclusive effect. See Part II.A below.

4 The court also invalidated the program approval regulations. *APSCU I*, 870 F. Supp. 2d at 157-58. The Department has not attempted to resurrect those regulations in this Notice of Proposed Rulemaking (“NPRM”), so APSCU does not discuss them.
information. See APSCU II, 930 F. Supp. 2d 210. The court explained that Section 1015c bars the creation of new databases of personally identifiable student information, but does not necessarily prohibit the addition of information to an existing database, such as the National Student Loan Data System (“NSLDS”), unless the addition of information effectively creates a new database. Id. at 218. The court concluded that the reporting requirements violated Section 1015c because they “expanded [the NSLDS] to hold detailed information about every student enrolled in a gainful employment program, whether or not that student had applied for or received any federal grants or loans.” Id. at 221. “The Department could not create a student unit record system of information on all students in gainful employment programs,” the court reasoned, “nor can it graft such a system onto a pre-existing database of students who have applied for or received Title IV assistance.” Id.

C. The 2013 Flawed Regulatory Process And The New Proposed Rule

1. The Biased Negotiated Rulemaking Committee

The Department learned nothing from its problem-filled 2011 rulemaking and litigation loss. On June 12, 2013, the Department announced its intention to establish a negotiated rulemaking committee to prepare another round of regulations. See 78 Fed. Reg. 35,179 (June 12, 2013). The Department identified various constituencies—including “[p]rivate, for-profit institutions of higher education” and “[b]usiness and industry”—as “having interests that are significantly affected by the topic proposed for negotiations,” and invited those groups to propose nominees to serve on the negotiated rulemaking committee. Id. at 35,181.

Despite the background of the flawed 2011 rulemaking, the Department took no steps to ensure a fairer, more reasoned process. Many stakeholders—including APSCU and the United
States Chamber of Commerce (the “Chamber”)—wrote to the Department, asking it to consider selecting specific individuals to serve on the negotiated rulemaking committee. APSCU’s nominees were deeply familiar with the challenges facing higher education and were well-suited to offer unique insights accumulated over years of managing successful private sector colleges and universities. The Chamber’s nominees would have also been well-positioned to explain, among other things, how the gainful employment regulations worked against job creation and would result in fewer Americans getting the postsecondary education needed to secure work.

APSCU’s and the Chamber’s submissions were ignored. Although the Department selected 28 representatives, only four of its selections represented private sector colleges and universities. The one purported “business and industry” selection represented veterans—a worthy constituency to be sure—but not the business community as a whole. Several other representatives were either on-the-record opposing the private sector or had worked for entities that were opposed to the existence of private sector schools. Both APSCU and the Chamber wrote timely letters to the Department expressing these concerns, but the Department refused to reconsider its appointments. See APSCU Ltr. to Sec. Duncan (Aug. 26, 2013)\(^5\); Chamber Ltr. to Sec. Duncan (Sept. 6, 2013). Thus, from the beginning of the negotiated rulemaking process, the Department seemed intent on targeting private sector schools and giving short-shrift to the industry’s views.

At the first negotiating session, APSCU and the Chamber once again tried to ensure adequate representation on the committee. The Chamber nominated two possible additions and

the private sector schools nominated the interim dean of Florida Coastal School of Law. Led by a strident opponent of private sector schools, members of the committee scuttled these nominations. The Department then chose to move forward with the rulemaking despite the committee’s skewed composition. See, e.g., Michael Stratford & Paul Fain, *Agree to Disagree*, Inside Higher Educ. (Sept. 10, 2013) (recounting these events). In a letter to the Department, APSCU predicted that the Department’s biased committee would “likely . . . draft proposed regulations that stifle educational innovation, cost jobs, and displace the students who benefit most from career and job-focused training.” APSCU Letter to Secretary Duncan (Aug. 26, 2013). That prediction came true: at each of the three negotiated rulemaking sessions, the Department introduced one flawed proposal after another, each of which was more harmful than the Department’s vacated regulations.

Throughout these sessions, the Department refused to heed the advice of the negotiators that it had called together. Some negotiators, including the president of an accrediting agency, “questioned efforts to hold programs accountable for the labor market successes and failures of their graduates,” explaining that “[c]olleges can’t control the economy.” See Stratford & Fain, above. Other negotiators similarly encouraged the Department to pursue a different regulatory path, noting that colleges and universities cannot control the availability of jobs, where students decide to live and work, and individual choices about borrowing. See Ben Miller, *Gainful Employment Negotiations Day 1 Liveblog*, Higher Educ. Watch (Sept. 9, 2013).
Despite this chorus of opposition, the Department insisted on introducing proposals based on students’ earnings and other factors that are unrelated to program quality. Indeed, the Department’s own negotiator eventually admitted that “the tests are less about judging the quality of a program and more about the performance of loan debt.” Ben Miller, *Gainful Employment Liveblog Session 2: Day 1*, Educ. Central (Nov. 18, 2013).

Throughout the negotiated rulemaking process, the Department also failed to explain many assumptions behind its proposals or provide data. Accordingly, a number of negotiators objected to continuing the process, with one explaining that the group could not “negotiate on something without data,” especially as the last rule was vacated based on a lack of supporting data. *See* Miller, *Session 2: Day 1*, above. Even one of the most vocal opponents of private sector schools complained that the “Department is almost grasping at straws, picking numbers and putting gigantic fudge factors” in its proposals. *See* Miller, *Day 1 Liveblog*, above.

Unsurprisingly, the negotiated rulemaking sessions ended in disagreement. That same day, a group of 30 Congressional Democrats wrote to Secretary Duncan, expressing serious concerns regarding “the process by which the Department has addressed these issues.” These members of Congress were particularly concerned with the fact that the Department had “targeted” private sector schools and had not provided “data regarding the impact on students by demographic,” and expressed their belief that “every effort should be made to limit adverse impacts on individuals who face limited access to educational opportunities.” Hon. Alcee Hastings, et al., Ltr. to Sec. Duncan (Dec. 13, 2013).

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8 http://www.edcentral.org/gainful-employment-liveblog-session-2-day-1/.
This history should persuade the Department that the rulemaking process has again gone seriously wrong. At this point, without more, the Secretary has every reason—legal, policy, and prudential—to withdraw the proposed regulations and begin again.

2. The Proposed Regulations

Not long after the committee failed to reach consensus, the Department published its current proposal in the Federal Register in the form of a NPRM. See Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426 (Mar. 25, 2014) (to be codified at 34 C.F R. pts. 600 and 668). This proposal exacerbates the problems inherent in the vacated gainful employment rule and directly contradicts many of the Department’s previous, allegedly reasoned conclusions, while also managing to repeat some of the key errors that proved fatal to the previous regulations.

The Department estimates that 14.5 percent of programs will fail under its current proposal, which is more than double the six percent of programs that would have failed under the prior rule. See 79 Fed. Reg. at 16,491. As the Chamber observed in a recent letter to the Department and the Office of Management and Budget (“OMB”), under the proposed regulations, “[t]he result is that more programs are impacted, more programs are projected to fail, and, most importantly, more students will be denied access to the opportunity for higher education.” Chamber Ltr. to the Department and OMB at 3 (Mar. 10, 2014).10

The proposed regulations seek to impose a new student debt regime and sweeping changes to current reporting and disclosure provisions based “primarily” on the statutory phrase “prepare students for gainful employment in a recognized occupation.” 79 Fed. Reg. at 16,436.

The Department seeks to establish two frameworks for regulating Title IV eligibility beyond what Congress has authorized: a so-called “accountability framework” and a so-called “transparency framework.”

The Department intends the “accountability framework” to “define what it means to prepare students for gainful employment in a recognized occupation by establishing measures by which the Department would evaluate whether a GE program remains eligible for title IV, HEA program funds.” 79 Fed. Reg. at 16,436. The Department proposes two debt tests: a debt-to-earnings test, which consists of a debt-to-annual earnings test and a debt-to-discretionary income test, and a program cohort default rate. See id. at 16,427.

A program “passes” the debt-to-earnings test if the relevant cohort has a debt-to-earnings ratio of 8 percent or less, or a debt-to-discretionary income ratio of 20 percent or less. 79 Fed. Reg. at 16,439. The proposed rule would also establish a “zone” for gainful employment programs that have a discretionary income rate between 20 percent and 30 percent or an annual earnings rate between 8 percent and 12 percent. Id. Gainful employment programs with a debt-to-discretionary income ratio over 30 percent and a debt-to-earnings ratio over 12 percent would fail the debt-to-earnings measure. Id. A program fails the program cohort default rate if its default rate is 30 percent or greater. Id. And a failing program “would lose eligibility sooner than under the 2011 Prior Rule.” Id. Under the proposed regulations, a program becomes ineligible for Title IV funds if it fails the debt-to-earnings measures for two out of three consecutive years, or has a combination of debt-to-earnings rates that are in the zone or failing for four consecutive years. Id. at 16,427.
Through the “transparency framework,” the Department proposes a number of reporting and disclosure requirements, which purportedly would “increase the transparency of student outcomes of GE programs so that ... information is disseminated to students, prospective students, and their families.” 79 Fed. Reg. at 16,488. The reporting requirements would require schools to report to the Department personally identifiable information regarding its students, including among other things a student’s social security number, enrollment date, attendance dates, enrollment status, completion or withdrawal dates, and amount of debt incurred known to the institution. Id. The “transparency framework” would also expand the amount of information about costs, earnings, debt, default rates, and completion rates that schools would be required to disclose, both on their websites and in promotional materials. 79 Fed. Reg. at 16,469, 16,479.

Additionally, under the current proposal, schools facing ineligibility must also provide written warnings to current and prospective students, informing them that they “may not be able to use” federal funding at the program because it has failed the Department’s debt metrics, and stating that the metrics were set by the Department “to help ensure that you are able to find gainful employment in a recognized occupation, and are not burdened by loan debt you may not be able to pay.” Id. at 16,511.

Finally, the Department would also require programs to certify, in the Program Participation Agreement (“PPA”) with the Department, that each of their gainful employment programs meets applicable institutional and program-level accreditation requirements and state or federal licensure standards. See 79 Fed. Reg. at 16,486.
II. The Proposed Rule Exceeds The Department’s Authority Under The Higher Education Act

A. The Proposed Rule Is Inconsistent With The Plain Meaning Of The Statutory Text

The HEA’s language does not allow for the Department’s claim that the phrase “prepare students for gainful employment in a recognized occupation” is shorthand for complex debt-related tests. See, e.g., 79 Fed. Reg. at 16,427; see also Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” (internal quotation omitted)). The ordinary meaning of “gainful employment,” both today and at the time the HEA was enacted, is a job that pays. See, e.g., 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A). It does not mean “a job that pays more than X,” or “a job that will permit a student to service loans in the amount of Y.” At the time the HEA was enacted, “gainful” was understood to mean “productive of gain,” or “providing an income <a [gainful] occupation>.” Webster’s Third New International Dictionary 928 (1965); see also The Shorter Oxford English Dictionary 768 (3d ed. 1964) (defining “gainful” as “[p]roductive of gain or profit,” or “[a] [gainful] (= paid) occupation”). More recent definitions do not reflect any change to that meaning. Shorter Oxford English Dictionary 1066 (6th ed. 2007) (defining “gainful” as “(of employment) paid, useful”); see also Black’s Law Dictionary 605 (9th ed. 2009) (defining “gainful employment” as “[w]ork that a person can pursue and perform for money”). Nothing in those definitions suggests that “gainful employment” contains notions of debt levels, discretionary income, an individual’s willingness or ability to repay debt, or complex formulas evaluating such factors. See Loving v. I.R.S., 742
F.3d 1013, 1016 (D.C. Cir. 2014) (considering dictionary definition of statutory terms to determine that the agency exceeded its authority in promulgating a rule).

The Department continues to ignore the phrase’s meaning. The proposed regulations require programs to do more than prepare students for gainful employment: by their terms, the proposed regulations attempt to measure whether students are able to “obtain and maintain jobs in the occupation for which the program purports to provide training.” 79 Fed. Reg. at 16,426 (emphases added). In other words, the regulations now make “gainful employment” not something to be “prepared for,” but a mandatory end. But Congress required programs to offer curricula that provide marketable skills, not guarantee successful employment outcomes measured relative to debt; nor did Congress preclude students from deciding to pursue less remunerative paths. The HEA does not make schools responsible for students who choose to pursue jobs in the nonprofit sector, for example, or who unexpectedly opt out of the labor force to raise children or care for aging family members.

Accepting the Department’s interpretation of the statute also would violate canons of statutory construction. First, “identical words used in different parts of the same act are intended to have the same meaning.” Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotation omitted). Congress has used the phrase “gainful employment” at least nine other times in Title 20 in a manner that is consistent with the term’s plain meaning—a job that pays—and inconsistent with the Department’s debt-focused regime. See 20 U.S.C. § 1036(e)(1)(B)(ii); id. § 1134c(a); id. § 1135c(d)(2); id. § 1140(1)(B); id. § 1140g(d)(3)(D); id. § 1161g(d)(5)(B); id. § 2008(a); id. § 4706(a); id. § 5605(a)(2)(B). Most notably, Congress repeatedly used the phrase to describe the type of employment that recipients of certain scholarships and fellowships may
not pursue. See id. § 1036(e)(1)(B)(ii); id. § 1134c(a); id. § 1135c(d)(2); id. § 1161g(d)(5)(B); id. § 2008(a); id. § 4706(a); id. § 5605(a)(2)(B). In each of these instances, Congress clearly meant generally to prohibit scholarship and fellowship recipients from engaging in paid employment at all—not employment that pays enough to satisfy certain debt tests. If Congress intended the phrase “gainful employment” to encompass anything resembling the complex debt tests the Department has invented, these provisions would make little sense.

Second, the Department’s expansive reading violates the principle that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). Under the proposed regulations, two schools in different states that offer identical programs and that place the same number of graduates into the same jobs, might not both satisfy the Department’s gainful employment tests. For example, if one program serves a greater percentage of low-income students who finance their education through borrowing, the tests likely will produce different outcomes; similarly, the tests will likely produce different outcomes if wage rates in the two states are different. These are absurd results.

In 2012, the district court concluded that the plain meaning of the statute did not “unambiguously foreclose” the Department’s interpretation of the phrase “prepare students for gainful employment.” APSCU I, 870 F. Supp. 2d at 146. The court observed that APSCU “rightly note[d] that [HEA] only requires that certain programs prepare students for gainful employment and not that they guarantee it,” but found sufficient ambiguity in the phrase to defer to the Department’s interpretation, which the court then concluded was reasonable. The district court seemed to rely on thin legislative history, including tangential testimony in a Senate report,
on which the Department now rests its statutory authority. See id. at 138-39 (quoting Senate report and testimony of Dr. Kenneth B. Hoyt); see also, e.g., 79 Fed. Reg. at 16,539. As discussed in Part II.B-C below, that legislative history cannot trump the plain meaning of the statute, and, in any event, does not support the Department. Of course, the district court’s dicta does not control whether Congress authorized the Department to engage in this rulemaking.¹¹

B. The Proposed Rule Is Inconsistent With The Overall Purpose And Structure Of The HEA

The Department’s interpretation of “gainful employment” is also inconsistent with the HEA’s structure and purpose. Loving, 742 F.3d at 1020 (rejecting an agency interpretation of a statute that “would effectively gut Congress’s carefully articulated existing system”). Congress is well aware of concerns associated with student debt and has enacted a detailed regulatory scheme to monitor and mitigate them while expanding access to higher education. Indeed, the Department has previously recognized that “[e]xisting Federal law attempts to meet” the regulations’ purported aims through “disclosure by institutions of information to . . . students on a range of issues including: cost of attendance, net price, graduation rates, and student financial aid.” 76 Fed. Reg. at 34,454 (citing provisions of the HEA) (emphasis added). The

¹¹ Although the district court in APSCU I concluded that the phrase “gainful employment” was sufficiently ambiguous to allow the Department to supply its own reasonable interpretation, that conclusion was not necessary to the holding, which invalidated the regulatory scheme on other grounds. Consequently, the district court’s discussion of the statutory authorization was dicta and does not control. See, e.g., Bobby v. Bies, 556 U.S. 825, 834 (2009); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1080 n.4 (D.C. Cir. 1987). Additionally, because the Department made a strategic choice not to appeal the adverse decision, there is no argument that the district court’s dicta in APSCU I could somehow control a future district court addressing the legality of these regulations.
Department’s evident dismissal of Congress’s “attempts” does not authorize it to second-guess Congress and impose a different approach.

The HEA specifies that institutions may not participate in specific Title IV programs if their students’ federal loan default rates exceed certain specified limits. See above Part I.A. Congress in 2008 altered these calculations to raise the threshold levels. See Higher Education Opportunity Act (“HEOA”), Pub. L. No. 110-315, 122 Stat. 3078 (2008). Notably, Congress did not amend the “gainful employment” requirements to include any similar debt considerations.

Despite Congress’s choice—recently ratified—to tie cohort default rates to institutional eligibility, the Department uses the “gainful employment” phrase to adopt debt regulations that second-guess Congress at every important step in the analysis. Most glaringly, the Department now proposes a program-level cohort default rate, which the Department pitches as similar to the institutional default rate established by Congress, but which serves a fundamentally different purpose and will operate in a fundamentally different way. The Department has improperly transformed the congressionally mandated institutional default rate.

Moreover, student debt concerns are not limited to one sector of higher education. Congress understood that, and enacted the cohort default regime to address debt at all institutions of higher education—including traditional four-year public universities. See, e.g., 20 U.S.C. § 1085(a). By proposing to impose the gainful employment regulations on only a subset of higher education programs, the Department has again second-guessed Congress’s choice.

The Department’s disagreement with Congress cannot authorize regulations that depart from the Congressional plan. If the Department believes that Congress’s chosen debt measurements are lacking, its remedy lies with Congress, not in abusing the phrase “gainful

By establishing institutional cohort default rates as its chosen debt metric, Congress demonstrated that it knows how to tie federal funding to debt considerations. It would make little sense for Congress to establish detailed student-debt-related provisions in the cohort default rate context and then grant the Department sweeping authority to establish conflicting rules. In light of Congress’s extensive regulation of student debt, to find the Department’s regulations plausible, the Court “would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.” Am. Bar Ass’n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005); see also Loving, 742 F.3d at 1021 (“The Supreme Court has stated that courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies.”); Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 468 (2001).

The proposed regulations also impermissibly undermine the central purpose of the HEA: “to assist in making available the benefits of postsecondary education to eligible students.” 20 U.S.C. § 1070(a). The proposed regulations shun that goal in favor of ensuring that programs prepare students for certain high-paying jobs. Congress, however, did not authorize the Department to funnel students into only high-paying jobs. Rather, Congress authorized the Department to ensure access to higher-education for all eligible students regardless of whether,
for example, they later elect to pursue a low-paying job with a nonprofit foundation or whether they decide that they are willing to bear a certain amount of debt to secure employment in another field. The regulations frustrate the policy Congress sought to implement and must be rejected. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

C. The Proposed Rule Is Also Inconsistent With The Department’s Prior Interpretations And With The Legislative History

Prior to promulgating the 2011 rule, the Department adopted a limited interpretation of “gainful employment,” consistent with its ordinary meaning, in administrative decisions and regulations. With the 2011 rule, the Department drastically changed its longstanding interpretation without a reasoned explanation. The Department now doubles down on this new, erroneous interpretation.

For example, in administrative proceedings interpreting the gainful employment requirement, the Department considered only whether the primary goal of a program was to prepare students for work; it did not consider student debt. See, e.g., *In re Acad. for Jewish Educ.*, No. 94-11-EA, 1994 WL 1026087, at *3 (Dep’t of Educ. Mar. 23, 1994) (requiring that the “statutorily intended goal or result of [a ‘gainful employment’] 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”).

The Department has also understood the phrase “gainful employment” to carry its ordinary, common sense meaning in regulations implementing another provision of the HEA. To meet a statutorily required placement rate, 20 U.S.C. § 1088(b)(2)(A)(ii), the Department’s regulations require that certain institutions “determine the number of students who, within 180
days of the day they received [a recognized educational credential], obtained gainful employment in the recognized occupation for which they were trained or in a related comparable recognized occupation.” 34 C.F.R. § 668.8(g)(1)(ii). As evidence that a graduate is gainfully employed, the Department accepts, among other things, a “written statement from the student’s employer,” “[s]igned copies of State or Federal income tax forms,” or “[w]ritten evidence of payments of Social Security taxes.” Id. § 668.8(g)(2). Tellingly, the Department does not require detailed data regarding students’ income, their loan debts, or their willingness or ability to repay their loans. The Department has not explained why it has given the phrase “gainful employment” different meanings in different sections of its own regulations.12

The Department’s longstanding and uniform interpretation of the gainful employment requirement also casts light on Congress’s intent. “It is well established that when Congress revisits a statute giving rise to a longstanding 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) (internal quotation omitted). Congress has amended the HEA numerous times and has never questioned the Department’s earlier, limited interpretation. In fact, in 2008, in the same legislation in which Congress altered the institutional cohort default calculations, it amended the definition of a proprietary institution of higher education to exempt institutions that offer certain programs “leading to a baccalaureate degree” from the gainful employment requirement. See HEOA § 102(d)(1), 122 Stat. at 3085-86. Yet

12 The Department’s failure to explain its departure from its longstanding interpretation also violates the APA. Dillmon v. Nat’l Transp. Safety Bd., 588 F.3d 1085, 1089-90 (D.C. Cir. 2009).
Congress did not alter the requirement that most proprietary institutions of higher education “prepare students for gainful employment.” If Congress believed the Department’s prior interpretation of “gainful employment” was too weak, the HEOA offered a relevant legislative mechanism to enact a different regime. Congress did not do so, suggesting that it meant the phrase to continue to carry its natural meaning of a job that pays. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-82 (1982).13

In the face of the Department’s consistent, historical interpretation of the phrase “gainful employment” as limited to its ordinary meaning, the Department justified its novel and expansive debt-related tests on the thinnest of reeds in the NPRM: the hearing testimony of two witnesses quoted in a Senate Report regarding the National Vocational Student Loan Insurance Act of 1965. See 79 Fed. Reg. at 16,441; see also S. Rep. No. 89-758, at 8, 11 (1965). The Department’s reliance on this legislative history is misplaced for at least two reasons. First, the National Vocational Student Loan Insurance Act of 1965 did not contain the phrase “gainful employment.” See Pub. L. No. 89-287, 79 Stat. 1037. Second, the Senate Report does not comment on the relevance of the specific testimony cited by the Department, which makes up only a few sentences within pages of quoted testimony; indeed, the testimony itself does not even purport to interpret the phrase “gainful employment.” The Department, like the district court (see APSCU I, 870 F. Supp. 2d at 139), gives unjustified weight to this Senate Report, which merely highlights the absence of relevant support for its strained interpretation.

13 The phrase “gainful employment” is not unique to the HEA and other agencies have defined the phrase consistent with its ordinary meaning. See, e.g., Treas. Reg. § 1.21-1(c)(1) (“Work as a volunteer or for a nominal consideration is not gainful employment.”).
The Department simultaneously ignores contrary congressional statements. For example, in the Higher Education Amendments of 1968, Pub. L. No. 90-575, § 293, 82 Stat. 1014, 1050-51, Congress explained that its use of the phrase “gainful employment” in another provision of the HEA was meant only to expand the definition of “institution of higher education” beyond business or technical schools. See S. Rep. No. 90-1387, at 79 (1968) (Congress “amend[ed] the definition of ‘institution of higher education’ so as to substitute for the phrase ‘business school or technical institution’ . . . the more inclusive phrase ‘any school which provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation.’”).

The legislative history of another “gainful employment” provision also confirms that Congress intended to give the phrase its ordinary meaning. In the Education Amendments Act of 1972, Congress amended the Vocational Education Act to provide that training for volunteer firemen constitutes training for gainful employment even though volunteer firemen are unpaid. See Pub. L. No. 92-318, § 202(b), 86 Stat. 235; see also S. Rep. No. 92-346, at 75 (1971). This history again confirms that Congress has consistently understood the phrase “gainful employment” to mean a job that pays, otherwise this amendment would not have been necessary.
III. The Proposed Rule Violates The Letter And Spirit Of The District Court’s Rulings In *APSCU*

As set forth below, the proposed regulation flies in the face of the district court’s decisions for three primary reasons.

A. Replacing The Baseless Loan Repayment Test With The Similarly Baseless Cohort Default Test Would Not Save the Regulations

The substitution of the loan repayment test with the cohort default test is arbitrary and illogical, and does not constitute reasoned decision-making. The district court struck down the entire gainful employment regulatory scheme because the loan repayment test lacked a reasoned basis. See above Part I.B.2. Among other things, the district court explained that the Department failed to base the loan repayment standard on expert studies or industry standards; indeed, the test “was not based upon any facts at all.” *APSCU I*, 870 F. Supp. 2d at 154. The court also explained that the Department’s intention of disqualifying an arbitrary percentage of programs—*i.e.*, the bottom quarter performing programs—was “not reasoned decision-making.” *Id.*

In its current proposal, the Department admits that its 2011 choice of a loan repayment threshold was groundless, because it was not based on any “expert studies or industry practice that would provide the kind of factual support for identifying a particular loan repayment rate as an appropriate threshold for determining whether a program prepares students for gainful employment.” 79 Fed. Reg. at 16,445. But despite the invalidation of the loan repayment test, the Department has simply replaced it with another equally baseless metric, without any reasoned explanation. The Department essentially claims that it is using the program cohort default rate because it is *different* from the loan repayment test: “To assess the repayment
performance of former students, we propose to use a different method than the loan repayment rate measure in the 2011 Prior Rule: the percentage of those students who default within a defined period, which we refer to as the program cohort default rate.” Id. The Department’s evasion of the district court’s holding does not constitute reasoned decisionmaking and calls into question the credibility of the justifications offered in defense of this proposal. Once again, the Department can point to no expert studies or industry practice to justify this rule.

It is also no comfort that this new metric is “modeled after the cohort default rate metric that is currently used to determine institutional eligibility.” Id. at 16,445. Indeed, the fact that Congress has specifically created an institutional cohort default measure, and not a program-level cohort default rate metric, militates against the Department adopting such a measure by regulatory fiat. See above Part I.A.

The introduction of this new metric clearly demonstrates that the Department is seeking an end-run around the APSCU I decision. The Department has simply grasped on to another baseless measure that will disqualify a certain number of programs. And instead of doing the difficult work of choosing a metric that is supported by reasoned decision-making, as the APA requires, the Department has simply plugged in the program cohort default rate metric, even though it has failed to establish why the cohort default rate is an appropriate measure, at the program-level, of whether a school prepares students for gainful employment.

B. The Department Has Arbitrarily Departed From Its Position That The Tests Must Work Together

In promulgating and defending the prior regulations, the Department repeatedly relied on the importance of the debt metrics working together, such that any potential errors in one test
would be mitigated because schools had to fail all the tests. The Department acknowledged that “there can be no single percentage that answers the question of how much students can borrow without risking repayment difficulties.” *APSCU*, No. 11-1314, ECF. No. 16, Dep’t Cross-Motion for Sum. J. at 20 (quoting AR004016) (alteration omitted); *see also* *APSCU*, No. 11-1314, ECF No. 20, Dep’t Reply, at 11 (acknowledging that “the Department has found no perfect single test” and that “the Department has no magic mirror through which it can identify programs that are not preparing their students for gainful employment”). Because a single test would not accurately and logically measure program performance, the Department relied on three different tests that the Department conceded were “designed to work together.” *Id.*, ECF No. 16, Dep’t Cross-Motion for Sum. J. at 20 (final emphasis added); *see also* Dep’t Reply at 12 (“[T]he repayment test is just one of three debt measures; a program that fails this test can remain eligible by passing one of the other two tests.”).

But now, the Department has done an about-face, allowing programs to lose eligibility after failing only one of the proposed debt metrics. What is worse, based on the Department’s own calculations, the “gainful employment” metrics are “negatively correlated,” meaning that failing one metric is correlated with passing the other. Thus, if an institution passes one metric, it is highly likely to fail the other metric. *See* Expert Report at Part VI.C. So while before it was important and necessary for the tests to work together—indeed, they were “designed” to work together and that design could mitigate the flaws in each individual test—now it is important for the tests to work independently, to fail more programs. That is unreasoned and illogical. *See*, *e.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982) (“[S]harp changes
of agency course constitute ‘danger signals’ to which a reviewing court must be alert.” (internal citations omitted)).

The Department provides no explanation for its drastic change in position. The closest the Department comes to providing an explanation is its statement that “each [test] focuses on separate and distinct expectations on which Congress relied in enacting legislation that make these programs eligible for title IV, HEA program funds based on the condition that they provide training that prepares students for gainful employment.” 79 Fed. Reg. at 16,442. But it is unclear what those congressional “expectations” are, and how they have changed so dramatically since the 2011 rule to alter a fundamental feature of the proposed regulations.

In a similar way, the Department provides no reason for its decision to make failing programs lose their eligibility “sooner than under the 2011 Prior Rule.” 79 Fed. Reg. at 16,439. It appears that the Department is simply denying eligibility to cut private sector schools out of federal aid programs. But, as the district court already held, this “is not reasoned decisionmaking.” APSCU I, 870 F. Supp. 2d at 154; see also APSCU II, 930 F. Supp. 2d at 212 n.1. The Department’s change of position is punitive.

If the Department insists on going forward with these new “gainful employment” regulations, the regulations should, at a minimum, be modified so that the metrics work together, i.e., passing one test is sufficient in any given year. The Department should also modify the proposed rule so that schools do not lose their eligibility “sooner” than under the previous rule. Although these changes would not make the regulations any more lawful, they would make them marginally fairer, less punitive, and less harmful to students and schools.
C. The Reporting Requirements Continue To Violate Section 1015c

Section 1015c generally prohibits the Department from “develop[ing], implement[ing], or maint[aining] . . . a Federal database of personally identifiable information,” unless that system “is necessary for the operation of programs” authorized by Title IV, or unless the system was in use by the Department prior to August 14, 2008. 20 U.S.C. § 1015c. As the district court explained, the previous reporting requirements violated Section 1015c because they unlawfully expanded the NSLDS to hold detailed information about every student enrolled in a gainful employment program. APSCU II, 930 F. Supp. 2d at 221. Now, the Department proposes a patch: schools need only report information regarding students who received Title IV funds. 79 Fed. Reg. at 16,471. But the proposed regulations do not fix the problem; rather, they continue to violate 20 U.S.C. § 1015c.

Under 20 U.S.C. § 1015c(b)(2), the reporting requirements must be part of an existing system that was in use prior to August 14, 2008. As the district court observed, an expansion of the data contained in an existing database may effectively create a new database in violation of Section 1015c. APSCU II, 930 F. Supp. 2d at 220-21. In APSCU II, the court suggested that the reporting requirements in the 2011 rule violated Section 1015c because they required the collection of information on students who had not received Title IV funding, whereas the NSLDS did not contain such information. Id. But that conclusion does not mean that any expansion of the NSLDS will survive under the statutory exception if it is limited to students who received Title IV funding.

Rather, the Department must establish anew how the personally identifiable data collected under the proposed rule does not also create a new database under Section 1015c. The
proposed regulations still require that schools report new, personally identifiable information—in particular, information regarding private loans taken out by students who may also receive Title IV funding. Such information is not currently included in the NSLDS, and its addition would constitute a drastic expansion of that database, along the lines discussed in APSCU II.

Accordingly, the reporting regulations are invalid under 20 U.S.C. § 1015c.

Additionally, the proposed reporting requirements cannot survive under 20 U.S.C. § 1015c(b)(1), which creates an exception for systems that are “necessary for the operation of [Title IV] programs.” The Department now claims that it intends the reporting requirements to operate completely independently from the gainful employment regulations. 79 Fed. Reg. 16,488 (discussing “severability” and making clear “that the regulations are designed to operate independently of each other”). Thus the Department cannot argue that it is “necessary” for the operation of a Title IV program to collect the information at issue. But if the reporting requirements are invalidated under Section 1015c—as they must be—then the Department will be unable calculate the proposed debt metrics. See 79 Fed. Reg. at 16,437. Consequently, invalidation of the reporting requirements under Section 1015c would require vacatur of the Department’s entire regulatory scheme, despite its contentions to the contrary.

IV. The Proposed Regulations Rest On Premises That Unfairly Target Private Sector Schools Based On Concerns That Are Not Unique To Them

Substantial evidence suggests that the proposed regulations target private sector schools in particular, contradicting the Department’s previous stance that the President’s goal of leading the world in percentage of college graduates 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). 14 The Department’s attempts to distinguish private sector schools from more traditional institutions are all flawed, and the disingenuous reasoning contained in the NPRM and the Department’s public comments underscores the bias inherent in the proposed rule. Given the evidence of discrimination against private sector schools, any rule issued in its current form will not benefit from a presumption of regularity. See Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 410 (1971) (there is no presumption of regularity when there has been a strong showing of bad faith or improper behavior).

A. The Department Intends The Gainful Employment Rules To Cut Private Sector Schools Out Of Participation In Title IV Programs

The Department’s bad faith is evident in its comments about private sector schools. In the midst of the negotiated rulemaking sessions, the President’s Special Assistant for Education publicly stated that the Administration “believe[s] [it] need[s] to cut [for-profits] out . . . of federal aid,” and explained that this was “the whole premise behind [the] [gainful] employment regulation[s].” See Roberto J. Rodriguez, Conference on Student Loans-Opening Plenary Session (Oct. 24, 2013). 15 That the Department continuously barred APSCU’s nominees from participating in the negotiated rulemaking sessions, further suggests that the Department was

14 There is no dispute that the proposal overwhelmingly affects private sector schools. Indeed, the Department estimates 2,274 programs at private sector schools would either fail the metrics or be in the “zone.” 79 Fed. Reg. at 16,493. This number is about 50 times the number of programs at private non-profit institutions that would fail or be in the zone (46) and more than 36 times the number of programs at public institutions that would fail or be in the zone (62). Id. These unequal effects, however, do not reflect meaningful differences between private sector and public institutions, but rather that many public education programs would not be covered by the regulations.

never serious about fulfilling its obligations under the HEA and the APA to engage in a fair process. See above Part I.C.1.

Language in the NPRM itself also evidences this intent to foreclose private sector schools’ access to Title IV funding. Indeed, the proposal criticizes private sector schools for a host of reasons unrelated to whether these schools prepare students for a job that pays.

First, the NPRM states that private sector schools “typically charge higher tuitions than do public postsecondary institutions” and, therefore, students “accumulate far greater debt than students at public institutions,” which is unloaded on taxpayers. 79 Fed. Reg. at 16,434; id. at 16,441. This has nothing to do with whether graduates of private sector schools are prepared for gainful employment, and it is based on the erroneous premise that private sector schools cost taxpayers more than their public sector counterparts.

The Department fails to take into account that private sector institutions consume far fewer taxpayer dollars than their public and non-profit counterparts. The economic consulting firm Charles River Associates determined that, under a conservative model comparing only direct costs to taxpayers, “for-profit 2-year institutions produce graduates at a cost to taxpayers that is $25,546 lower on a per student basis than the public 2-year institutions.” Bradford Cornell & Simon M. Cheng, Charles River Assoc. for the Coalition for Educ. Success, An Analysis of Taxpayer Funding Provided for Post-Secondary Education: For-profit and Not-for-profit Institutions 2 (Sept. 8, 2010) (emphasis added).16

Unlike private sector schools, public institutions benefit from large, hidden state subsidies. See Bob Kerrey and Jeffrey T. Leeds, A Federal Anti-Education Plan, Wall Street J.  

Community colleges and public universities have the benefit of receiving funding directly from state and local governments—usually in the form of grants and not as loans to be repaid. See Expert Report at Part IX. This taxpayer-funded subsidy permits community colleges and public universities to purport to charge students a “lower” tuition than private sector schools. See id. Additionally, there are many “hidden” subsidies for public and non-profit schools, such as lost revenues from tax-exempt public institutions. When these “hidden” subsidies are factored in, the taxpayer savings associated with private sector education are even more pronounced. See Robert Lytle, Roger Brinner & Chris Ross, Parthenon Perspectives on Private-sector Post-secondary Schools: Do They Deliver Value to Students & Society? at 11 (Mar. 12, 2010) (showing significantly higher taxpayer funding per positive outcome at public institutions compared to private sector schools).

Moreover, the federal government’s handling of student debt reveals that there is no cost to taxpayers. The Government Accountability Office (“GAO”) released a report on February 1, 2014, which estimates that federal student loans originated between 2007 and 2012 will bring in $66 billion in revenue to the U.S. Treasury. The report follows projections released last spring and summer by the Congressional Budget Office estimating that the federal government will receive an additional $185 billion in profits on new student loans made over the next ten years. Consistent with recent years, the proposed budget for fiscal year 2015 projects a more than 100

18 http://www.cci.edu/multimedia/market/Parthenon_Study_Private_Sector_Career_Education.pdf.
percent recovery rate for federally guaranteed higher education loans. Office of Management and Budget, *U.S. Government Budget FY 2015, Federal Credit Supplement*, tbl. 5.\(^{19}\)

In addition, any putative savings to Title IV under the regulatory proposal will be offset by lost tax revenues at all levels of government and increased demands on state and federal treasuries from public sector schools struggling to build sufficient capacity to handle the flood of students from the private sector. One recent study estimated that it will cost four states alone nearly $8.4 billion to educate the students currently educated at private sector schools. See Jorge Klor de Alva & Mark Schneider, Nexus Research & Policy Center, *Do Proprietary Institutions of Higher Education Generate Savings for States?* (2014).\(^{20}\) Purportedly protecting taxpayer resources by risking greater expenditure of taxpayer resources—and shifting taxpayer outlays from repayable loans to nonrepayable grants—is illogical and provides no basis for this drastic regulatory proposal.

In short, whatever the difference in magnitude between student loan debt at private sector schools and other types of schools, the Department failed to calculate, and failed to consider, these costs. After accounting for overlooked cost factors, the proposal’s taxpayer protection rationale simply does not withstand scrutiny.

*Second*, the NPRM states that the “[l]ower rates of completion in many four-year [private sector] institutions are also a cause for concern.” 79 Fed. Reg. at 16,434. But this concern, too, has nothing to do with whether a private sector school offers programs that prepare students for


gainful employment. Indeed, the Department cannot explain why it is reasonable to evaluate whether a program prepares students for gainful employment based on students who have chosen not to see the program through to completion.

Moreover, this concern is only unique to private sector schools insofar as private sector schools serve many “at-risk” students that other schools are either unwilling or unable to serve. It is beyond dispute that many “at-risk” students at private sector schools tend to be older students who have full-time jobs, dependents to care for, and other responsibilities that require them to make education a secondary goal. See Watson Scott Swail, Imagine America Foundation, *Graduating At Risk Students: A Cross-Sector Analysis* 14 (2009).21 To be sure, educating these “new traditional” students has its challenges as, on average, they are less likely to complete the program’s requirements. *Id.* But this would be true whether the same student attended a private sector school or a public sector school. See Expert Report at Part IV.B. Again, it has nothing to do with whether a program “prepares students for gainful employment in a recognized occupation.”

In any event, this justification is not well supported. In fact, many studies show that private sector students who attend a two-year institution graduate at much higher rates than students who attend two-year public institutions. The National Center for Education Statistics (“NCES”), a division of the Department of Education, reports graduation rates of 21 percent for students attending a public two-year institution compared to a rate of 63 percent for students attending a private sector two-year institution. See NCES, *Enrollment in Postsecondary Institutions, Fall 2012; Financial Statistics, Fiscal Year 2012; Graduation Rates, Selected*

Cohorts, 2004-09; and Employees in Postsecondary Institutions, Fall, 2012 (Dec. 2013);22 Robert J. Shapiro & Nam D. Pham, Sonecon, Taxpayers’ Costs to Support Higher Education: A Comparison of Public, Private Not-for-Profit, and Private For-Profit Institutions 19 (2010) (showing substantially higher graduation rates at two-year and less-than-two year private sector schools compared to public schools).23

Third, the Department notes that private sector schools engage in “aggressive sales practices.” 79 Fed. Reg. at 16,538. Setting aside that the Department lacks a credible basis for this contention, this again is entirely unrelated to whether students will graduate and ultimately be successful in the working world.24 Moreover, Congress has already addressed this concern in other ways, including by banning institutions from providing certain incentive payments based on success in securing enrollments. See 20 USC §1094(a)(20).

Fourth, the proposal’s claim that there have been “numerous investigations brought by . . . Federal and State oversight agencies” against private sector schools related to “deceptive marketing and recruiting practices” is proof of nothing. 79 Fed. Reg. at 16,434-35. Many of these investigations are politically driven, or based on bad-faith attacks, and fail to produce any evidence of wrongdoing.25 In any event, a school’s marketing practices have nothing to do with whether it provides programs that prepare students for a job that pays. And, if anything, this fact

24 See below Part IV.B for an explanation of why the sources that the Department relies upon for its mischaracterizations of schools’ promotional efforts—including oftentimes baseless allegations in qui tam lawsuits—are unreliable.
25 See note 24.
actually highlights that private sector schools are already subject to sufficient oversight by States and other entities such as accreditation agencies, the panoply of regulatory requirements and enforcement mechanisms maintained by the Department, and fraud and consumer protection provisions under state and federal law.

**B. The Sources Upon Which The Department Relies Cast Doubt On Its Impartiality**

Worse yet, the Department reveals the sweeping extent of its bias by basing its contentions regarding private sector schools almost entirely on three notoriously flawed sources. *First*, throughout the NPRM, the Department relies on unsubstantiated allegations in *qui tam* lawsuits to assail private sector schools (see, e.g., 79 Fed. Reg. at 16,426, 16,434, 16,538), but fails to mention that the vast majority of these lawsuits are dismissed at the pleading stage. Indeed, courts have awarded attorneys’ fees to private sector schools, finding that underlying *qui tam* claims were “clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.” See, e.g., *U.S. ex rel. Lee v. Corinthian Colls.*, No. 2:07-cv-01984-PSG-MAN, ECF No. 277 (C.D. Cal. June 6, 2013). In any case, *qui tam* lawsuits often reflect nothing more than a speculative gamble by the professional plaintiffs’ bar.

*Second*, the Department places undue weight on an error-riddled GAO report. See 79 Fed. Reg. at 16,538. The proposal fails to mention that the GAO was forced to “reissue” this report with corrections, which undermine the allegations against private sector schools. *See* Ltr. from the Hon. Michael Enzi to the Hon. Gene Dodaro, at 1-2 (Dec. 7, 2010). The proposal

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26 The “reissuance” of GAO testimony is itself noteworthy. A search of the GAO website for other instances of “reissued” GAO testimony found *none* over the last five years, during which time GAO testified more than 1,400 times.
also fails to mention that the GAO demoted the person behind the report and reorganized its investigative unit to “ensure greater attention to the issues that led to the need to produce the errata to the for-profit schools report.” GAO Employees Internal Memorandum 1 (Mar. 1, 2011).

Third, the Department relies on a deeply flawed, partisan document that it misleadingly labels as a report of the Senate Committee on Health, Education, Labor and Pensions (“HELP”), even though the Committee never voted on it. See 79 Fed. Reg. at 16,434-35, 16,537-38. The Committee majority released that document at the end of a biased investigation, in which it: (1) headlined a Committee hearing with a key witness who was actually a short seller with undisclosed financial interests in the failure of private sector schools27; (2) heavily relied on the flawed GAO report; (3) misused and misrepresented information produced to the Committee, selectively releasing confidential documents and misconstruing data to reach inaccurate and unsupported results; and (4) failed to follow well-established procedures, resulting in the Committee minority’s boycott of a hearing and issuance of a signed letter of protest. See Ltr. from the Hon. Michael Enzi et al., to the Hon. Tom Harkin (Apr. 13, 2011). Moreover, the Committee majority’s exclusive focus on private sector schools—despite the fact that many of the policy issues the Committee allegedly sought to address applied to all educational sectors—prompted at least one Senator to note, “that’s really what this [investigation] is all about—[l]et’s get the for profits.” Senate HELP Comm., The Federal Investment in For-Profit Education: Are

27 In fact, a federal investigation has uncovered records that show extensive inappropriate contact between Department officials and the short-seller who testified before the Committee. See Brody Mullins, Former Education Official Faces Federal Investigation, Wall Street J. (May 16, 2013), http://online.wsj.com/news/articles/SB10001424127887323398204578485411420518702.
Students Succeeding?, CQ Trans., at 28 (Sept. 30, 2010) (emphasis added). In short, the Department appears to base many of its conclusions about private sector schools on a document that also irrationally—and obviously—discriminated against private sector schools.

C. The Department’s False Dropout Statistic Also Reveals Its Bias

The Department’s press release in support of the NPRM—“Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges” (Mar. 14, 2014)—also highlights the Department’s bias against private sector schools. Its main contention is that 72 percent of private sector programs have graduates making less than high school dropouts. See id.; see also Cameron Brenchley, Protecting Americans from Predatory and Poor-Performing Career Training Programs, Home Room: The Official Blog of the U.S. Dep’t of Educ. (repeating this point); Fact: Too many career-training programs lead to low wages, high debt, Home Room: The Official Blog of the U.S. Dep’t of Educ. (same).

According to The Washington Post’s Fact Checker, this statistic is “bogus.” See Glenn Kessler, “Do 72 percent of for-profit programs have graduates making less than high school dropouts?”, The Fact Checker, Wash. Post (Apr. 11, 2014). Indeed, even the most cursory glance at the methodology the Department used to reach this conclusion reveals that it is bunk.

31 http://www.washingtonpost.com/blogs/fact-checker/wp/2014/04/11/the-obama-administrations-claim-that-72-percent-of-for-profits-programs-have-graduates-making-less-than-high-school-dropouts/.
The Department explains that it came to this conclusion after considering Bureau of Labor Statistics (‘BLS’) weekly wage data for high school dropouts—no matter how long ago they left school—multiplied by 52 weeks. 79 Fed. Reg. at 16,535 n.76. The Department then considered the earnings of private sector school graduates in a totally different way, by analyzing the earnings of students in a percentage of programs during a certain cohort period, without regard to the size of the program. Id. at n.77. Worse, the Department plucked this earnings data from the SSA—not the BLS—which, unlike BLS data, includes people who are not working and would bring the average wage down for programs. Id.

Unsurprisingly, experts have resoundingly criticized this method and conclusion. See Feds Accused of Using Sloppy Factoid on For-Profits, Inside Higher Educ. (Apr. 14, 2014).32 Indeed, Department of Labor officials have denounced the Department’s methodology as incorrect, explaining that it “wouldn’t report it that way.” See The Fact Checker, Wash. Post. In fact, a different Department of Labor measure—using information from employers—puts the median annual wage for high school dropouts with no training at a much lower number. See Bureau of Labor Statistics, Employment by education by on-the-job training category, 2012 and projected 2022.33 But astoundingly, so does another arm of the Department itself. See NCES, Digest of Education Statistics, Median annual earnings of full-time year-round workers 25 to 34 years old, by sex, race/ethnicity, and educational attainment: Selected years, 1995 through

Indeed, the Expert Report found that only 2% of graduates of “gainful employment” programs had average earnings lower than a high school dropout’s earnings. See Expert Report at Part III.C. Moreover, the Department completely ignores expert studies, which calculate that there is a positive rate of return per year of education from attending a private sector school, especially for students from low income families. See, e.g., Stephanie Riegg Cellini & Latika Chaudhary, George Washington University, The Labor Market Returns to a For-Profit College Education (Oct. 2013).

In the wake of this criticism, Department officials have admitted that their comparison of private sector graduates to high school dropouts is based on a comparison of “apples and oranges.” See Kessler, Wash. Post. The Department has since published a blog post—which continues to obfuscate and mislead the public—but does nothing to correct the made-up 72 percent figure. The Department admits that “[t]here likely is an earnings gain in the vast majority of the programs that we evaluated.” See Fact: Too Many Career-Training Programs Lead to Low Wages, High Debt, The Home Room Blog. The point is not that the arithmetic might be complicated, but that the Department unjustifiably sought out and published an inflammatory and unsupported comparison to target private sector schools in particular.

D. The Consequences That Would Flow From Application Of The Department’s Proposed Metrics To “Traditional” Schools Also Demonstrate The Department’s Bias

Application of the Department’s proposed metrics to more “traditional” schools demonstrates that its obsession with private sector schools is unjustified. According to a recent study by the Department itself, more than 26% of graduates from four-year public colleges and 39% of graduates of private four-year colleges are not “gainfully employed” under the proposed metrics. See Jennie H. Woo, U.S. Dep’t of Educ., Degrees of Debt: Student Borrowing and Loan Repayment of Bachelor’s Degree Recipients 1994, 2001, and 2009 (2014). Indeed, this study shows that 39% of private non-profit institutions exceeded a 12 percent—let alone an 8 percent—debt-to-income threshold compared to 35% at for-profit institutions. See id. Analyzing data for 520 programs at public universities in Texas, the American Enterprise Institute for Public Policy Research found that 25% percent of public bachelor’s programs in Texas would be at risk if the proposed standards were applied to those programs. See Mark Schneider, Are Graduates from Public Universities Gainfully Employed? Analyzing Student Loan Debt and Gainful Employment (May 14, 2014); see also Steve Gunderson, Building Walls to the Middle Class, Inside Higher Educ. (Mar. 17, 2014) (observing that under earlier version of proposed rule, several programs at even the most highly-regarded institutions in the United States would fail the proposed metrics, including a bachelor’s degree in journalism from Northwestern University, a law degree from George Washington University Law School, and a bachelor’s

degree in social work from Virginia Commonwealth University). Yet, the Department is not prepared to say that these programs do not prepare students for gainful employment, and proposes to target only private sector schools and the new traditional students that they serve.

The Department also ignores well-substantiated studies that show that the student outcomes at private sector schools are almost identical to the student outcomes at comparable traditional schools, **even though** private sector schools serve a high proportion of at-risk students. A recent Harvard study, for example, found that for-profit schools have a higher retention rate during students’ first year than comparable public and non-profit schools (and according to the study, first-year retention correlates with a higher probability of obtaining a degree). David J. Denning, Claudia Goldin, & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. of Econ. Perspectives 139, 158 (Winter 2012). Similarly, a recent GAO report found that “for-profit school students had higher graduation rates for certificate programs” and “similar graduation rates for associate’s degree programs,” compared to public and non-profit schools. GAO Report, *Postsecondary Education: Student Outcomes Vary at For-Profit, Nonprofit, and Public Schools*, GAO-12-143, at 63 (Dec. 2011). A study conducted by the Parthenon Group also highlights the positive educational and financial outcomes for students of private sector schools. See Lytle, Brinner & Ross, above. For example, five years from their initial enrollment at a two-year or less institution, 65% of students at private sector schools had obtained a degree, compared to 44% at public institutions. *Id.* at 9.

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After graduating, these students earn 50% more than their pre-enrollment income. Id. at 13 (noting that public school students earn 30% more than their pre-enrollment income).

The Department has yet to explain why it is reasonable to use the “gainful employment” language in the HEA to punish private sector schools for perceived student-debt issues that are not unique to them. Indeed, the Department’s choice to target private sector schools in this way has led many in government to denounce the proposed rule as discriminatory. See, e.g., Senator Roger Wicker, “Gainful Employment” Rule Discriminates Vocational Schools, Community Colleges (May 6, 2014)\(^{41}\); Education & The Workforce Committee, Members Denounce New Gainful Employment Regulation (Mar. 14, 2014)\(^{42}\); see also Janet Napolitano Ltr. to Sec. Duncan, et al. (May 13, 2014) (explaining that the Department should abandon the gainful employment proposed rule and adopt a measure that will apply to “all participating institutions, including public and private universities, and for-profit and non-profit colleges”). There is also no reason why the Department should not at least apply its “transparency” regulations—which do not even purport to evaluate whether programs prepare students for gainful employment—to all schools. After all, the proposal envisions that each regulation would not be dependent on the other. See 29 Fed. Reg. at 16,488.

In light of these serious concerns regarding the proposed rules’ motivations, the Department should abandon its proposal. At a bare minimum, and if contrary to all available evidence, the Department believes that the debt metrics are a strong indicator of program quality,


it should assess how all programs—not just private sector programs—perform on those metrics. Moving forward with the rules as they currently stand would only confirm that these rules are a not-too-subtle attempt to “discriminat[e] against private sector colleges and universities,” which is both “wrong and unfair.” The State of American Business 2014, Remarks by Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce (Jan. 8, 2014).43

V. The Proposed Regulations Are Arbitrary And Capricious And Therefore Would Violate The Administrative Procedure Act

Regulations that are not compelled by the statutory text must be reasonable to withstand scrutiny under the APA. The Department has flouted its obligations under the APA. Even if the “gainful employment” language could be construed to support debt metrics, the Department’s tests are faulty and do not properly measure program quality in a meaningful way. The assumptions behind the proposed rules are also flawed, and the Department unlawfully failed to account for many of the proposal’s effects.

A. The Metrics Defining Gainful Employment Lack Any Reasoned Basis

As the district court held, the Department is not permitted to select tests that are lacking in a reasoned basis. See APSCU I, 870 F. Supp. 2d at 154. An agency’s choice of methodology must be found arbitrary and capricious if the agency relied on factors that Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Friends of the Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 822 (8th Cir.

Moreover, an agency cannot adopt “inconsistent positions without presenting ‘some reasoned analysis.’” Huntington Hosp. v. Thompson, 319 F.3d 74, 79 (2d Cir. 2003); EPA v. EME Homer City L.P. Generation, No. 12-1182, slip op. 17 (U.S. Apr. 29, 2014) (an agency “retain[s] discretion to alter its course provided it g[i]ve[s] a reasonable explanation”).

The Department’s proposed metrics run afoul of these APA requirements in several ways. Just like the loan repayment test that the district court held was arbitrary, the program cohort default rate metric selects arbitrary percentages and is based on non-representative data. It also impermissibly second-guesses Congress’s choice to tie Title IV eligibility to cohort default rates at the institutional level, rather than at the program level. Similar to the previous debt-to-income tests, the proposed debt-to-income tests also select arbitrary percentages, rely on incomplete income data, and fail to consider long-term educational benefits. See City of Dallas v. Hall, 562 F.3d 712, 720 (5th Cir. 2009) (“Properly analyzing the risks of an action requires an agency to use updated information or data; reliance on out-of-date or incomplete information may render the analysis of effects speculative and uncertain.”). Although the district court suggested that the Department’s previous debt-to-income tests would survive APA scrutiny, the Department now proposes a far more arbitrary measure with stricter thresholds. See 70 Fed. Reg. at 16,444. In addition, neither test adequately accounts for factors outside the control of schools, such as the impact of macroeconomic conditions and student life choices.

1. The Department Arbitrarily Constructed The Program Cohort Default Rate Metric

The Department does not attempt to resuscitate the vacated loan repayment rate metric, and for good reason. The district court specifically held that the loan repayment metric was “not
based upon any facts at all,” explaining that, “[n]o expert study or industry standard suggested that the rate selected by the Department would appropriately measure whether a particular program adequately prepared its students.” *APSCU I*, 870 F. Supp. 2d at 154. Now, the Department expressly admits that it cannot re-propose a loan repayment metric because it “found no expert studies or industry practice that would provide the kind of factual support for identifying a particular loan repayment rate as an appropriate threshold for determining whether a program prepares students for gainful employment, nor has it found alternative support or arguments in support of a threshold.” 79 Fed. Reg. at 16,445. The Department instead proposes to substitute a program cohort default rate that is just as arbitrary—if not more so—than the Department’s vacated loan repayment rate metric.

a. Congress’s decision to measure cohort default does not support the Department’s choice

The Department advances “no expert studies or industry practice” to support setting its proposed threshold “for determining whether a program prepares students for gainful employment.” 79 Fed. Reg. at 16,445. Rather, the Department suggests that it need not rely on such sources to justify its program cohort default rate metric because its proposal finds support in Congress’s decision to tie very different cohort default rates to Title IV eligibility. *See id.* This rationale is fundamentally flawed for three reasons.

*First,* even if Congress intended a high cohort default rate to evidence a poor quality education—and it did not—the Department provides no reason to second-guess Congress’s other choices with respect to this measure. Specifically, Congress uses this measure to consider institutional—and not programmatic—default rates. It also applies this measure to *all schools*—
not just programs subject to the “gainful employment” phrase. The Department ignores the latter difference and brushes aside the former when it conclusorily pronounces that “every institution is the sum of its programs.” 79 Fed. Reg. at 16,445.

Indeed, if the Department was simply mimicking what Congress intended, it could have proposed a metric that actually mirrored what Congress takes into account—institutional cohort default rates at all schools. But the Department preemptively refuses to do so, explaining that it believes this is “not a useful measure in determining whether a program prepares students for gainful employment in a recognized occupation.” 79 Fed. Reg. at 16,446 (emphasis added). In other words, the Department admits that its only justification for the cohort default rate metric is that Congress uses a different measure that includes the word “default,” yet it also admits that Congress’s measure does not actually evaluate program quality. In short, the Department concedes that it has no justification for its cohort default rate metric.

Second, the Department provides no coherent justification for its proposed 30 percent cohort default threshold rate. Rather, it simply states that Congress’s choice to set the institutional cohort default level at 30 percent or greater is “compelling support for use of the identical standard to assess the eligibility of a GE program,” because that level “reflects Congress’s experiences and careful deliberation over the years.” 79 Fed. Reg. at 16,445-46 (emphasis added). Tellingly, the Department never considers the most important aspect of the problem: why did Congress set an institution’s cohort default level at 30 percent and what experiences and deliberations factored into this decision?

If the Department had considered those questions, it would have found that Congress did not choose the 30 percent level because it believed that institutions with greater default levels
were not preparing their students adequately. Rather, Congress raised the disqualifying cohort default rate from a lower threshold to 30 percent for reasons that had nothing to do with evaluating program quality. Although Congress believed that an institutional cohort default measure was an important way to protect the federal fiscal interest, it also recognized that a lower cohort default rate could lead to some “unintended consequences.” 154 Cong. Rec. H7658-03, H7666, 2008 WL 2938196 (July 31, 2008). Specifically, Congress worried that, if the rate was too low, “for-profit schools would . . . sto[p] seeking minority, low-income students, or any subgroup that shows any risk of more defaults of student loans,” which would harm its ultimate goal of “serving higher-need, less historically graduating percentages.” Id. Congress intended to encourage—and not “punish”—“the colleges that reach out.” Id. (emphasis added). In light of this clear congressional intent, the Department has no justification for its 30 percent threshold—which is expressly designed to be punitive.

Third, Congress has never suggested that it is appropriate to use cohort default rates—programmatic or institutional—as a means to evaluate whether programs prepare students for gainful employment. As previously noted, the institutional cohort default rate is not the only statutory requirement intended to protect the federal fisc. Congress also requires schools to provide students with loan counseling, to take steps to promote repayment among delinquent borrowers, and, in certain times, to implement a default management plan. See above Part I.A. It would be absurd to posit that an institution that does not provide loan counseling or that does not implement a default management plan categorically cannot prepare students for gainful employment. Yet, the Department makes this same logical leap when it suggests that programs
with a certain percentage of students who default on their loans within a defined period also do not prepare students for gainful employment.

b. The cohort default rate formulas are also flawed

The cohort default rate formulas are also flawed. For example, the cohort default rate metric includes all students who have attended the program—not just those who have graduated from the program—yet the debt-to-income metric includes only graduates of the program. The proposal justifies taking into account the debt of non-completers to incentivize schools to “address any high dropout and ‘churn’ issues or face the loss of eligibility” (79 Fed. Reg. at 16,541), but these so-called “churn issues” are not necessarily related to whether programs provide a quality education and instead may reflect student life choices. See below Part V.B.2.

2. The Department Arbitrarily Constructed The Debt-to-Income Metrics

The Department has also arbitrarily constructed the debt-to-income metrics. First, the proposal’s passing thresholds of eight percent of annual earnings and 20 percent of discretionary earnings are arbitrary and not adequately explained. Second, the Department has not provided a sufficient justification for its “zone” proposal. Third, the formula used to calculate the debt-to-income metrics is defective for numerous reasons. The Department should also clarify how it plans to consider the debt of students who have deferred payment on their loans through congressionally-sanctioned debtor-relief programs.

a. The Department’s proposed thresholds are unreasonable

Both the eight percent and the 20 percent thresholds are flawed. Indeed, the Department admits that the eight percent earnings threshold is not derived from student loan underwriting criteria, but is instead based on “mortgage underwriting criteria.” 79 Fed. Reg. at 16,638. The
Department omits that Sandy Baum and Saul Schwartz—experts relied upon by the Department as authorities for its metric thresholds—have already stated that the eight percent threshold should not necessarily be applied to higher education loans. See Sandy Baum & Saul Schwartz, Project on Student Debt and the College Board, How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt 5-7 (2005). As they have explained, the eight percent threshold reflects a lender’s standard of borrowing, is completely unrelated to borrowers’ credit scores or their economic situations, reflects a standard for potential homeowners rather than for recent college graduates who generally have a greater ability and willingness to maintain higher debt loads, and does not account for borrowers’ potential for higher future income. Id.; see also Expert Report at Part VI.A. Significantly, this point was raised during the last rulemaking; the Department continues to ignore it.

The Department also proposes decreasing the passing discretionary income rate from its previous rules—30 percent—to 20 percent, but it provides no real justification for doing so. Rather, it merely states that “[u]pon further consideration of this issue and analysis of the GE Data, we believe that the stated objectives of the 2011 Prior Rule to identify the worst performing programs and build a ‘tolerance’ into the thresholds are better achieved by” using a stricter threshold and by creating a “zone” for certain programs. 79 Fed. Reg. at 16,638. The Department contradicts itself only pages later, when it admits that programs with debt-to-earnings rates exceeding the 20 percent threshold are “not among the very worst performers.” Id. at 16,444 (emphasis added). These confusing and arbitrary justifications are inconsistent with reasoned decisionmaking.

b. The Department’s proposed zone is also arbitrary

Although the Department claims the “zone” will give programs the opportunity to improve, it never explains how programs can do this without reducing tuition and fees: the Department states, “[b]ecause institutions have the ability to impact the debt that their students accumulate by lowering tuition and fees, which the transitional D/E rates calculations would take into account, we believe it is possible for zone programs to improve.” 79 Fed. Reg. at 16,444. But forcing schools to lower costs is not a legitimate justification. As explained in Part I.A, above, Congress never intended the Department to have the power to implement de facto price controls on schools. And as explained in Part V.C.1, below, the Department’s efforts to impose these unauthorized price controls would create perverse incentives.

Moreover, the Department’s claim that the proposed rule would permit programs in the zone to improve is misleading. As explained by Mark Kantrowitz, Senior Vice President and Publisher for Edvisors, “programs in the zone will inevitably lose eligibility for federal student aid because of the retroactive nature of the rule, making the zone tantamount to failure.” Mark Kantrowitz, *U.S. Department of Education Proposes Stricter Gainful Employment Rule*, at 1 (Apr. 28, 2014).45

c. The Department’s proposed formulas are unreasonable

The formulas that the Department proposes to measure student earnings are deficient in at least three major ways. *First*, the use of SSA data raises a host of Due Process, privacy, and data integrity concerns. The Department has not, for example, explained how it will receive or

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protect this data. In addition, the use of SSA data is inappropriate because it undercounts student income for several reasons. SSA data excludes individuals’ deductions for costs such as medical care, child care, and other elective deductions. Moreover, data for self-employed individuals is the net income reflected on Schedule C of their federal income tax returns, and thus does not reflect income spent on deductible items like insurance and business travel. Additionally, some self-employed individuals underreport their income, especially if they work in a cash-and-tip-based industry.

Second, the formula is also defective because it measures student income following their initial years after graduation and ignores “out” years when their incomes may increase dramatically. Higher education is a lifelong investment with benefits that are typically not fully (or even significantly) realized within the first few years after graduation. See Sandy Baum, Urban Institute, *Higher Education Earnings Premium, Value, Variation, and Trends* (Feb. 2014) (earnings premiums for bachelor and associate degrees grow with the passage of time)46; see Expert Report at Part II.B. The Department ignores this reality and demands immediate returns.

Third, the proposal to evaluate student debt on the basis of a 10-year repayment schedule for associate degrees and a 15-year schedule for bachelor degrees is unjustified. The Department explains that most borrowers are on a standard 10-year payment plan (79 Fed. Reg. at 16,452), but it expressly concedes that most graduates never stick to that plan. The Department evaluated students who had entered into repayment between 1993 and 2003 and found that, within 10 years of entering into repayment, only 58 percent of undergraduates at two-year institutions and 54

percent of undergraduates at four-year institutions had fully repaid their loans. *Id.* The Department also found that, within 15 years of entering into repayment, about 74 percent of undergraduates at two-year institutions and 76 percent of undergraduates at four-year institutions had fully repaid their loans. *Id.* In recent years, borrowers have had an even tougher time paying off loans within 10 years; of borrowers who entered into repayment in 2002, 55 percent of undergraduates at two-year institutions and 44 percent of undergraduates at four-year institutions repaid their loans within 10 years. *Id.* The Department used these findings to justify evaluating student debt on the basis of a 20-year repayment schedule for *graduate* degrees, but its findings support utilizing the 20-year repayment schedule as the baseline for evaluating *associate’s* degrees. *See* Expert Report at Part VI.A.2.

d. **The Department should clarify how it considers the debt of students who have used congressionally-sanctioned programs to manage their debt**

The Department also states that it would consider the debt-to-income ratio of students in most congressionally-created programs aimed at offering borrowers relief from debt, including forbearance, deferment, and income-based repayment plans (“IBR plans”), but it does not explain how it will take this into account. *See* 79 Fed. Reg. at 16,443 (explaining that, although the program cohort default measure does not take into account students receiving economic hardship deferments, the debt-to-income measure “would take into account those students who are struggling with their debt burden”). The Department must clarify how it will calculate the debt of the students with deferred debt and students in IBR plans.

If the Department decides to proceed with this unlawful rule, at the very least it should calculate the debt of the students with deferred debt as zero and the debt of students in IBR plans
against a longer amortization period. The Department does not include in its calculations loans that are in deferment because the student is in the military, reasoning that “the reasons for which [the] ... loans are in deferment ... are not related to whether a program prepares students for gainful employment.” 79 Fed. Reg. at 16,454. The same is true with respect to other types of non-military related forbearances, which can be granted by lenders for any number of reasons. For example, students may utilize deferment entitlements or an IBR plan while pursuing an unpaid internship that may be the ticket to receiving a job in that industry. Students may also use an IBR plan to accept a socially-valuable—but not well paid—job like teaching. More generally, the proposal does not account for the myriad factors beyond the quality of schools’ educational programs that can—and often do—account for a student’s need to take advantage of these debt-mitigation programs. Economic downturns, accidents, and health problems may all play a part in a student’s inability to make full payments. See Expert Report at Part VIII.D (discussing the correlation between loan delinquency and economic conditions).

3. **Both Metrics Irrationally Punish Schools For Events Outside Of Their Control**

Even if (1) being prepared for gainful employment were a lawful goal for the Department to pursue in this way, and (2) this goal could be measured by cohort default rates and debt-to-earnings metrics, the Department’s proposal does not withstand APA scrutiny because its metrics punish schools for events that are beyond their control. The proposed measures penalize institutions and their students on the basis of arbitrary factors like whether the economy is in a recession; whether a market for a particular job is oversaturated with qualified applicants; whether students abandon the workforce (for any reason) after graduation; whether students get
sick or are involved in an accident; whether students pass up higher-paying jobs for lower-paying ones; and whether students make poor financial decisions. Similarly, the proposed metrics punish schools for enrolling at-risk students who are at a higher risk of defaulting on their loans or accepting employment in low-paying jobs. See below Part V.C.1. It is simply irrational to conclude that a school should not be able to participate in Title IV funding because of events that are plainly unrelated to how well it educates its students.47

B. The Apparent Premises Of The Proposed Rule Are Deeply Flawed

Two main assumptions behind the rulemaking—that public sector schools can absorb private sector students and that schools can regulate the debt their students incur—are flawed. The proposed rule is therefore arbitrary and capricious for that reason as well. See Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 179 (D.C. Cir. 2010) (rejecting agency analysis based on a “flawed presumption”).

1. The Regulations Are Based On The Faulty And Unsubstantiated Premise That Public Sector Schools Can Absorb Private Sector Students

One of the main premises of the Department’s proposal is that public sector schools will be able to absorb an influx of students no longer able to attend private sector schools. See 79 Fed. Reg. at 16,608. But public and non-profit schools are either unwilling or unable to serve many of the students enrolled at private sector institutions. Indeed, according to the Expert Report, only between 25 and 50 percent of displaced students will find alternative programs to attend, depending on how much variation in programs a student is willing to tolerate. Expert

47 Moreover, the Department’s decision to make the metrics more punitive than the ones in its vacated rule is also arbitrary. Significantly, on issue after issue, the Department has chosen to adopt a more punitive and unfair regime than the one already thrown out by the district court.
Report at Part XII.D. This is due to a variety of factors including that state governments are currently suffering from budget shortfalls, and funding has steadily declined for public colleges and universities. See Dep’t of the Treasury with the Dep’t of Educ., The Economics of Higher Education 4 (Dec. 2012). Even the Department admits that “[r]ecent evidence . . . suggests that for-profit institutions are increasingly absorbing students from budget constrained public institutions.” 79 Fed. Reg. at 16,536. A Treasury Department report also shows that enrollment at private sector schools has increased at a far more rapid rate than at their public sector counterparts, and notes the correlation between this growth and the state budget cuts to community and other public colleges. See The Economics of Higher Education 8, 22-23; see also Josh Keller, Facing New Cuts, California’s Colleges Are Shrinking Their Enrollments, Chron. Higher Educ. (Jan. 13, 2011).

In addition, even if public and non-profit schools had the funding to serve additional nontraditional students, many of these students would continue to seek out private sector institutions because of the innovative, diverse, and flexible educational offerings. The Department admits that private sector institutions “develop curriculum and teaching practices that can be replicated at multiple locations and at convenient times, and offer highly structured programs to help ensure timely completion.” 79 Fed. Reg. at 16,536. Indeed, every day thousands of students conclude that private sector education is a better educational investment.

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49 For the past 30 years, the annual average enrollment growth rate in public and private not-for-profit postsecondary schools has been 1.9 and 1.8 percent, respectively. The annual average growth rate for private sector schools has been 39.5 percent. Expert Report at Part XIV.

for a number of reasons, including the ability of private sector schools to meet the needs of students who want to advance their careers but, for a variety of reasons, can afford to study only part-time, and often online. Private sector schools also tend to provide more hands-on attention, have smaller class sizes, permit more flexible schedules, use more modern equipment, and operate more aggressive job placement programs than public sector schools. Moreover, for some students, private sector education appears to be a better financial investment than community college as well: on average, graduates from private sector schools increase their earnings by a greater percentage than do their public sector counterparts. See Daniel de Vise, For-Profits vs. Community Colleges, Wash. Post (Mar. 31, 2010) (noting a 54 percent gain for private sector students and a 36 percent gain for public sector students); Lytle, Brinner, & Ross at 13, above (showing significantly higher percentage earnings growth among graduates at two-year and less-than-two year private sector schools compared to public sector schools’ graduates).

2. **The Regulations Are Based On The Faulty And Unsubstantiated Premise That Schools Can Regulate The Debt Their Students Incur**

The Department’s proposal seeks to hold schools accountable for the debts accrued and not repaid by their students. The NPRM assumes without any analysis or support that schools could lower their tuition rates, thereby systematically solving any perceived issues of student debt. See 79 Fed. Reg. at 16,607 (“Students would benefit from lower tuition prices or improved program quality as institutions with failing or zone programs seek to comply with the proposed regulations.”); id. at 16,444 (“Institutions that lower tuition and fees sufficiently at the outset of the transition period could move failing programs into the zone in order to avoid ineligibility.”).

[^51]: [http://voices.washingtonpost.com/college-inc/2010/03/for-profits_vs_community_colle.html](http://voices.washingtonpost.com/college-inc/2010/03/for-profits_vs_community_colle.html)
But the truth—entirely ignored by the proposal—is that debt levels may not fall even if schools could reduce tuitions without sacrificing quality. Debt levels are mostly driven by students’ existing financial resources and their lifestyle choices rather than tuition costs.

Even if schools were to lower the tuition they charge, they lack any authority to require their students to borrow less money. In fact, departmental guidance currently forbids schools from limiting borrowing by students or parents on “an across-the-board or categorical basis.” Dep’t of Educ., 2013-2014 Federal Student Aid Handbook 3-86. Therefore, schools could lower their tuition amounts without any meaningful effect on student debt levels, as students could continue to borrow the same amount of money after the reduction to finance other purchases. Indeed, the resulting reduction in student borrowing, if any, will depend largely on students’ lifestyle choices (e.g., using public transportation versus buying a car or having a roommate versus living alone). The proposal will do nothing to encourage students to modify their behavior or become more responsible borrowers—factors that may impact student debt levels far more significantly than tuition rates, which the Department in any event has no authority to set.

C. The Department Has Failed To Account Sufficiently For The Negative Effects Of Its Rule

To promulgate a rule based on a reasoned foundation, the Department must consider the effects of its rule. See, e.g., North Carolina v. EPA, 531 F.3d 896, 907 (D.C. Cir. 2008) (per curium) (invalidating agency rule that failed to demonstrate it “achieve[d] something measurable toward the goal” set forth in the relevant statute); Timpinaro v. SEC, 2 F.3d 453, 457-60 (D.C. 52

(remanding rule for further analysis where agency had not adequately substantiated its theory about the rule’s likely effects). It is obvious that the Department has not considered all the effects of the proposed rule.

1. The Proposed Regulations Would Create Disincentives For Private Sector Schools To Admit Low-Income, Minority, Female, And “New Traditional” Students

The Department fails to consider the role of socioeconomic status in student loan default rates, the role of private sector schools in educating students from disadvantaged backgrounds, and the impact of the proposed rule on incentives to enroll at-risk students. The Department admits that the private sector “serves older students, women, Black students, Hispanic students, and students with low incomes at disproportionately high rates.” 79 Fed. Reg. at 16,536. Indeed, the student populations at private sector schools have the following breakdown: 76 percent live independently without parental support, 67 percent are at least twenty-five years old, 39 percent are minorities, 64 percent are women, 86 percent receive some sort of student aid based on their financial need, 63 percent receive federal Pell Grants based on exceptional financial need, and many are single parents. See APSCU, America’s Private-Sector Colleges And Universities: Generating Real Value for Students & Society 2 (2013).

The Department suggests that there is no statistically valid correlation between institutional loan repayment rates and demographic factors such as race, gender, ethnicity, age, and the financial resources of incoming students (79 Fed. Reg. at 16,544). The Department’s analysis is deeply flawed. Indeed, it admits that, when it considered these variables, 36 percent [53](http://www.career.org/news-and-media/press-releases/upload/APSCU-Generating-Real-Value-Final.pdf).
of the variance in the annual earnings rate could be explained and 33 percent of the variance in the program cohort default rate could be explained. Id. Further, as the Expert Report shows, the Department’s use of the “R-squared statistic” to estimate the extent to which student demographic factors explain program performance is inappropriate; the Department should have reported the “point estimates” (i.e., the estimates of the slopes of the regression line) and the “t-statistics” (which are based on the standard errors) associated with each of the explanatory variables. See Expert Report at Part IV.C.

APSCU’s own preliminary analysis reveals that there is a strong, statistically valid correlation between completion and institutional loan default rates and demographic factors such as race, gender, ethnicity, age, and the financial resources of incoming students. In fact, that analysis reveals that controlling for these factors, the loan default rates for private sector schools are virtually identical to their public sector counterparts. See Expert Report at Part IV.C.

APSCU’s analysis does not stand alone. For example, research shows that the smaller a share of the student body made up of Pell Grant-eligible students, the better the graduation rate. For 2011, the graduation rate for baccalaureate nonprofit colleges was 52 percent. For colleges with fewer than 20 percent Pell Grant recipients, the graduation rate was 79 percent. For those schools where more than 60 percent were Pell Grant recipients, the graduation rate was 31 percent. Moreover, colleges with fewer than 20 percent Pell Grant students had few part-time, nontraditional, and underrepresented students of color, but colleges with more than 60 percent Pell Grant students had twice as many part-timers, five times as many nontraditional students,
and almost six times as many underrepresented minority students. See Walter M. Kimbrough, *When Rating Colleges, Think Diving*, Inside Higher Educ. (Sept. 30, 2013).54

APSCU has explained to the Administration that application of the debt metrics could deny as many as 2 million people—including 300,000 Hispanics and almost 500,000 African-Americans—access to college through the end of the current decade. See Ben Goad, *Battle Raging At WH Over For-Profit College Rules*, The Hill (Feb. 18, 2014).55 As the Washington Post’s Editorial Board stated, “the likely outcome of implementing the draft as written is that schools will admit only students who pose the least risk. That will make it harder for minorities, poor people and nontraditional students to get the kind of post-secondary education that might help them improve their lives.” *Tightening Rules On For-Profit Colleges*, Wash. Post (Apr. 27, 2014)56; see Expert Report at Part III.A. This is both arbitrary and contrary to the judgment of Congress in the HEA that individuals from these groups deserve an equal opportunity at higher education, notwithstanding the fact that they are statistically less likely to complete their educations, secure long-term employment in a skilled occupation, or repay their loans. See below Part V.C.1.a-d.

a. **Low-Income Students**

The Department does not account for the fact that institutions are less likely to admit fewer poor students who must finance their education. See Kerrey & Leeds, above. A recent


report by Sallie Mae and Ipsos Public Affairs demonstrates that students from higher income families have at least half of their costs of going to college paid for by their parents. Sallie Mae, How America Pays for College 2013 9, fig. 7 (2013). But students whose families earn a total income of less than $35,000 annually are much more reliant on grants, scholarships, and their own student loan borrowing. Id. at 9, fig. 5. Thus, a student from a low-income home is much more likely to need to take the maximum amount of Title IV funds, which would hurt the cohort default rate and debt-to-income ratios. Moreover, the Department’s proposal to count Perkins Loan debt in its evaluation of the debt-to-income metrics will also penalize schools for accepting particularly economically-disadvantaged students.

b. Minority Students


Secretary Duncan recently highlighted that minority men in particular face a special set of challenges when it comes to earning a degree. Emily DeRuy, Why Are Minority Girls More

Likely Than Boys to Graduate High School and Attend College?, Nat’l J. (Feb. 27, 2014). These challenges are not unique to private sector schools. Indeed, 14 of the 106 historically black colleges and universities had three-year cohort default rates above 30 percent for borrowers who entered repayment during the 2009 fiscal year. See Michael Stratford, Default Rate on Federal Student Loans Rises Again, Chron. Higher Educ. (Sept. 30, 2012).

These realities will make it more risky for private sector schools to admit such students under the proposal. This would be particularly harmful because private sector schools have higher graduation rates for black and Hispanic students in two-year and four-year programs than public sector institutions. Shapiro & Pham at 2-3, above. In other words, under the proposed regulation, minority students may be excluded from the very type of educational institution with the proven ability to serve them best. That is wholly irrational.

c. Female Students

Female students, according to numerous studies, earn less on average than their male counterparts, and are more likely than men to leave the workforce to raise children. June E. O’Neill, Nat’l Cen. for Policy Analysis, Brief Analyses No. 766, The Disappearing Gender Wage Gap (June 22, 2012). This suggests that admitting females will negatively impact schools’ performance on the debt-to-earnings metrics, even when their female graduates remain current with their loan payments. A family may decide that it is best for their specific needs for the woman to work in the home for a number of years and not receive outside income (note that


this is true for stay-at-home men as well). In many instances, a household earns more than enough to repay the woman’s student loans, and eventually the stay-at-home mother returns to full-time employment outside the home. The Department simply does not account for these situations or family circumstances when calculating the average income of a student who graduated from an educational program.

d. **“New Traditional” Students**

Schools may also be tempted to enroll fewer “new traditional” students, i.e., students who tend to be at least 25 years old. See Steven Bell, *Nontraditional Students Are the New Majority*, Libr. J. (Mar. 8, 2012). There are a number of factors that influence the composition of private sector schools and make them appealing to new traditional students. For example, adults are drawn to these schools because they tend to offer online classes, accelerated degrees, personal guidance from career counselors, and practical, work-related experience. See Carolin Hagelskamp, David Schleifer & Christopher DiStas, *Public Agenda, Profiting Higher Education? What Students, Alumni, and Employers Think About For-Profit Colleges* (2014). Former-felons seeking to turn their life around may also seek out a private sector education that prepares them to earn a beautician or barber license, which are among the only types of professional licenses that ex-offenders are permitted to hold. See Henry C. Alford, “*Gainful Employment*” Rule Throws Black Students for a Loss, Black Press USA (Mar. 24, 2014).

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Under the proposed regulation, however, the penalties associated with admitting students with increased “risk” characteristics will deter programs from admitting these students. Although these students need a quality education to better their lives, the regulatory requirements of educating them will become prohibitively high. See Andrew Ferguson, *Who Profits?*, Wkly. Standard (May 5, 2014).66

2. The Proposed Regulation Would Create An Incentive For Schools To Curtail Enrollment Across-The-Board And Cut Quality Programs

The Department has also failed to consider how its proposal creates an incentive for schools to curtail enrollments across-the-board and cut quality programs, which could have the perverse effect of exacerbating the so-called “churn” problem.

As explained above in Part V.A.2.b, the Department hopes that private sector schools will lower their costs to remain eligible to participate in the Title IV programs. It does not consider, however, that private sector schools may not be able to lower costs without sacrificing important programs and quality. Indeed, many of the gainful employment programs at private sector schools provide a technical education, which is significantly more costly to provide than a liberal arts, humanities, or childhood education program. See Nancy Shulock, Jodi Lewis, & Connie Tan, Inst. for Higher Educ. Leadership & Policy, *Workforce Investments: State Strategies to Preserve Higher-Cost Career Education Programs in Community and Technical Colleges* (2013).67 That the Department’s proposal ignores the cost differential of providing a technical education underscores the uniformed and arbitrary nature of its approach.

Moreover, the Department’s proposal creates a disincentive for schools to offer programs with low projected earnings. Indeed, to remain eligible for Title IV funds, schools may be tempted to limit enrollments in or cut programs that prepare students for socially-valuable but low-paying jobs in areas such as education and social work. This could have a profound effect on women in particular, who are highly concentrated in these fields. See Anthony P. Carnevale, Jeff Strohl, & Michelle Melton, Georgetown University, What’s It Worth?: The Economic Value of College Majors 33 (2011).68

Additionally, to remain eligible for Title IV funds, schools may feel pressure to encourage their undergraduate students to pursue graduate education at a different school rather than their own. This is because the debt-to-earnings formula broadly excludes loans incurred at other institutions under the calculation of debt, but includes debt incurred at the same institution or other programs or institutions under common ownership or control. 79 Fed. Reg. at 16,450. That means students who attend two programs at the same institution will have to earn a lot more to satisfy the proposal’s debt-to-earnings measurements than students who attend similar programs at two separate institutions. As a result, students who enjoyed and benefited from their educational experience at one institution may have to find another institution to pursue an additional degree. That consequence is both unexplained and irrational.

Finally, by encouraging students to pursue studies that they are not necessarily interested in and by making it harder for students to enroll in quality programs, the Department may actually exacerbate the churn problem. APSCU’s member schools know that students are more likely to persist in their education if they are studying what interests them and what they believe

68 http://cew.georgetown.edu/whatsitworth.
will be meaningful in their careers. If forced to choose from fewer options that do not excite them, students may drop out rather than pursue their studies. Indeed, one Harvard Study attributed the positive first-year retention rate at private sector schools to “[t]he greater ability of for-profit students to take courses they consider directly relevant and not languish in remedial courses.” Deming, Goldin & Katz, above, at 20. The Department fails to account for the ways in which its proposal compounds the dropout problem.

3. The Proposed Rule Encourages Suboptimal Debt Management

The Department failed to consider that its proposal will incentivize schools to encourage students to pay loans associated with their programs before addressing other financial obligations like loans from another educational program, consumer loans, or home loans. It will not always be in a student’s best interest to pay one set of loans over another. It is not clear why the Department would propose a regulation that encourages suboptimal debt management by students. But that is exactly what it has done.

4. The Proposed Rule Is In Tension With Aspects Of The HEA And Other Proposals

The Department also failed to consider how its proposal is in tension with other HEA provisions and other education proposals.

As explained in Part V.A.2.b, above, the Department’s proposal is based on the premise that schools can and should lower tuition, but the Department failed to consider how tuition reductions are likely to place schools in danger of violating the 90/10 rule, regardless of their effect on students’ borrowing behavior. See 90/10 Conundrum, MarketDrivenEdu.69 Under this


70
rule, schools may not derive more than 90 percent of their revenues from Title IV funds. See above Part I.A. Whether or not students respond to tuition decreases by borrowing less, the percentage of their tuition bill that they pay with Title IV funds will likely not decrease; it will either remain constant or increase. As the percentage of students’ tuition paid for with Title IV funds increases, schools will increasingly be in danger of violating the 90/10 rule. These schools will be forced to respond by either limiting enrollments of these students or by eliminating low-cost, skill-retraining programs that are designed for the students most in need of education, but that also require the greatest percentage of Title IV funds. Inexplicably, the NPRM fails to consider the interaction between its proposed formulas and the 90/10 rule as well as the severe hardships that will befall students and schools if schools must meet these conflicting conditions. This glaring omission is at odds with the APA’s requirement of reasoned decision-making.

The Department also completely ignored President Obama’s call to rate all colleges based on measures of access, affordability, and student outcomes, and to allocate aid based on those ratings. Under that plan, prospective students would be enabled to compare institutions on several criteria—not just on the debt and earnings of their students. See Kelly Field, Obama Plan to Tie Student Aid to College Ratings Draws Mixed Reviews, Chron. Higher Educ. (Aug. 22, 2013). In support of the proposal, Secretary Duncan noted that the Department would consider judging colleges on access, which would include how many students are on Pell Grants. See Michael Stratford, Duncan Chides Critics of College Ratings System, Pledges To Advance

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The Department does not explain how it would reconcile this proposed rule with the rating proposal. Nor does the Department explain why it is important to account for demographics and take a holistic approach in the ratings proposal, but not here.

Many institutions question whether the government should even be in the business of rating schools, and “most believe it is nearly impossible for the federal government to do such a thing with any degree of reliability or validity.” American Council on Education, et al. Ltr. to Richard Reeves, NCES at 2 (Jan. 31, 2014). Given the diversity of schools and their distinct missions, the Department should not adopt a one-size-fits-all ratings system as a proxy for “value.” Id. In addition, a ratings system threatens to “exacerbate the biased view of higher education as a private good, a commodity, rather than something that benefits society as a whole.” Id. Finally, a ratings system has the potential to create perverse incentives for institutions, as detailed above. See above Part V.C.1. Tellingly, these concerns are not unique to the rating system, but also apply with equal force to the proposed regulations.

5. The Proposed Certification Standards Could Invite Frivolous Qui Tam Lawsuits

The Department has not considered how its certification requirements could open the door to frivolous qui tam lawsuits. The proposal requires a school to certify in its PPA that each of its programs satisfies the licensure or certification requirements of the State in which the school is located such that its graduates would qualify to take licensure or certification exams.

that are required for employment in an occupation that the programs prepare graduates to enter. This was not a feature of the previous rule, and its inclusion here is not adequately explained. And the Department does not explain what it means to be “qualified” to take a licensure or certification exam—e.g., must a student pass the exam to be considered qualified to take the exam? Nor does the Department explain which programs must satisfy which licensure or certification requirements—e.g., must a culinary program satisfy a butcher’s license requirements or a cosmetology program satisfy requirements to be a licensed manicurist? The vagueness of these certifications would only invite a host of frivolous lawsuits brought by professional plaintiffs hoping to secure a quick payday, through settlement or other means. See, e.g., Corinthian Colls. Inc., No. 07-01984, ECF No. 277, Amended Final Judgment (dismissing case with prejudice and awarding attorneys’ fees and sanctions to Corinthian Colleges). If the Department insists on these certification requirements, it must take care not to multiply schools’ liability.

D. The Proposed Rules Are Unlawfully Retroactive

Agencies are not permitted to adopt regulations that will have retroactive effect if doing so will cause injury or increase a party’s liability for past conduct. See Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006) (a new regulation has an impermissible retroactive effect where its application “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed”) (internal quotation marks omitted); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (noting a presumption against retroactive rulemaking authority). Secretary Duncan has stated that the proposal could go into effect as early as July 2015. See Julia Edwards, For-Profit
Colleges Call New Obama Administration Rules Unfair, Reuters (Mar. 14, 2014). If so, the calculated rates would be based on the outcomes of students’ experiences in award years 2010–2011 and 2011–2012 for a two-year cohort period, and 2008–2009, 2009–2010, 2010–2011, and 2011–2012 for a four-year cohort period. 79 Fed. Reg. at 16,506. Even if schools have some power to affect their performance on the proposal’s metrics going forward, schools cannot do anything to alter cohort default rates or debt-to-income ratios for past years. As a result, the Department proposes to subject schools to severe penalties based on events that took place well before the proposed rules were published.

These concerns are particularly acute here because the inclusion of income and debt data from 2009, 2010, and 2011 will skew programs’ performance significantly downward due to the severe recession. A recent study for the Federal Reserve Bank of New York found that unemployment peaked after 2008, remaining at this level until 2011. See For Recent Grads, Recession Equal Underemployment, Inside Higher Educ. (Jan. 7, 2009). Underemployment also peaked in 2012, and from 2009-2011, 52 percent of liberal arts college graduates stated that they did not need a degree for the job they held. Id.; see also Katherine Peralta, College Grads Taking Low-Wage Jobs Displace Less Educated, Bloomberg (Mar. 6, 2014) (explaining that the jobless rate of college degree-credentialed Americans ages 25 to 34 grew to 3.7 percent from 2.2

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73 http://www.reuters.com/article/2014/03/14/us-usa-obama-training-idUSBREA2D21420140314.

74 http://www.insidehighered.com/quicktakes/2014/01/07/recent-grads-recessions-equal-underemployment#sthash.3qRUSjtM.dpbs.
percent between 2007 and 2013); Expert Report at Part VIII.B. Subjecting schools to retroactive application of the proposed requirements without accounting for these particularly extraordinary macroeconomic factors—which are wholly unrelated to program quality—is illogical.

E. The Proposal Runs Roughshod Over A School’s Right To Review And Challenge The Department’s Calculations

Wholly independent of other flaws in the proposed rules, the Department’s proposal—if adopted as is—would also violate the rights of schools to review and challenge the Department’s calculations. Schools have a protected interest in their eligibility to participate in federal student loan programs. See Cont’l Training Servs., Inc. v. Cavazos, 893 F.2d 877, 893 (7th Cir. 1990); Mildred Elley Bus. Sch., Inc. v. Riley, 975 F. Supp. 434, 439 (N.D.N.Y. 1997); Career Coll. Ass’n v. Dep’t of Educ., No. 92-1345, 1992 WL 233837, at *5 (D.D.C. Aug. 31, 1992). This means that the government must provide schools with a meaningful opportunity to be heard, as well as adequate notice before it can deprive them of their right to participate in Title IV programs. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Although the Department states that its proposal is “intended to provide institutions with an adequate opportunity” to challenge the debt-to-earnings rates (79 Fed. Reg. at 15,457), this statement is mistaken. Meaningful notice requires disclosure of the underlying evidence, without which it would be impossible for a school to present an


76 The Department’s “transition period” proposal does not mitigate this concern. This proposal only concerns the debt-to-earnings metric, and not the cohort default rate metric, and, in any event, still considers students’ earnings during a time period before the rule went into effect. 79 Fed. Reg. at 16,451.
effective challenge. *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005). Yet, the Department proposes to hamper a school’s ability to review—and, therefore, challenge—the debt-to-earnings calculations in several ways.

*First,* schools cannot adequately challenge the debt-to-earnings rates because they would not have access to the underlying earnings data. The Department proposes that the “Secretary would obtain from the SSA the mean and median earnings, in aggregate form” of the relevant students. 79 Fed. Reg. at 15,456-57. But it does not appear that institutions will have access to *individual* wage records, and in fact, the Department concedes that schools *cannot* challenge “the aggregate earnings information used to calculate” the debt-to-earnings rates. *Id.* at 15,457. In other words, the Department will require a process that would leave schools without access to the underlying data to confirm that it is complete and properly calculated.

The proposal attempts to address this severe deficiency by allowing schools to appeal the calculations, using “alternate earnings evidence from a State earnings database or an earnings study conducted in accordance with requirements established by the NCES.” 79 Fed. Reg. at 16,459. Schools still will be denied the ability to rebut the Department’s income calculations. Not every State will have an earnings database or even if it does, that database may reflect only the average earnings of total workers and conflate occupation and industry. *See* Jonah Newman, *The Pitfalls of Comparing Colleges Based on Postgraduate Earnings*, Chron. of Higher Educ.

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77 Indeed, the Department concedes that schools have a proprietary interest in remaining eligible to receive Title IV loans. *See* 79 Fed. Reg. at 16,460 (“Because a program’s continued performance in the zone can ultimately lead to an ineligibility determination, we believe due process warrants allowing appeals for both failing and zone final D/E rates.”).
(Mar. 26, 2014). The NCES earnings study would be costly to create and apply, especially for smaller institutions without many resources; there is also no guarantee that graduates will even respond to the survey. Moreover, institutions simply cannot conduct these surveys in the time in which they must appeal the calculations—three days after the Secretary issues final debt-to-earnings rates.

**Second**, the Department’s decision to place the burden of proof on an institution challenging its calculations is also unlawful. Under the proposal, the Department would provide the school with a list of completers to be included in the Department’s calculations of the debt-to-earnings rates. The school would then have the burden of explaining which completers should be deleted because they fall under certain exclusions (e.g., military deferment, disability, enrollment in an eligible program at another institution, or death). The school, of course, does not necessarily have access to information to determine whether any of the completers satisfy the exclusion criteria. It is, therefore, arbitrary to place the burden on the school.

In short, the proposal permits the Department to strip a school of its ability to participate in Title IV programs based on calculations made in secret and not subject to verification or meaningful challenge. That is simply not a reasonable method for potentially causing schools to go out of business, leaving students without a school, and faculty, staff, and administrators without jobs. If the Department persists, the Department must reform these procedures to accord with Due Process.

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F. The Imprecision And Lack Of Attention To Detail Evident In The Proposal Render It Fundamentally Flawed

The proposed rulemaking constitutes a “significant regulatory action” under Executive Order 12,866 because the Department forecasts it will have an annual effect on the economy of more than $100 million. See 79 Fed. Reg. at 16,489. When proposing a regulatory action that imposes costs of this magnitude, the Department must prepare a detailed regulatory impact analysis assessing the costs and benefits of its proposal, as well as identifying feasible alternatives to the planned regulation. The Department modeled what it asserts would be the effects of the regulatory requirements and, on this basis, claims that it has made “a reasoned determination that [the proposed rules’] benefits justify their costs.” Id. at 16,490.

The data presented in the NPRM, however, suffers from various problems. Instead of taking the time necessary to model fully the implications of this “significant regulatory action,” the NPRM reflects a rush to promulgate. Notably, the NPRM relies on inapposite data and fails to provide methods for verifying the data used or duplicating the Department’s economic analysis, which makes it impossible to confirm that the NPRM’s claims are in fact correct. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 236 (D.C. Cir. 2008) (“the court explained long ago that ‘[i]n order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules’”) (citation and emphasis omitted). In addition to the other problems identified in this comment letter, the Department must take the time necessary to address these shortcomings.
1. The Proposal Is The Product Of A Rushed Process

The lack of reliable data underlying the NPRM, including the failure to consider existing regulations and statutory requirements (e.g., the cohort default rate and the 90/10 rule) when estimating the impact of the proposal, undermines any claim that it is the product of a deliberative—rather than a rushed—decision-making process. At the very least, the numerous gaps in data and other errors call into question the reliability of the NPRM’s analysis, including:

- The Department’s proposal is based on a significantly limited set of data. Although 37,589 gainful employment programs reported program information to the Department in FY 2010, only 7,934 of these programs had the 30 completers necessary for the Department to calculate at least one of the metrics. 79 Fed. Reg. at 16,542. This means that the Department only considered at least one metric for about 21 percent of programs. That the Department considered only one cohort of students compounds this problem, especially because that cohort graduated during a terrible recession in which good-paying jobs were unusually scarce. Accordingly, any assumptions the Department makes about the impact of its rule are, at most, “rough approximation[s],” and at worst, “misleading.” Expert Report at Part X.A.

- The assumptions contained within the NPRM’s modeling analysis are largely unexplained and understate the effects of the proposal on students and schools. For example, the proposal estimates that 844,488 students are in failing programs at private sector schools. See 79 Fed. Reg. at 16,491. The proposal assumes without any analysis that other private sector, public, and non-profit institutions will absorb these affected
students. Other schools are unlikely to welcome students with debt profiles that rendered their first school subject to sanctions.

- In a gross oversight, the proposal fails to consider the financial burdens on state and local governments from having to fund the expansion of public sector schools that will be necessary to absorb this massive influx of students. As noted above, one recent study shows that the cost to four states of shifting the students who enrolled at nine proprietary education providers to public two-year or four-year institutions would be $3,631,533,700 and $4,757,885,200, respectively. See Klor de Alva & Schneider, above, at 5, tbl. 1. The Department’s failure to address these costs contravenes the clear dictates of a federal statute and an Executive Order that require agencies to consider the effects of their regulations on state, local, and tribal governments. See Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, 109 Stat. 48 (codified at 2 U.S.C. § 1531); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring federal agencies to minimize burdens on state, local, and tribal governments and to seek their views, when feasible, before imposing significant regulatory requirements).

- The regulatory burdens estimated as part of the Paperwork Reduction Act are vastly understated. Because much of the data is not publicly available—indeed, some of the data, like earnings data, will never be publicly available—schools will have to expend significant resources estimating these effects and trying to gauge the impact of the proposed rule on programs.
2. **The Department Also Fails To Consider Adequately Less Burdensome Alternatives That May Alleviate Its Concerns About Student Debt**

“[T]he private sector and private markets are the best engine for economic growth.”

Exec. Order No. 12,866. Accordingly, federal agencies are admonished to “promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets.” *Id.* Before regulating, agencies must also identify “the problem that it intends to address (including, where applicable, the failures of private markets).” *Id.* Contrary to these requirements, the proposal fails to explain (for example) why private-standard setters such as accrediting agencies would not be more effective at addressing the concerns motivating this regulatory action in a less burdensome manner. In requiring agencies to stay their hand unless there is an identifiable market failure, Executive Order 12,866 recognizes the reality that absent such a failure, individual students, in consultation with their families and friends, should be able to weigh for themselves the potential benefits (and costs) of different educational programs and make individual, personalized decisions about whether those programs are an appropriate lifetime investment.

VI. **The Reporting And Disclosure Requirements Are Unduly Burdensome And Violate Numerous Other Statutory And Constitutional Protections**

In addition to lacking statutory authorization and violating the APA, as discussed above, the reporting and disclosure requirements that make up the Department’s proposed “transparency” framework are invalid for a number of additional reasons.

*First,* the reporting requirements will require institutions to report a host of personally identifiable information about its students to the Department. As discussed above, this violates 20 U.S.C. § 1015c. *See APSCU II,* 930 F. Supp. 2d at 218-221, *see also* above Part III.C.
Second, the required debt warnings violate the First Amendment, which protects the “right to refrain from speaking at all,” as it protects the right to speak freely. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); see *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 16 (1986) (plurality op.). Here, the Department proposes a requirement that schools must “warn” current and prospective students that “[t]he Department [of Education] set these standards to help ensure that you are able to find gainful employment in a recognized occupation, and are not burdened by loan debt you may not be able to repay.” 79 Fed. Reg. at 16,511.

During the previous litigation, the district court expressed “doubt” that a similar warning would pass muster. *APSCU I*, 870 F. Supp. 2d at 154 n.7; see also *Nat’l Ass’n of Mfrs. v. SEC*, _ F.3d _, 2014 WL 1408274, at * 8-9 (D.C. Cir. 2014). Because the required disclosures are not purely factual and non-ideological, heightened scrutiny will apply. *See* 2014 WL 1408274, at * 8-9.

And under any form of heightened scrutiny, the proposed debt warnings will fall, because the Department has not shown a compelling or substantial government interest, nor has it shown that the compelled speech is narrowly tailored to serve that interest. *Id.* at *10-11.

Third, the proposed disclosure provisions violate the First Amendment by allowing the Secretary unbridled discretion to compel speech on schools’ websites. 79 Fed. Reg. at 16,513. Specifically, the proposal requires that schools post “[o]n any Web page containing academic, cost, financial aid, or admissions information about a GE program,” “a prominent, readily accessible, clear, conspicuous, and direct link to the disclosure template for that program.” *Id.* Such a requirement alone is burdensome, vague, and intrusive. The Department goes further, adding that “the Secretary may require the institution to modify its Web page if the link for the disclosure” does not satisfy the Secretary’s whim regarding the prominence and accessibility of
First Amendment jurisprudence is clear that a speech regulation “placing unbridled discretion in the hands of a government official or agency” constitutes an impermissible prior restraint. *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750, 757 (1988). The proposed regulation is so broadly written that the Department could require any change to a school’s website if that change would make the Department’s disclosure link more prominent and accessible on the page. Restricting or changing speech based on such discretion cannot survive First Amendment scrutiny.

**Fourth**, the required disclosures needlessly and confusingly add another layer of disclosures on top of those required by Congress in the Student Right-to-Know and Campus Security Act of 1990 (codified at 20 U.S.C. § 1092) (“Student Right to Know Act”), which requires that schools disclose information in 15 categories, ranging from “the cost of attending the institution,” to “the completion or graduation rate of certificate- or degree-seeking, full-time, undergraduate students.” 20 U.S.C. § 1092(a)(1)(A), (E), (L). Despite these specific disclosures required by Congress, the Department has invented its own set of disclosures, which may conflict with those required by the Student Right to Know Act and confuse students. By knowingly promulgating requirements that will likely confuse students, the Department will undermine the disclosure scheme mandated by Congress. *Cf. Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008) (holding that it is arbitrary and capricious for an agency to “maintain two irreconcilable policies”).

**Fifth**, the disclosure requirements are unduly burdensome and vague. For example, schools are required to disclose to enrolled and prospective students the “total cost of tuition and fees, and the total cost of books, supplies, and equipment that a student would incur for
completing the program within the length of the program.” 79 Fed. Reg. at 16,512. But in many
instances, schools will simply not know those costs, especially with regard to longer-term
programs. Additionally, schools are required to disclose placement rates, if they are required to
calculate them by an accrediting agency or state. Id. at 16,512. Some schools operating in
various states and subject to different accreditation regimes may have to calculate numerous
placement rates for a given program, and those rates may differ depending on how they are
calculated. Similarly, the requirement that schools disclose “whether completion of the program
satisfies any applicable educational prerequisites for professional licensure in the State in which
the institution is located and in any other State included in the institution’s Metropolitan
Statistical Area” is ambiguous because the Department does not explain which States online
programs are “located” in, and whether online programs must meet the educational prerequisites
for licensure in all States.

The “debt warnings” that result from failing the Department’s debt metrics are also
unduly burdensome. After the Department deems a program failing, a written warning must be
provided to prospective students “[a]t the time the prospective student first contacts, or is
contacted by, the institution about the GE program.” 79 Fed. Reg. at 16,511. Under the
Department’s broad definition of “prospective student,” schools may be required to provide the
warning to any individual who is even indirectly exposed to advertising regarding a program. Id.
at 16,433, 16,511. The Department does not explain how a school will be able to provide the
required written warning in a meaningful way to the numerous individuals exposed to the
school’s advertising.
Moreover, the Department proposes that schools provide “alternatives to English-language warnings for those students and prospective students for whom English is not their first language.” 79 Fed. Reg. at 16,511. If a school is advertising to a broad population of prospective students, it is unclear how the school is to determine whether English is the first language for individuals receiving the advertising. The alternative language requirement applies only “to the extent practicable,” but that is little solace to schools concerned with complying with the Department’s complex regime. Such uncertainty in assessing compliance may also violate schools’ Due Process rights. See, e.g., Throckmorton v. Nat’l Transp. Safety Bd., 963 F.2d 441, 444-45 (D.C. Cir. 1992) (internal quotation marks omitted) (regulations must provide a “reasonable degree of certainty” to regulated entities).

CONCLUSION

For the foregoing reasons, APSCU respectfully requests that the Department withdraw the proposed regulations. The flaws in the proposal are so fundamental, and so pervasive, that any “corrected” rule would not be a logical outgrowth of the proposal. See Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005). Accordingly, the Department must abandon this flawed and reckless proposal, and start fresh.

Respectfully submitted,

Steve Gunderson
President and CEO

apscu.org
APPENDIX


14. Chamber of Commerce Letter to Secretary Duncan (Sept. 6, 2013) (attached).


A-2


44. Ben Miller, Gainful Employment Liveblog Session 2: Day 1, Education Central (Nov. 18, 2013), http://www.edcentral.org/gainful-employment-liveblog-session-2-day-1/.

45. Ben Miller, Gainful Employment Negotiations Day 1 Liveblog, Higher Education Watch (Sept. 9, 2013), http://higheredwatch.newamerica.net/blogposts/2013/gainful_employment_negotiations_day_1_liveblog-91371.

47. Janet Napolitano Letter to Secretary Duncan, et al. (May 13, 2014) (attached).


A-5


Report on the Proposed
Gainful Employment
Regulation

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Date: May 23, 2014
Disclaimer

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Executive Summary

In March of 2014 the Department of Education (Department) proposed a rule attempting to define the term “gainful employment” as it was used in the Higher Education Act. The proposed rule bases the definition of gainful employment on two metrics: a debt-to-earnings metric (D/E) and a programmatic Cohort Default Rate (pCDR). In order to accept Title IV funding as payment, a program must pass the thresholds set by the Department for both metrics. Programs failing either metric face having to publish debt warnings to students and eventually would lose the eligibility to accept Title IV funds altogether if the program fails multiple times within a given time period.

While the Department seems to be attempting to identify programs that lead to unmanageable debt, the proposed rule contains several significant problems.

• **The impact will be very large and the alternatives for the students impacted are very limited.** The Department’s analysis based on a single year of data shows that 20 percent of programs and 30 percent of students in the for-profit sector will fail the metrics. Our more complete analysis of the rule based on five years of data suggests that the impact may be even larger with between 13.1 and 21.8 percent of programs losing eligibility, though these large numbers understate the impact on students because programs with more students are more likely to fail the rule. We estimate that between 23 and 44.2 percent of students in for-profit programs are in programs that will become ineligible. Our estimates show that this would lead to between one and four million students being denied access to postsecondary education by 2020, and between 2 and 7.5 million students being denied access to postsecondary education over the next ten years. The Department reports much lower numbers of students impacted by assuming that nearly all students would find alternative programs to attend. Our analysis shows that much fewer reasonable alternatives actually exist for students and that the Department’s assumptions are overly optimistic given the incentives to avoid low-income students that the gainful employment rule would create, the current constraints on funding for public institutions and the non-open enrollment policies of most public and non-profit institutions.

• **The impact will be very large on students who need to borrow more and have had less access to traditional post-secondary education.** The proposed regulation would have a substantial impact on minority and female students, as well as poorer students and veterans. Our estimates suggest that
between 21 and 39 percent of Hispanic students, between 25 and 40 percent of African-American students, and between 24 and 41 percent of female students are enrolled in impacted programs. In addition, we find that at least one in four, and as many as one in two, Pell recipients are in impacted programs.

**The fundamental idea behind the proposed rule is flawed.** In order to determine whether a program is a good investment for the student (and for taxpayers) the Department should be looking at the long-term gains from the education not at the level of income a few years after completion. By focusing on the level of earnings rather than the gains the Department effectively ignores much of the benefit of education and does not account for what students could have earned outside of the education. For example, the Department would deem a program successful if the graduates from that program borrowed $12,000 and earned $40,000 a few years after graduation even if those same students would have earned $40,000 without going to school (a gain of $0 at the expense of $12,000). Similarly, the Department would deem a program unsuccessful if the graduates from that program borrowed $12,000 and earned $17,000 after graduation even if those students would have earned $7,000 without going to school (the median earnings of high school dropouts). This is a gain of $10,000 per year for an initial expense of $12,000. This fundamental flaw in the proposed rule would deny access to students to programs that the Department admits have a net positive benefit.

**The D/E metric and pCDR are highly negatively correlated.** The two metrics in the gainful employment rule are intended to measure a single concept: gainful employment. If the two metrics were measuring the same concept, we would expect them to be positively correlated. They are not. There is almost no overlap between programs identified as failing the debt-to-earnings metric and programs identified as failing the pCDR metric. This strong negative correlation suggests that the two metrics cannot be measuring the same thing. The Department claims that both metrics are measures of whether students are able to repay their loans, but it is unclear why each measure would identify entirely different programs as leading to poor repayment outcomes for their students. Perhaps most strikingly, the programs that fail the debt-to-earnings test are less likely to fail the pCDR test than programs that pass the debt-to-earnings test. This means that students in programs that fail the debt-to-earnings test – programs that the rule identifies as having too much debt – are more likely to repay their loans
on time, not less. This relationship is backwards from what one would expect if the debt-to-earnings test were measuring what it is intended to measure, and it suggests that the debt-to-earnings test is not identifying programs where students are taking on too much debt relative to the benefits the schooling is providing.

• **Pre-enrollment characteristics of students have an impact on post-graduation outcomes.** The proposed rule ignores the fact that student outcomes are determined not only by the quality of programs, but also by student characteristics and other inputs from students. One possible unintended consequence of the proposed rule may be for institutions to restrict access to students who have the highest likelihood of success and therefore limit the educational opportunities of traditionally underserved populations (minorities, low-income students, etc.). Impeding access to historically underserved populations will contribute to income inequality in the U.S. and restrict access to college at a time when a college education may be as important as it has ever been for economic well-being.

• **The Department’s conclusion that there is no relationship between the proposed gainful employment metrics and student characteristics is incorrect and based on a misinterpretation of statistical results.** The Department attempts to provide statistical support to refute the allegation that a program’s likelihood of passing the gainful employment metrics is dependent on the composition of Pell recipients and minority students in the program. Using the data described in the NPRM to replicate the Department’s analyses shows that when examining the appropriate statistical results the Department’s analyses find a significant negative correlation between the percent of students who are Pell recipients and the likelihood of passing either the D/E or the pCDR metric. The Department’s analyses also show a significant negative relationship between the percentage of minority students and the likelihood of passing the pCDR metric.

• **The rule makes no adjustments for macroeconomic conditions that are outside of a program’s control.** Since the rule sets a fixed threshold for passing each metric that does not adjust to changes in macroeconomic conditions, a program that passes during good economic times may fail during poor economic times due entirely to factors outside of the institution’s control. This will also lead to “good” programs failing during poor economic times and “bad” programs passing during better economic
times even when the training those programs provide has not changed. In addition, the proposed regulation would restrict access to education during poorer economic conditions when education is most valuable and least costly.
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I. Introduction

For the past several years the Department of Education (ED or Department) has attempted to clarify the meaning of the phrase “gainful employment” (GE) as it relates to programs providing training that prepares students for gainful employment according to the Higher Education Act (HEA). The Department has released several different proposed regulations since 2010, each of which has relied on one or more metrics that ED believes define what it means for a program to provide training that prepares students for gainful employment. In each case these measures are related to cost, earnings levels, and loan repayment. None of these are direct measures, or even reasonable proxies for the quality of a program or the long-term benefit that a student may receive as a result of the education.

The first Notice of Proposed Rulemaking (NPRM) was issued on July 26, 2010 with a comment period ending in early September of that same year. Based on the numerous public comments submitted during the comment period, ED made some modifications to the proposed rule and issued a final rule in June 2011 containing two metrics intended to identify programs that failed to prepare students for gainful employment: a debt-to-earnings rate and a repayment rate, both of which were included in a similar form in the original NPRM.

The first metric, a debt-to-earnings rate, was calculated as annual loan payment on the median total debt of all graduates from a program in the given cohort divided by the average (or median) earnings of those same students based on earnings data obtained from the Social Security Administration. Similarly a debt-to-discretionary earnings rate was also calculated by taking the same debt amount and dividing by “discretionary” earnings (earnings above one and one half times the poverty guidelines for a single individual). If the debt-to-earnings rate was above 12 percent the program was deemed to be failing the debt-to-earnings metric. If a program had a debt-to-discretionary earnings rate above 30 percent then the program was deemed to be failing the debt-to-discretionary earnings metric. Programs failing both of these metrics failed the debt-to-earnings portion of the proposed gainful employment rule for that calculation year.

The repayment rate was calculated as the percent of total loan dollars from all students in the given cohort (graduates or dropouts) that were either paid in full or currently had principal balances being paid. If a program’s repayment rate was below 35 percent in the calculation year, that program was deemed to be failing the repayment rate metric for that calculation year.

Programs failing both the debt-to-earnings metrics and the repayment rate metric were deemed to be ineligible to accept Title IV funds. As part of the changes made after the comment period, programs would only become ineligible to accept Title IV
funding after failing both metrics in three out of four calculation years, and small programs (less than 30 students) would be deemed to automatically pass the metrics.

After a legal decision deemed the repayment rate metric invalid, and as a result invalidated both metrics that were included in the prior rule, ED has now issued a new proposed regulation that keeps some parts of the prior rule and adds a new metric to replace the repayment rate. The debt-to-earnings metric remains largely unchanged, but programs must now pass two out of three calculation years, small programs do not automatically pass but rather are not considered for any calculation year with less than 30 graduates, and a program passes only if it has a debt-to-earnings ratio (D/E) at or below the threshold of 8 percent rather than 12 percent in the prior rule. Programmatic Cohort Default Rates (pCDR) are now calculated for every program and used as a part of the gainful employment evaluation and any program with a pCDR above 30 percent in three consecutive years will be deemed ineligible to accept Title IV funding. As a significant departure from the previous version of the rule, programs must now pass both the debt-to-earnings metric and the pCDR metric in order to be a passing program. In addition, both metrics are limited to students receiving some form of Title IV money.

The modification in the debt-to-earnings from the prior rule to the current proposal is one example of the arbitrary nature of the Department’s metrics in determining gainful employment. In the prior rule a program that had a debt-to-earnings measure of 9 percent would be assessed as providing training that prepares students for gainful employment regardless of any other metrics. Under the current regulation this program would be assessed as not preparing students for gainful employment. Furthermore, under the current regulation a program that has a debt-to-earnings ratio of 7 percent (which would clearly be a program preparing students for gainful employment in the prior rule) only prepares students for gainful employment if it also passes the pCDR criteria. Why would the Department’s definition of what it means to be gainfully employed change in just over a year? Will it change again in another year?

In addition, the two metrics that the Department claims to identify programs that leave student with too much debt appear to be negatively correlated. That is, rather than identifying some of the same programs using either metric, each metric identifies an almost completely different set of programs. If D/E is supposed to identify programs whose students have too much debt, why do those programs’ students pay back their loans at a higher rate? D/E is clearly not measuring what ED intends it to measure.

We submitted a public comment during the comment period for the first proposed rule, and since very little has changed regarding the fundamental reasoning behind the rule, much of our criticism remains consistent with our prior public comment. The rule as it is currently constructed is fundamentally flawed and could have adverse unintended consequences for students, taxpayers and the general public.
Any rule whose purpose is to determine whether a program provides earnings benefits to students should focus on the earnings gains students receive and not the post-completion level of their earnings. This is not the case in the proposed rule. Furthermore, if multiple measures intended to identify a similar outcome are to be used, they should be positively correlated.

Based on our review and analyses, we are most concerned that the current proposal has the potential to greatly restrict access to individuals who have traditionally had limited access to postsecondary education when the consensus among top researchers in this area is that the returns to education might be quite high. More research should be done before taking action that has the potential to restrict access to many of the types of students that tend to benefit the most from additional schooling.

Our report is organized into six sections. In the first section, we describe the standard way that academic economists analyze and understand the investment that students make when they choose to further their education beyond secondary school. We point out inconsistencies between this standard way of thinking about education and the gainful employment proposal. In particular, the standard economic analysis of education implies that the focus should be on ensuring that all students who are likely to gain more from education than the costs they have to pay will attend. Consistent with the Department's findings that students who have low earnings may still experience great gains, it is these gains not the earnings level on which the rule should focus. We believe that the currently proposed rule does not focus adequately on measuring the benefits to students from education. We describe our concern that by not measuring the benefits to students, the rule has the potential to reduce access to programs that would have conferred significant benefits to students in the form of higher lifetime earnings.

In this first section, we also discuss what academic economic studies show about the increasing and significant importance of postsecondary schooling for labor market success, and the need for growth in capacity in the higher education sector. This section also includes a review of recent research into the returns to a for-profit education and discusses some of the preliminary results as well as some of the limitations of these studies. We explain that if the earnings benefits from postsecondary schooling are in line with what academic studies suggest, the currently proposed rule will be detrimental to many students.

In the second section, we demonstrate that the proposed rule has no relation to the quality of a program, but instead identifies programs that enroll students who have been underserved by traditional postsecondary education. We discuss our concern that the rule may generate a discriminatory incentive for schools to avoid serving low-income students. We also compare the outcomes of for-profit programs to other open enrollment not-for-profit alternatives. Finally, we address analyses presented by the Department that claim the proposed metrics are not correlated with percent of minority or Pell eligible students enrolled in a program.
The third section of our report focuses on the individual metrics upon which the gainful employment regulation is based. We explore the appropriateness of an 8 percent debt-to-earnings threshold, the impact of non-completers on the pCDR calculation, as well as a comparison of the percent of dollars in default to the percent of borrowers in default. In addition, we demonstrate how the two metrics cannot be measuring the same thing. Finally, we address the inflexibility of the proposed rule to macroeconomic fluctuations that will impact program eligibility.

We then turn to our estimate of the potential impact of the proposed rule based on data collected from several for-profit institutions in the fourth section of our report. Unlike the Department, we utilize multiple years of student data to more accurately assess the impact of proposed rule, including assessing whether programs found in the “zone” remain there for consecutive years. In addition, we provide estimates of the potential long-term impact that this rule could have on access to education for a traditionally underserved population. Finally, we provide a more detailed review of how programs failing one of the metrics perform with regard to the other metric.

In the fifth section we contrast the recent slow rate of growth in the number of students that institutions of higher education accommodate with the larger needs and demands that the economy has for workers with postsecondary education. We demonstrate the important role for-profit programs have in high job growth fields, and how the Department substantially understates the number of students who will likely be impacted by the proposed regulation. We provide a detailed review of the percentage of students who are likely to find alternative educational programs.

We conclude with some specific suggestions for how the rule – if one resembling the proposed rule were implemented – might be changed to address some of the concerns we raise. Though we offer these specific suggestions, they should not be interpreted as fully addressing the conceptual problems we raise throughout our report.

II. Fundamental Economic Decision-Making Process and Research on the Benefits of Education

In this section, we first review the standard analysis that is used by academic economists to examine postsecondary education decisions to provide a background for why the proposed GE rule can lead to inappropriate outcomes that protect neither students nor taxpayers. We then further demonstrate the importance of examining the benefits of education over an extended time horizon and how the focus on the earnings in the first few years after completing a degree will substantially understate the earnings gains associated with additional education. Finally, we focus on the existing academic research regarding the benefits of education. We examine both the established research on more traditional
education, and the more recent literature that has focused on the outcomes of students in for-profit educational programs.

A. The standard economic analysis of schooling

The standard economic analysis of schooling says that all students for whom the benefits of college are likely to outweigh the costs should go to college. As detailed below, we believe the proposed rule deviates from the standard economic model in ways that will lead to reductions in access for students from disadvantaged backgrounds who would benefit from postsecondary education.

Ideally, whether a student attends college would not depend on his or her level of earnings before or after college. Instead, it would depend on the increase in earnings resulting from the schooling. The decision of whether to go to college should be based on a comparison of benefits and costs. We believe the proposed rule does not focus on benefits and in some important ways mismeasures the costs. As a result, we believe the proposed rule may have the unintended consequence of disproportionately limiting postsecondary education access for students who have traditionally faced barriers to higher education and who would benefit from postsecondary schooling.

The standard economic analysis of schooling considers the choice of whether an individual should obtain an additional year of education.\(^1\) If the benefits from attending college are larger than the costs, the student should attend, and if the costs are larger than the benefits, he or she should not attend. The costs include explicit costs, in the form of tuition and fees, and opportunity costs, the earnings foregone if one attends school full time. The benefits include increased earnings in future years. Earnings increases are measured by comparing what the individual is able to earn after completing the education to what that same student would have earned had he or she not obtained the additional education. The earnings that a student would have earned absent the additional education are commonly referred to as “counterfactual” or “but for” earnings, and are key to the evaluation of the benefits of education. It is also worth noting that the benefits of education cannot simply be measured by the post-schooling earnings level alone.

Education is an investment, meaning that the costs are generally paid up front and the benefits come over an extended period in the future. To properly weigh the costs and benefits, one must discount benefits that will not be realized for many years. Because the earnings gains from college come over a long period of time, many students need to borrow to cover the cost of education. That some students need to borrow while other students, or their families, can afford to pay tuition without borrowing has important implications for college access. To simplify things,

\(^1\) The standard reference is *Human Capital* by Gary Becker (University of Chicago), who won the Nobel Prize in Economics for this and other work.
consider the interest paid on savings accounts or the expected return on personal investments as the discount rate.

Consider the education choice of two students: one who has enough personal or family wealth to pay tuition costs out of savings, the other who must borrow to finance the tuition costs.

For the student who would pay tuition costs out of savings, the decision comes down to comparing the present value of the increase in lifetime earnings (the benefits) to the foregone earnings while in school plus the tuition (the costs). If the benefits are greater than the costs, then the student should continue in her schooling. If the costs are larger than the benefits, she should end her schooling and begin working.

Compare this decision with a student who must borrow to pay the tuition costs. This student must consider as costs the additional interest payments associated with the loan. Those payments must be paid in the future. If the interest rate on the loan were equal to the interest rate used for discounting (in this case the interest paid on savings), then the decision would be the same for the student who must borrow and the student who can pay for college out of savings. Since the unsubsidized interest rate charged on student loans is typically higher than the interest rate paid on savings accounts, the cost of furthering education is higher for the student who must borrow.

In short, because borrowing interest rates are higher than savings interest rates, the cost of schooling is higher for those who must borrow to pay for higher education. Because these students almost by definition come from poorer families, this problem creates differences in college access along wealth, socioeconomic, and racial lines. Subsidies for student loans are meant to narrow the difference between borrowing and saving interest rates to reduce the relationship between family wealth and the costs of education.

Therefore, a restriction of access to debt financing for higher education will generally have the effect of decreasing access more for poor and minority students. This is completely at odds with the intent and spirit of the Higher Education Act.

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2 Note the cost of education does not necessarily include living expenses while attending school. Many of these expenses, particularly for financially independent students, would be incurred regardless of the education decision. However, students will often take loans to cover part, or all, of their living expenses.

3 While it is necessary to consider as a cost the interest she does not earn on the money she takes out of saving to pay tuition, these interest payments are discounted because they would have happened in the future. If we use the savings account interest rate as the discount rate, the discounting eliminates this from consideration.
B. Earnings grow over time and earnings growth is steepest in the early stages of one’s career

Evaluating employment outcomes during the first several years after finishing schooling is likely to give a misleading sense of the benefits from attending college because the benefits from education are properly measured over a long time horizon, and because labor market outcomes tend to improve over the course of a worker’s career. As discussed above, the earnings benefit from education should be measured as the gain relative to what the individual would have earned absent the education rather than the level of income at any given point in time. Examining the level of an individual’s earnings early in their work life (e.g., during the first few years after completing their education) further biases the assessment of the educational investment because for a typical worker, a significant portion of lifetime earnings growth happens throughout the early stages of one’s career (i.e., beyond the first few years).

Evaluating earnings so soon after the completion of schooling ignores the substantial earnings growth that workers typically experience, and, more importantly, the earnings gains relative to their “but for” earnings. While these job changes may lead to higher earnings growth over time, they may also be accompanied by periods of either underemployment or unemployment. If earnings are measured during one of these periods, which may be necessary for long-term wage growth, it could further underestimate the benefits of education.

Early career earnings growth has been well documented in the economic literature starting with Jacob Mincer’s work in 1974 showing that earnings tend to rise rapidly in the early years of work, grow more gradually for a period of time, and finally decline towards the end of a worker’s career. Studies tend to find that growth early in a worker’s career and the decline towards the end are larger for workers with more education. Figure 1 presents the median earnings profiles of individuals with a high school diploma and those with a bachelor degree.

The lines in Figure 1 represent the median earnings profiles for those whose highest level of education is a high school diploma (blue line) compared to those with a bachelor degree (red line) using data from the 2013 Current Population Survey (CPS), a representative sample of people in the U.S. The figure shows how median earnings of the two groups progress as workers age.

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Based on the CPS data, at age 22 the median individual holding a bachelor degree earned the same amount as the median individual completing no more than a high school diploma, about $18,000. From that point on, however, the median holder of a bachelor degree always earned more than the median holder of only a high school diploma, with the difference between their earnings growing over time. For example, by age 25, the median bachelor degree holder earned about $35,000 while the median high school diploma holder earned only about $25,000, a difference of about $10,000. By age 50, the median bachelor degree holder earned about $65,000 while the median high school diploma holder earned about $35,000, a difference of about $30,000.

There are two important patterns that the figure shows. First, the growth in earnings over a worker’s career is typically greater for college-educated workers than for high school educated workers. The gap in earnings between workers with a college degree and those with only a high school degree grows as workers age. This means that a comparison of earnings between workers with a college degree and those with a high school degree early in their career will underestimate the lifetime difference in earnings between the two groups. Second, Figure 1 shows that earnings gains tend to be largest when workers are young. There are many reasons for this steep growth in earnings that the average worker experiences at the beginning of his or her work life. Workers switch jobs as they try to find the best match for their particular skills, and workers continue to gain skills as they learn on the job. This empirical regularity means that it can be misleading to infer where a worker will end up economically based on his experiences early on. To evaluate the
benefit of education based on the first job a worker holds after completing schooling, or based on the level of earnings early in the worker's career would clearly understate the earnings benefit from education.

C. Research on the economic returns to education

It is informative to describe what the vast set of studies by academic researchers has found regarding the benefits of postsecondary schooling. There are dozens, if not hundreds, of studies of this sort that have been published in peer-reviewed academic journals. Education is widely recognized as a source of social mobility. Though the United States is regarded as a “land of opportunity,” correlations in earnings between fathers and sons are actually quite high. To understand how much social mobility there is in the U.S., consider a family of four at the poverty threshold. Based on the best current estimates, it would on average take their descendants 5 or 6 generations before their income is within 5 percent of the national average.6

What's more, studies find less social mobility among families with low net worth, suggesting that the inability to borrow restricts social mobility. In other words, restrictions on borrowing (coming from poorly functioning credit markets and high interest rates) makes being born into an impoverished household a significant barrier to social mobility. All of this argues strongly that it is as important as it has ever been to assure that all students who will benefit have access to higher education. The social costs of restricted access are larger than they have been in almost a century.

The general consensus from studies that examined data from various periods over the past 50 years is that each year of schooling causes the average student to enjoy a gain in annual earnings of between 7 and 15 percent. This means that the average student earns between 7 and 15 percent more each year for the rest of his career, for every additional year of schooling he completes. Because the gains accrue per year of schooling, students that complete 4-year college programs on average see gains in earnings that are 4 times this large.

Another consistent finding is that these returns to education have been rising in the U.S. fairly consistently since the early 1980's. The 7 percent estimates tend to come from data representing earnings from earlier periods, while estimates between 10 and 15 percent have come from more recent data. Postsecondary schooling is more important than perhaps it has ever been – certainly since the 1920’s – for labor market success. Put differently, the gap in earnings and economic wellbeing between the rich and poor is at historically high levels, and postsecondary schooling is an important factor in determining which side of that gap one sits.

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Consider if the earnings return of schooling were only 5 percent per year. A student who attended a 2-year program would earn 10 percent more each year for the rest of his career. That student could spend 10 percent of his annual earnings on student loan payments and not be any worse off during those 10 years than if he had not attended school. Then for all of the remaining years of his working life, he would earn 10 percent more with no costs. And yet, a program that educated students like this would be in the “zone” based on the proposed rule and would eventually be deemed ineligible.

If for-profit schooling leads to 8 or 10 percent earnings increases, still significantly less than the average return to schooling today, restricting student borrowing to fall in line with the guidelines implied by the proposed rule will reduce lifetime earnings for those students.

1. Studies on the economic returns to education – Traditional

By focusing primarily on the cost side of the education investment decision, the proposed rule does not account properly for the benefits of education. There is a large and well-established literature in economics documenting the large benefits of education (see e.g. David Card, 1999 and Claudia Goldin and Lawrence Katz, 2008 for discussions). Economic studies typically find that each additional year of schooling on average raises a student’s annual earnings by between 8 and 15 percent. These studies vary in the level of education they examine, but the general finding is that the returns are fairly similar for different levels of education. For example, one prominent study focuses on the benefits of staying in high school for an extra year among students who drop out of high school at the earliest date allowable by compulsory schooling laws (Joshua Angrist and Alan Krueger, 1991). This study finds earnings increases for these high school dropouts of about 10 percent per year of schooling in 1980, a point in time when the returns to schooling were significantly lower than they are today.

The highest-quality study that examines the returns to community college education is by Tom Kane and Cecilia Rouse (1995). Using data that follow students who completed high school in 1972, they find that the returns per credit at 2-year colleges is no different than the return per credit at 4-year colleges; this is true both

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for students who completed associate degree programs and for those who only
completed a semester or two’s worth of classes. On a per year basis, they find
returns of 4-6 percent. As is well documented, the return to education has risen
consistently over time since then (see e.g. Card, 1999; Goldin and Katz, 2008). If the
returns to community college attendance have risen in the same proportion to the
returns to all other levels of schooling that have been studied, ranging from high
school to college, these estimates imply the return per year of a 2-year community
college program would be between 8 and 10 percent today.

In the time since both of those studies measured earnings, the returns to education
have consistently increased. Claudia Goldin and Lawrence Katz (2008), estimate
that in 2005 the return to education was between 13 and 14 percent per year. Thus,
a student completing four years of college on average earned more than 55 percent
more each year than a high school graduate. They conclude that:

The true economic rate of return would remain high even after adjusting for
the direct resource costs of providing a college education. Thus, investments
in schooling would appear to make enormous economic sense. What is
preventing America from crossing the finishing line?

One possibility is that some young people might not actually benefit from
going to college. The rate of return we have estimated may not be applicable
to some young people who do not currently attend or complete college. The
average wage gap between college and high school workers may, therefore,
overstate the returns to those on the margin of going to college. But that
possibility appears not to be the case.

Recent estimates of the rate of return to a year of schooling have used
“natural experiments” from policies that have increased access to college,
changed college tuition subsidies or merit aid, and altered compulsory
schooling laws. These carefully executed studies using plausibly exogenous
variation in educational attainment find high rates of return to further
schooling. Because these returns would accrue to the marginal youth affected
by such policy interventions, often an individual of modest means, they
reinforce our conclusion that returns could be extremely high for many
individuals currently not finishing college or even not finishing high school.
(Goldin and Katz, 2008, p. 336.)

A similar point is made by David Card (1999). He explains that the natural
experiments referred to by Goldin and Katz fall into two general categories, those
that vary the benefits to schooling and those that vary the costs. He shows that
studies that vary the cost of schooling tend to find larger returns. He then explains
that these studies are informative of the returns for students who do not attend
because of difficulty paying for college, whether because they face higher borrowing
costs or because they have fewer financial resources. These are precisely the
students that Title IV funding is meant to encourage to continue their schooling.
The evidence that exists suggests that the benefits of further education for these students are higher than for the students who can more easily afford college tuition.

2. Studies on the economic returns to education – For-profit

More recent studies have attempted to estimate the effect of attending a for-profit college on earnings, though this research has yet to reach a consensus. Estimating the returns to a for-profit education is challenging. Measuring the actual returns to a for-profit education would require subtracting a for-profit graduate’s "but for" earnings, or the earnings she would have received “but for” the education, from her actual earnings. Since this is not possible, econometricians (economists specializing in developing models to analyze data) have developed several methods that attempt to overcome this problem, some of which are utilized in the literature examining returns to for-profit education. However, the available data on for-profit students is limited which makes it more difficult to apply these techniques. As a result many of these studies are limited by the representativeness or size of the sample, the inability to account for fundamental differences in the characteristics of students attending for-profit programs, or more than one of these limitations.

Deming, Goldin, and Katz (2013) use Beginning Postsecondary Student data (BPS) to provide a general description of the schools, students, and programs in the for-profit postsecondary sector, finding that for-profits specialize in associate degrees, particularly those in business, management, and marketing and the health professions, and disproportionately serve “older students, women, African-Americans, Hispanics, and those with low incomes.” 11 (Deming, Goldin, and Katz, 2013, p. 146) They conclude with an estimation of the returns to enrolling in a for-profit institution. Their analyses show that first-time enrollees at for-profit schools experience greater unemployment after leaving school, but among those working their annual earnings are statistically similar to their not-for-profit counterparts. It is important to note that these results do not attempt to fully account for the potential differences in employment outcomes of for-profit and not-for-profit students prior to enrollment. Deming, Goldin and Katz clearly note this deficiency stating:

Although we have used the detailed background covariates in the Beginning Postsecondary Students survey data to make comparisons between individuals who are similar as can be observed, we do not have quasi-experimental variation concerning who goes to which type of higher-education institution. Thus, one needs to be cautious in providing a causal interpretation of the estimated for-profit school treatment effects in Tables 2 and 3 since the potential problem of selection bias from nonrandom sorting on unobservables remains. Furthermore, our comparison of the medium-term outcomes for beginning postsecondary students starting at for-

profits versus comparable students starting at other higher-education institutions does not directly provide information on whether attendance at a for-profit college (or, for that matter, attendance at public or private, nonprofit colleges) is a worthwhile (private or social) investment. (Emphasis added) (Deming, Goldin and Katz, p. 160)

Lang and Weinstein (2013) also use BPS survey and transcript data to compare returns to for-profit and not-for-profit certificate and associate degree programs. Using data from 3,270 students who entered postsecondary certificate or associate degree programs in 2003-04, they find statistically similar returns to for-profit and not-for-profit students after accounting for the area of study. Comparing major areas of study available at both for-profit and not-for-profit institutions, they find that differential returns across area of study vary much more than differential returns across sector. In addition, they find that strong students completing not-for-profit programs are more likely to pursue a bachelor degree than similar students in for-profit programs. This result would be consistent with potential differences in long-term education goals of students entering for-profit programs compared to those entering not-for-profit programs.

Several types of bias enter both Deming, Goldin and Katz and Lang and Weinstein’s estimates of the returns to for-profit education. First, the BPS follows only beginning postsecondary students, meaning that this is their first enrollment in postsecondary education. In that sense, these estimates are not statistically representative of all postsecondary students, because the sample does not include those who have tried school before, quit, and then reenrolled. In fact, for-profit institutions tend to educate a greater share of these students than other types of institutions. Second, we would worry about ability bias. Specifically, there may be observable and unobservable differences between graduates and dropouts at for-profit institutions compared to graduates and dropouts at not-for-profit institutions. Understanding these differences is important when interpreting any estimated impacts.

Because of the shortcomings of the BPS data, others have used alternative data sources to estimate the impact of for-profit programs. In a working paper, Cellini and Chaudhary (2013), attempt to estimate the labor market returns to a for-profit education among students enrolling in an associate degree using data from the 1997 National Longitudinal Survey of Youth (NLSY97) Geocode. They compare the earnings of an individual after being in school to his or her own earnings before being in school, thus eliminating some of the bias due to unobserved variables. They calculate earnings growth for high-school graduates with no college education and

for for-profit college attendees. Cellini and Chaudhary use the difference in these estimates to estimate the return to a for-profit education. They find that students who enroll in for-profit colleges experience earnings gains of about 4 to 8 percent per year. Additionally, they find that for-profit degree-completers earn about 20 percent more than those who drop out.

While the methodology of Cellini and Chaudhary (2013) has some advantages over those of Lang and Weinstein (2013) and Deming, Goldin, and Katz (2013), since they are able to compare a for-profit attendee or completer’s earnings to her own earnings before enrollment, it also has a major drawback. Individuals in the NLSY97 data were at most age 31 by 2010, the last year of their data. This means that the earnings gains are being identified, at best, off of several years of earnings beginning at age 18 (not necessarily representative of an individual’s earnings potential) and several years of earnings post-graduation. In addition to this methodological drawback, the authors are only able to identify 388 students who work towards or complete an associate degree at a for-profit college, a relatively small sample size.

While Cellini and Chaudhary do not directly estimate the returns to public or not-for-profit college attendance in their paper, they do state that their estimates of for-profit returns are lower than those of Jacobson, Lalonde, and Sullivan (2005) or Kane and Rouse (1999), both of which estimated the returns to a year of public community college. However, caution should be used when comparing the results of studies utilizing not only different data sets containing different variables and workers at different stages of their lives, but also different methodologies.

Most recently, Liu and Belfield (2014) use transcript data from two statewide community college systems, data on students transferring to other institutions from the National Student Clearinghouse, and earnings data from state Unemployment Insurance records to identify the effect of for-profit attendance on the set of students transferring from community colleges to the for-profit sector. Because the authors only look at students transferring from community colleges to other colleges, their results are only statistically representative of those types of students. Additionally, unlike the three previously described papers, their data has no direct information on student socioeconomic status prior to enrollment and so they are unable to control for differences in family background. As we note throughout this report comparing to “but for” outcomes are crucial when evaluating the benefit of a program. The impact of education relative to what an individual would experience in absence of the education should be the focus, not the post-education outcome in isolation.

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Liu and Belfield conclude that students transferring to for-profit institutions earn less than their counterparts transferring to public or private not-for-profit institutions in the long run. In fact, their estimates show that in one state, for-profit students do poorly compared to their public counterparts (earning 5 to 9 percent less, on average) while in the second state, for-profit students do better than their public counterparts (earning 18 to 25 percent more, on average). Interestingly, they hypothesize that the relative gains of for-profit students in the second state are overstated due to a difference in the length of time after school completion at which earnings estimates were taken rather than question the appropriateness of the modeling, limitations of the data, or the potential impact of unmeasured observable and unobservable student characteristics. Liu and Belfield also estimate the differential earnings by sector during school attendance, finding that for-profit students have a substantially lower opportunity cost of attendance than their public or private not-for-profit counterparts. This outcome is important when considering the cost of education, which is more than tuition or loan debt.

The success or failure of the econometric methods utilized in these studies depends in large part upon the quality and amount of data available to the economist. That is why Lang and Weinstein (2013) and Deming, Goldin, and Katz (2013) use the BPS despite its relatively unrepresentative nature, and why Cellini and Chaudhary (2013) use the NLSY97 despite its small sample size. These data sets, while not ideal for the reasons mentioned above, contain rich background information on each individual, allowing the use of these sophisticated econometric techniques.

The presence of large, typically observable differences between two groups receiving different “treatments” causes econometricians to worry about whether “unobservable” differences between the groups might be responsible for the different outcomes of group members. As described in the literature, for-profit students differ substantially from public and private not-for-profit students. For this reason, we cannot be certain that even the use of sophisticated econometric techniques can fully inform us regarding the “causal” effects of a for-profit education; in fact, without experimental data (data that comes from an experimental design in which students are randomly assigned to different types of education), we cannot be certain that studies on the effect of for-profit education on earnings are measuring the effect of attending a for-profit college as opposed to the difference in earnings potential of the types of students who attend for-profit colleges versus public and not-for-profit colleges.

D. More research is needed

If the returns that accrue to students who attend for-profit colleges are in line with the returns found for most other schooling, then any policy that restricts growth in capacity in the for-profit college sector will hurt potential students. If the returns to for-profit college education are much lower, then restricting access to poor quality
programs will protect uninformed students. Without knowing what the returns are, however, a rule that shuts down programs and restricts their growth has the potential to hurt the students it intends to protect. Because the consensus among top researchers in the area is suggestive that the returns might be quite high, more research should be done before taking action that has the potential to restrict access for many of the types of students that tend to benefit the most from additional schooling.

Just to give a sense of how important the returns are relative to the debt guidelines implied by the proposed gainful employment rule, consider a return to schooling of 8 percent per year. With this return, a student attending two years of college will earn 16 percent more each year than he would have if he had stopped schooling after completing high school. That student could pay 8 percent of his annual earnings on student loans, as suggested by the proposed rule, and still have 8 percent more each year, until the loan is repaid, than he would have had if he did not take out the loan and did not complete the schooling. This calculation ignores any foregone earnings while he was in school, which should be considered as a significant cost, and it also ignores the years beyond the loan repayment when the benefits continue but loan payments do not. It points out, however, that for a student who gets these average gains, their new, higher income minus the loan payment is more on an annual basis than their “but for” income; they are better off than they would have been “but for” borrowing money to attend college. For students that get much smaller returns, such loan payments may not be affordable. Again, it is the gains in earnings that are important not the levels, thus learning more about the returns (the gains) to these types of programs is necessary to make informed and thoughtful policy.

We suggest that the Department of Education encourage direct experimental or quasi-experimental studies of the returns from for-profit colleges, though we suspect the results from all of the studies described above, as well as those referenced by Goldin and Katz and Card, are informative. Whether the use of Title IV aid to attend for-profit colleges is beneficial to students depends crucially on what these earnings returns are. As the results from Kane and Rouse (1995) and the summary of the literature from Goldin and Katz (2008) show, the quality studies that do exist do not suggest that the returns to education are similar at different levels of schooling (i.e. high school versus college) and that the returns are if anything higher for students who might be discouraged from attending college because of high costs. We therefore think the large base of academic research suggests that the returns to students receiving Title IV aid at a for-profit college are likely to be in line with the returns estimated for other types of schooling. However, there is likely to be a good deal of variation in returns across programs, just as there is variation in quality among public and not-for-profit colleges.
III. Proposed Rule is Inconsistent with Students’ Best Interests

The standard economic analysis of education implies that the decision of whether to continue schooling beyond high school should be based on a comparison of the lifetime benefits and the lifetime costs of that schooling. These costs and benefits should both be properly discounted to account for the fact that many of the benefits and some of the costs occur far in the future. Even when the benefits only slightly exceed the costs, when properly measured, it benefits the student to continue to pursue additional education.

The proposed gainful employment debt-to-earnings metric is different from this ideal in a number of ways. Most significantly, the proposed metric focuses on the level of earnings in the first few years after completion of the schooling. While the Department of Education’s intent is likely to ensure that students are able to afford the necessary loan payments in those early years after schooling, it must be noted that any deviation from a comparison of lifetime benefits to lifetime costs has the potential to harm the students. For this reason, special care should be taken when analyzing a rule that effectively restricts borrowing for schooling costs.

A. Benefit of education should be measured in earnings gains not earnings levels

Focusing on the level of earnings a person is able to obtain with the additional education rather than the gains that result from the education can lead to an inappropriate assessment of the benefits relative to costs for at least two reasons. First, the level of earnings will tend to be low for students who would have had low earnings in the absence of a college education, even if the college education conveyed a large earnings gain. And second, an assessment soon after the education is completed is likely to miss the benefits of education that typically accrue over a long period of time.

Public policy since the inception of No Child Left Behind in 2001 has led to debates over measuring the “quality” of public school teachers, which is often measured by the performance of the teacher’s students on annual standardized exams. Economists who study education are in consensus that comparing the levels of student performance on standardized tests is not an accurate way to compare the quality of one teacher to another. Consider, for example, two math teachers, one who is assigned to teach 9th-graders basic math, and the other assigned to teach 9th-graders geometry. The students in the geometry class will almost certainly perform better on their year-end standardized exams than the students in the basic math class, but does that imply that the geometry teacher has done a better job of teaching his or her students than the basic math teacher has done for his or her students? The answer is no; students assigned to different teachers often differ in level of ability and knowledge before setting foot in that teacher’s classroom, and...
that may have more to do with those students’ performance on annual exams than the actual knowledge imparted by the teacher during the course of the school year.

Instead, economists suggest a model referred to as “value-added,” which considers not the levels of student performance on annual standardized exams, but rather the improvement of student performance on those exams compared to the previous year. A teacher has more impact on their students’ improvement in exam scores than the levels of their exam scores, and thus this is a more fair assessment of teacher quality than simply considering the levels. Of course, even the improvement in exam scores may not be a fair way of comparing one teacher’s performance to another teacher’s performance since students’ motivation also affects their test score improvement, and the students of one teacher may be more motivated than the students of another teacher. Despite this remaining discrepancy, the value-added measure of teacher quality remains less biased than the level measure of teacher quality.

The proposal’s focus on students’ early career earnings will have the effect of differentially punishing programs educating students with poor labor market prospects and who would gain the most from higher education, much like teachers assigned to teach low-performing students would be punished if they were evaluated based only on their students end of grade tests without adjusting for those same students’ test scores from the end of the prior year. Students with poor labor market prospects would have low earnings, and likely high unemployment rates, without any higher education. Among these students, the ones who would benefit greatly from additional focused schooling may end up in gainful employment with low earnings. But, these students’ earnings may be much higher than those same students’ personal alternative earnings, but for the additional schooling. If applied on a student-level, the proposal would limit how much these students could borrow based on the low level of earnings, and not based on the large gains that would be realized from the doors opened by education. Worse yet, colleges have discretion over which students they admit, and we are concerned that the most effective way to reduce the risk of a program failing the proposed gainful employment D/E and pCDR metrics would be to avoid educating students with low “but for” earnings prospects. Imagine what would happen if teachers were evaluated and paid based on their student’s end of year test scores – not value added, but the end of year test score with no adjustment – and those same teachers were allowed to choose which students they allow into their classrooms. Which students do you think teachers would avoid? Would we expect teachers to enthusiastically welcome low-performing students into their classrooms?

B. Comparison to “but for” earnings are what is important when evaluating educational outcomes

Unlike the costs of education that are paid up front, the benefits from education accrue over time. Measuring the benefits from education is difficult. To illustrate this difficulty, we will first consider only the earnings benefits from a college
education. As discussed throughout this report, the earnings benefits from college typically accrue over a long period of time. Conceptually, the earnings benefits from education are the difference between what someone earns after attending college relative to what that person would have earned if he had not attended college. In other words, the earnings benefits from college are the amount that college increases someone's earnings relative to what he would have earned if he had stopped schooling at the end of high school.

It is difficult to measure this increase, or difference, because it is a comparison between what someone actually earns, and a hypothetical amount. The hypothetical amount – what he would have earned had he not gone to college – is sometimes called the “counterfactual” earnings, and sometimes called the earnings in the “but for” world. The former description comes from the fact that we are comparing to a baseline, in which the person did not go to college, that did not actually occur (it is counter to fact). The latter description evokes the idea that the proper baseline for comparison is what the person’s earnings would have been “but for” the college education.

Consider, for example, a student who would have been unemployed had she not gone to college. If her post-degree earnings are $20,000 annually, then the degree has provided her a benefit of $20,000 per year.

Consider, on the other hand, a student who would have made $25,000 annually with a high-school diploma. If this student earns $25,000 annually post-degree, then the benefit of her degree is zero.

In practice, it is impossible to observe, or to collect data on, any individual’s counterfactual earnings. Instead, it is possible to collect data on earnings of other individuals who did not go to college. Sometimes, to estimate the earnings benefit of college, evaluators compare earnings of groups of individuals who attended college to earnings of another group who did not. Such a comparison will only yield a valid estimate of the benefits of college if the latter group’s earnings are equal to the former group’s “but for” earnings (what they would have earned if they had not attended college). This condition is unlikely to be true if the two groups of students are different in observable or unobservable ways prior to the decision whether or not to go to college.

For instance, consider a comparison of the lifetime earnings of two groups of students: one group grew up with college-educated parents, got straight A's in school, and attended Harvard University; the other group grew up with high school dropout parents, struggled to maintain the grades that would allow them to finish high school, and did not attend college. It is very unlikely that the latter group’s earnings are equal to what the former group would have earned had they not attended Harvard. The Harvard students’ “but for” earnings are likely significantly higher than the actual earnings of the students who struggled to finish high school. Thus, a comparison of the two groups’ earnings will significantly overstate the
benefits of attending Harvard. Part of the reason the Harvard students earn more is that they start at a higher base; attending Harvard probably increases their earnings relative to that high base, but the difference in earnings between the Harvard students and the students who barely completed high school is equal to the difference in their starting points plus the benefit of attending Harvard.

ED makes this point themselves in their blog post “Fact: Too many career-training programs lead to low wages, high debt.”\textsuperscript{17} In reference to students graduating from GE programs, it states:

There may very well be earnings gains in the vast majority of these programs. A student may be making much less than a high school dropout before they enroll in a program, and three years after they graduated they are still making slightly less than a high school dropout. That’s a problem if you have accumulated debt that requires a couple of thousand dollars a year in loan payments. In short, an individual in that situation has gone from worse off to bad off.

In the next section, we illustrate why, even with a couple of thousand dollars a year in loan payments, many or most of these students may actually be better off than before enrolling in a program.

\textbf{C. ED comparison to high school dropouts is not appropriate}

Much has been made of a claim the Department made in the NPRM regarding a comparison to high-school dropout earnings.

72 percent of for-profit programs [...] produce graduates with average annual earnings less than the earnings of individuals who have not obtained a high school degree. (NPRM, p. 600)

In calculating this statistic the Department uses the average weekly wage of persons aged 25 and over who are full-time wage and salary workers ($471), obtained from the Bureau of Labor Statistics, and multiplies it by 52 weeks to come up with annual earnings of $24,492. The Department then calculates the percent of GE programs at for-profit institutions with average earnings of graduates that fall below this threshold. The comparison made is fundamentally flawed.

If the Department still wishes to make such a comparison then it needs to be consistent in how earnings are defined for both groups. It is inappropriate to compare earnings of gainful employment graduates to the Department’s estimated earnings for high school dropouts because the two earnings groups are composed of

\textsuperscript{17} Available at \url{http://www.ed.gov/blog/2014/04/fact-too-many-career-training-programs-lead-to-low-wages-high-debt/}
different populations of workers. The GE graduates’ earnings measure is obtained from the annual wages of all graduates as reported to the Social Security Administration. Because of the way the Department has chosen to measure earnings for the purpose of the GE D/E calculation, this number includes graduates who will have very low or zero annual earnings because they were:

1. Not in the labor force
2. Unemployed for the full year
3. Unemployed for part of the year
4. Employed part-time for the full year
5. Employed full-time for part of the year and part-time (or not employed) for the remainder of the year

This number is also limited to only include recent GE graduates who are in the early stages of a career where earnings are naturally lower than at later stages of a career.

On the other hand, the Department chose to measure the earnings of high-school dropouts in a very different way. The annual wages for high school dropouts estimated by the Department is limited to only include full time wage earners and the Department makes the assumption that these full time wage earners work for the entire year. Restricting the high school dropout group to only full-time, full-year employed workers and then not to do so in the GE graduates group biases the comparison. Additionally, the Department fails to exclude workers from the high school dropout group who are mature in their careers and have been working for many years. These individuals almost surely have higher earnings than many recent GE grads because of their experience and time in the workforce, and the nature of earnings growth over time as described in previous sections.

Without access to the underlying earnings data of GE graduates, the only option for making an honest comparison is to use the underlying Current Populations Survey (CPS) data and make the high school dropout population as comparable as possible to the GE graduate population. The March 2013 CPS contains person-level information on age, employment, labor force status, educational attainment, and total annual earnings, which we use to make a more appropriate comparison of earnings. We restrict the population to individuals with less than a high school diploma between the ages of 25 and 32 inclusive and we exclude persons in the military. We make no other exclusions. The weighted median earnings of a high school dropout for this population is just $7,000 and the mean is just $11,744 which is less than half of the number estimated by the Department. After ensuring that the populations used in each measure are similar, the percent of GE programs whose

18 Any number of reasons exist for persons exiting the labor force including raising a family full-time, caring for a sick relative, becoming disabled, or other life choices.
graduates have average earnings lower than a high school dropout by this measure is 2 percent, not 72 percent. 20

The Department’s method of comparison suggests that it would be better for these graduates to have not even graduated high school than to graduate high school and then enter and complete a postsecondary training program. The Department claims that not only are GE programs at for-profit institutions failing to help individuals but “sixty-four percent of all GE programs produce graduates with average annual earnings less than the earnings of individuals who have not obtained a high school diploma.” (NPRM, p. 600) The implication of the Department’s claim is that when faced with a choice between two otherwise comparable workers, employers would rather hire (or pay more to) someone who failed to finish high school than someone who not only finished high school, but also completed additional postsecondary training.

In light of this implication it seems clear that the Department’s method for comparing earnings of GE graduates with high school dropouts must be flawed. The Department’s comparison is useful however in demonstrating that its method for calculating earnings in the D/E is also flawed for precisely the same reasons that the two populations are not comparable.

Furthermore, the debt to earnings measure ignores an important benefit that is associated with higher education. Unemployment rates for those with postsecondary credentials are lower than for those with a high school diploma or high school dropouts. The fact that high school dropouts are less likely to be employed surely contributes to the $7,000 estimate for the median earnings; this is one compelling reason to not drop out. High-school dropouts face incredibly difficult prospects in finding employment, whereas individuals with postsecondary credentials have less difficult prospects. As discussed in more detail below, according to the BLS, the unemployment rate in March 2014 was 10.2 percent for those with less than a high school diploma, for high school graduates it was 6.8 percent, and for those with some college or an associate degree it was 6.1 percent. 21

Additionally, the fluctuation in the unemployment rates for those with postsecondary credentials is much smaller. The variance in monthly unemployment rates over a 20-year period from March 1994 through March 2014 for high school dropouts is 7.9, for high school graduates it is 4.63 and for those with some college or an associate degree it is 4.09. 22 Thus, aside from any earnings gain that may exist there are job stability benefits that are not captured by the D/E measure. The Department’s claim is simply wrong, and the methods used to make the calculation

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20 Percentages based on the earnings data of GE programs produced by the department.
21 http://www.bls.gov/news.release/empsit.t04.htm
22 The variance is calculated using monthly unemployment data from March 1994 – March 2014 gathered using the “One-Screen Data Search” tool at www.bls.gov/data/#unemployment Database Name: Labor Force Statistics
surrounding the 72 percent number are so misleading that we think it is important for the Department to set the record straight.

IV. Proposed Rule is not a Measure of Quality

In addition to focusing on the level of earnings rather than the gains, the proposed rule fails to examine or measure the quality of a program. Standard economic analysis clearly indicates that good schooling decisions should be based on a comparison of the costs of education to their benefits. Just as teacher quality should not be measured by the levels of their students’ test scores, because these are affected by their characteristics prior to entering the teacher’s classrooms, so too programs should not be measured by the levels of their graduates’ earnings because these are affected by their characteristics prior to entering the program. In other words, if the goal of the proposed regulation is to help students, the focus should be on program quality – the benefits that the program gives to students in terms of increased earnings and improved employment likelihood – and not so directly on debt amounts or levels of earnings.

A. Student characteristics prior to enrollment may affect earnings gains

When comparing the outcomes of groups of students from different schools, it is important to recognize that students in one group might differ greatly from students of another group, leading them to have significantly different counterfactual earnings. A comparison of the “pre-treatment” characteristics of the two groups is one method commonly used by economists to determine whether it seems reasonable to compare the outcomes of different groups that have received different “treatments” (such as one group attending one type of school while the other group attends a different type of school). If two groups seem similar before attending different schools, then it is more reasonable to compare these two groups than two groups who seem quite different before attending different schools. Specifically, it would be more reasonable to compare the earnings of for-profit graduates to the earnings of another group with similar pre-treatment characteristics (such as demographics and family background) than to a dissimilar group. As we will show below, for-profit graduates differ significantly in pre-treatment characteristics from the average college graduate, thus it is not reasonable to compare their earnings to the earnings of the average college graduate. Again, because of this difference in student characteristics, the gains that for-profit graduates may experience could be quite substantial relative to their "but for” earnings even if their annual earnings may be lower than graduates from public and private not-for-profit schools.
B. The focus should be on quality of education and value-added by schools, not on measures that punish schools for serving non-traditional students

Many for-profit colleges are open-enrollment schools, essentially allowing any person who has completed high school (either by graduating or completing a GED) to enroll, while many public and private not-for-profit schools have more restrictive admissions. Harvard University, for example, is highly selective of who is allowed to enroll in a bachelor degree program, with a 6.0 percent undergraduate acceptance rate, according to U.S. News and World Report. Many state universities also have selection processes determining who is allowed to enroll. Salem State University, for example, which is also located in Massachusetts, has a 69.3 percent undergraduate acceptance rate, according to U.S. News and World Report, indicating that approximately 7 out of every 10 applicants are allowed to enroll in the university. Simply comparing student outcomes across these two universities would give a misleading measure of the relative quality of education at the two schools, since the students at the two schools are likely to be different in many ways. For the same reason, comparisons of student outcomes at schools with open enrollment policies to student outcomes at schools with selective admissions are also misleading indicators of the relative quality of education among groups of schools.

Table 1 below presents the percent of students graduating within 150% of normal time across different types of 4-year colleges. The data underlying the table are drawn from the U.S. Department of Education’s National Center for Education Statistics (NCES) Integrated Postsecondary Education Data System (IPEDS). The top panel of the table shows graduation rates for all 4-year colleges. The average graduation rate for the 2012 finishing cohorts of students was 48.2 percent across all institutions. Public 4-year colleges graduated 45.0 percent of students within 150% of normal time, private not-for-profit colleges graduated 54.7 percent, and for-profit colleges graduated 36.4 percent of students.

The bottom panel of Table 1 shows graduation rates for 4-year open-enrollment institutions. Here the story is much different. Public open-enrollment colleges graduated 28.3 percent of students within 150% of normal time while private not-for-profit colleges graduated 39.7 percent. For-profit colleges graduated 35.2 percent of students within 150% of normal time. Additionally, more than half (55.7 percent) of for-profit colleges were open enrollment institutions in 2011-12, compared to less than 18 percent of public and 12 percent of private not-for-profit institutions.

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schools. While the for-profit graduation rate is lower than the average of all public and private nonprofit institutions, it is higher than the average of all open-enrollment public and private nonprofit institutions, which is likely to be a more appropriate comparison group. The lower graduation rates of these schools reflect, in part, their choice not to deny admission to students with a higher risk of dropping out.

It has also been reported publicly that cohort default rates (CDR) are higher among for-profit students than among public or private not-for-profit students. Data released by the Department of Education show 2010 CDRs of 22, 13, and 8 percent, respectively for these groups of students. However, virtually all of the difference between for-profit and public colleges is explained by the fact that for-profit college students are more likely to receive Pell grants. Receipt of Pell grants is income-dependent, and so Pell receipt is a strong predictor of having low family income and low family wealth.

As shown in Table 2 if one splits all schools into two groups – those where more than 50 percent of the students receive Pell grants, and those where less than 50 percent of the students receive Pell grants – and then compare for-profit and public colleges, the large differences in CDRs disappear in 2-year and less-than 2-year schools. Among 2-year schools, in the high-Pell group, the CDR at for-profits is 20.6 percent, compared with 24.2 percent at publics. Among 2-year schools, in the low-Pell group, the CDR at for-profits is 16.6 percent, compared with 20.4 percent at publics. Turning to 4-year or above schools, in the high-Pell group the CDR at for-profits is 22.4 percent, compared with 15.5 percent at publics. And among 4-year or above schools, in the low-Pell group the CDR at for-profits is 22.1 percent, compared with 8.7 percent. It is not surprising that the largest difference is among 4-year low-Pell schools. These public schools are the most likely among the comparisons to have selective admissions policies.25

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25 Pell eligibility is based on economic factors of the individual student and her family. Pell eligibility does not reflect other individual characteristics such as aptitude, skill, ability or desire. Pell eligible students at institutions with high admission standards likely differ from Pell eligible students at
Why is Pell receipt so strongly related to CDRs? One possibility is that because they qualify based on low family income and family wealth, Pell students have fewer outside resources to draw on when they face economic hardship. Particularly during recessions such as the Great Recession from which we are still recovering right now, but not exclusively so, those with few outside resources are more likely to defer payments or default on loans.

These two examples illustrate that comparisons between for-profit colleges and the rest of the higher education sector need to be thoughtful to be informative. Almost all for-profit colleges are either open enrollment or require minimal testing to assure that a student has the basic skills required to complete courses at the college-level, meaning that they do not restrict admission based on the student’s income or academic record. For-profit colleges also are far more likely to enroll “non-traditional students.” Students at for-profit colleges are more likely to be the first in their family to attend college, more likely to be working adults, more likely to be female and more likely to be racial and ethnic minorities. As many of these are groups that have historically been denied access to higher education, it would be a

institutions with less restrictive, or open, enrollment policies. Thus, other individual characteristics are important factors to consider when examining differences in measures such as repayment rates, graduation rates, default rates and placement rates.
mistake to punish these schools solely for serving these students.\textsuperscript{26} Once again, it is clear that the focus of policymakers should be on ensuring these students attend programs that are high quality and that benefit students. Unfortunately, neither the measure of debt nor the pCDR as defined is a measure of program quality.

\section*{C. The Department’s analyses do not prove that the rule is not correlated with demographic or socioeconomic factors}

Comparing the “pre-treatment” differences in observable characteristics is important when comparing the outcomes of two different groups of college graduates. In the NPRM, the Department attempts to dismiss pre-treatment differences in student characteristics as meaningful by reporting that two basic measures of student characteristics perform poorly in explaining all of the differences in pCDR and D/E among programs. In performing their simple analysis, the Department both misinterprets the statistics that they do report and fail to report the statistics that would be most meaningful in describing the importance of the relationship between student characteristics and graduate outcomes. In this section, we present a similar analysis of the impact of student characteristics on graduate outcomes and show that there is a meaningful relationship between the two that could be costly to ignore.

The Department states that they estimated two regression models to “examine the extent to which student demographic factors explain program performance under the proposed regulations.” (NPRM, p. 647) Regression analysis is an appropriate statistical technique for this purpose; however the R-squared statistic from the regression reported by the Department is not the appropriate statistic for the question they wish to answer. The purpose of regression analysis is to fit an average trend line through a series of data points to discover the average relationship between X and Y as measured by the slope of the line. The R-squared value measures how tightly the data points fit around the line and is a useful measure in identifying how precisely Y can be predicted if a value of X is known. However it is not informative by itself in understanding the relationship between X and Y. Dr. Jeffrey M. Wooldridge makes this point in one of the most commonly used introductory econometric textbooks:

\begin{quote}
It is worth emphasizing now that a seemingly low R-squared does not necessarily mean that an OLS regression equation is useless. It is still
\end{quote}

\begin{footnote}
\textsuperscript{26}There are several equally important questions that we believe the Department should be raising in light of these enrollment trends. For example, are there ways for-profit colleges have designed their programs that students find attractive, more convenient and more accessible? Why have traditional public universities and community colleges failed to grow to meet the increased demand for postsecondary education? What can be done to encourage public and not-for-profit colleges to attract the students for-profits are serving? What can be done to encourage public and not-for-profit colleges to increase availability of on-line courses, flexible class schedules, and flexible academic calendars?
\end{footnote}
possible that [the specified model] is a good estimate of the ceteris paribus relationship between [the dependent variable] and [the explanatory variables]: whether or not this is true does not depend directly on the size of $R^2$.\(^{27}\) (emphasis added)

We further illustrate this point using Figure 2 as a visual reference.

![Figure 2: An Illustration of R-squared](image)

Figure 2 displays two hypothetical data series with very different values of $R^2$. The bottom data series has a very high value of $R^2$ meaning the data points are clustered very tightly around the trend line. However, in spite of this seemingly large $R^2$ value there is almost no relationship between X and Y as determined by the slope of the trend line. As X increases from 0 to 100, Y increases almost imperceptibly. On the other hand in the top data series there is a relatively lower value of $R^2$ meaning the data points are scattered widely around the trend line, but in spite of this low value of $R^2$, one can clearly see an increasing relationship between X and Y. As X increases from 0 to 100, Y changes on average from approximately 205 to nearly 400. Thus while a high $R^2$ value is helpful it is not necessary for an important relationship to exist between X and Y. The regression statistics that matter for determining whether there is a relationship between a dependent variable (Y) and explanatory variables (X) are the slope of the line and whether that slope is statistically different from zero which is determined using the standard error of the slope estimate.

The relevant statistics that should have been reported by the Department (but were not) are the point estimates (i.e. the estimates of the slopes of the regression line) and t-statistics (which are based on the standard errors) associated with each of the explanatory variables. These values provide the best estimate of how large of an effect differences in each of the explanatory variables will have on the dependent variable and whether that effect is statistically important.

We attempted to replicate the Department’s regression models to identify the point estimates and standard errors of the two explanatory variables in each model. The two regression models estimated by the Department are similar to each other, each having two explanatory variables. In the first regression the dependent variable is the program’s D/E rate. The explanatory variables measured at the program level are 1) the percentage of students enrolled in the program who were Pell eligible, and 2) the percentage of students enrolled in the program that had minority status defined as African-American, American Indian, or Hispanic. The Department reports only the R-squared value from this regression, which is less than 0.02.

In the second regression the dependent variable is the pCDR. The same program-level percentage of Pell eligible students variable is used as the first explanatory variable but institution-level minority data is used as a proxy for the percent of both completers and non-completers that are African-American, American Indian, or Hispanic. ED again only reports the R-squared value, which is less than 0.20.

In our replication we use the D/E rate and the pCDR from the data that was produced by the Department for the dependent variables. We use information on the percent of undergraduates who received a Pell grant at the institution level from IPEDS. We also use information at the program level for the percent of students that are minority (African-American, American Indian, or Hispanic).28 Our results will not identically match what the Department found due to differences in levels of aggregation for the explanatory variables, as well as the IPEDS Pell data being for students who received Pell grants rather than students who were Pell eligible. But if the R-squared value is close then they will at least be informative of what relationship might be expected if the Department had reported the relevant statistics. Summary information on the variables used and the results of our estimations are listed in the Table 3 and Table 4 below.

Table 3: Summary Information for Regression Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>D/E</td>
<td>3,938</td>
<td>5.62</td>
<td>4.79</td>
<td>0</td>
<td>54.75</td>
</tr>
<tr>
<td>pCDR</td>
<td>4,681</td>
<td>18.39</td>
<td>10.22</td>
<td>0</td>
<td>78.94</td>
</tr>
<tr>
<td>Percent Pell</td>
<td>5,483</td>
<td>52.47</td>
<td>21.40</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>Percent Minority</td>
<td>5,370</td>
<td>17.29</td>
<td>26.25</td>
<td>0</td>
<td>100</td>
</tr>
</tbody>
</table>

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28 Program-level data is identifiable in IPEDS using OPEID, CIPCODE, and CREDENTIAL LEVEL.
Table 4: Results of Regression Analyses

<table>
<thead>
<tr>
<th></th>
<th>D/E</th>
<th>pCDR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Pell</td>
<td>0.034 *</td>
<td>0.165 *</td>
</tr>
<tr>
<td></td>
<td>(4.49)</td>
<td>(12.50)</td>
</tr>
<tr>
<td>Percent Minority</td>
<td>-0.012 *</td>
<td>0.025 *</td>
</tr>
<tr>
<td></td>
<td>(2.45)</td>
<td>(2.30)</td>
</tr>
<tr>
<td>Constant</td>
<td>4.038 *</td>
<td>9.117 *</td>
</tr>
<tr>
<td></td>
<td>(8.47)</td>
<td>(12.00)</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.025</td>
<td>0.113</td>
</tr>
<tr>
<td>N</td>
<td>3,891</td>
<td>4,579</td>
</tr>
</tbody>
</table>

Note: Absolute values of the t-statistics are shown in parentheses. All estimates are statistically significant at the 5-percent level.

Where the Department estimated an R-squared value of less than 0.02 for the D/E regression, we obtain an estimate of 0.025. For the pCDR regression the Department's reported R-squared was less than 0.20 and we obtain an estimate of 0.113. The more relevant point estimates for both regressions are statistically meaningful since the t-statistics are larger than 2, which suggests that these two measures of student characteristics are correlated with D/E and pCDR measures. The size of the effect is also meaningful when the scale of the D/E variable is considered. As an example, the point estimates in the D/E regression for the Percent Pell suggests that an increase of one standard deviation in the percentage of students who receive Pell grants at an institution correlates with approximately a 13 percent increase in a program's D/E at the mean value of D/E. Similarly, in the pCDR regression, a one standard deviation increase in the percent of students who receive Pell grants at an institution correlates with approximately a 19 percent increase in a program's pCDR at the mean value of pCDR.29

We also consider the total effect of percent Pell and percent minority on each of the explanatory variables by including each explanatory variable in its own regression. In the prior estimations, the interpreted effect of minority status on each dependent variable controls for, or is conditioned on Pell status. In other words, given that a student is either rich or poor, how does being a minority affect the dependent variable? We question whether it matters if a student is rich or poor when trying to understand how being a minority affects D/E or pCDR and vice versa for whether being poor affects D/E or pCDR without respect to race. The results are in Table 5.

29 The calculations are \((0.034 \times 21.40)/5.62 = 0.129\) and \((0.165 \times 21.40)/18.39 = 0.192\)
Table 5: Relationship Between Percent Pell and Percent Minority and D/E and pCDR

<table>
<thead>
<tr>
<th></th>
<th>D/E percent pell</th>
<th>D/E percent minority</th>
<th>pCDR percent pell</th>
<th>pCDR percent minority</th>
</tr>
</thead>
<tbody>
<tr>
<td>point estimate</td>
<td>0.032 *</td>
<td>-0.007</td>
<td>0.170 *</td>
<td>0.050 *</td>
</tr>
<tr>
<td>t-statistic</td>
<td>(4.26)</td>
<td>(1.42)</td>
<td>(12.80)</td>
<td>(4.39)</td>
</tr>
<tr>
<td>N</td>
<td>3,938</td>
<td>3,891</td>
<td>4,681</td>
<td>4,579</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.021</td>
<td>0.001</td>
<td>0.107</td>
<td>0.015</td>
</tr>
</tbody>
</table>

The absolute values of the t-statistics are in parentheses

* p < 0.05

We find that Pell status alone has a positive and significant relationship with both D/E and pCDR, which means that higher proportions of low income students correlate with higher debt relative to earnings and higher default rates. We also find that minority status is positively correlated with pCDR and that there is not a statistical relationship between minority status and debt to earnings based on these data.

Since both the D/E and pCDR measures are based on student outcomes it seems more relevant that an analysis of whether student characteristics affect student outcomes should be based on student-level data rather than program- or institution-level data. We conduct a similar analysis using student-level information based on data gathered from 10 different for-profit institutions to estimate the impacts of race and Pell status on various outcomes including program completion, propensity to borrow, amount borrowed, and propensity to default. We find strong supporting evidence that student characteristics matter.

The data consists of student loan data (National Student Loan Data System - NSLDS) combined with demographic data provided by multiple institutions (these data are described in more detail in the Impact Analysis section of this report). The demographic data is maintained at a student level for both completers and non-completers and contains information such as race or minority status, gender status, default status, and Pell status. The loan data is also maintained at a student level and therefore potentially contains multiple observations for each student depending on how many loans the student has upon entering repayment. For our analysis, consolidated loan types, as well as loans with a status of cancelled, consolidated, death, disability, or grace period are excluded. The loan data is also restricted to observations for which the date of repayment entry occurs between October 1, 2007 and September 30, 2012. Loan dollars for each student are totaled, and along with the default and borrowing status, are matched to the student demographic data by student and institution.

The dependent variables used in the analyses include three binary variables representing whether a student completed, ever borrowed, or defaulted, and a
fourth that represents the cumulative amount borrowed upon graduation. For each of the binary dependent variables we estimate a logistic regression and present odds ratios for relative comparison. The reference group for the race variables is white and the reference group for the degree level variables is associate degree. Records with missing data for a particular variable in a given model are excluded from the analysis.

We find strong evidence that minority and Pell status matter for completion, borrowing and default outcomes. In what follows, all interpretations are *ceteris paribus*, meaning they have the caveat “after controlling for the other factors listed.” Table 6 contains the results using both completer and non-completer observations. The starred values are statistically significant at the 1-percent level.

**Table 6: Odds Ratios for the Propensity to Graduate, Borrow, and Default**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Completion</th>
<th>Borrow</th>
<th>Default</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asian</td>
<td>1.26 *</td>
<td>0.89 *</td>
<td>0.74 *</td>
</tr>
<tr>
<td>African-American</td>
<td>0.54 *</td>
<td>0.92 *</td>
<td>1.13 *</td>
</tr>
<tr>
<td>Hispanic</td>
<td>1.00</td>
<td>1.15 *</td>
<td>1.36 *</td>
</tr>
<tr>
<td>Other race</td>
<td>0.80 *</td>
<td>1.11 *</td>
<td>1.59 *</td>
</tr>
<tr>
<td>Unknown race</td>
<td>0.47 *</td>
<td>1.01</td>
<td>0.85 *</td>
</tr>
<tr>
<td>Pell recipient</td>
<td>1.93 *</td>
<td>4.91 *</td>
<td>1.14 *</td>
</tr>
<tr>
<td>Female</td>
<td>1.14 *</td>
<td>1.09 *</td>
<td>0.73 *</td>
</tr>
<tr>
<td>Married</td>
<td>1.46 *</td>
<td>1.15 *</td>
<td>0.75 *</td>
</tr>
<tr>
<td>Veteran</td>
<td>1.05 *</td>
<td>0.56 *</td>
<td>0.83 *</td>
</tr>
<tr>
<td>Bachelors</td>
<td>0.81 *</td>
<td>1.22 *</td>
<td>0.75 *</td>
</tr>
<tr>
<td>Certificate</td>
<td>4.52 *</td>
<td>0.74 *</td>
<td>1.89 *</td>
</tr>
<tr>
<td>Graduate</td>
<td>2.47 *</td>
<td>1.46 *</td>
<td>0.24 *</td>
</tr>
<tr>
<td>Non-Degree Seeking</td>
<td>8.09 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>7.50 *</td>
<td>1.02 *</td>
<td>1.07 *</td>
</tr>
<tr>
<td>Over 25</td>
<td>1.25 *</td>
<td>0.94 *</td>
<td>0.93 *</td>
</tr>
<tr>
<td>Non-Completer</td>
<td>0.38 *</td>
<td>3.43</td>
<td>*</td>
</tr>
<tr>
<td>Pseudo R-Squared</td>
<td>0.276</td>
<td>0.155</td>
<td>0.066</td>
</tr>
<tr>
<td>N</td>
<td>1,148,165</td>
<td>1,138,547</td>
<td>772,986</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Institution fixed effects not reported</td>
<td>* p&lt;0.01</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

We find that Asian students are 26 percent more likely to graduate relative to white students while African-American students are 46 percent less likely to graduate than white students. Asian students are less likely to borrow than white students overall. Among those who do borrow, Asian students are less likely to default. African-American students are less likely to borrow relative to white students but among students that borrow, African-American students are 13 percent more likely to default than white students. Hispanic students are not statistically different from white students in the likelihood that they will graduate. However they are 13 percent more likely to borrow and 36 percent more likely to default relative to white students. Pell status is also a strong indicator. Those who receive Pell grants are almost twice as likely to graduate and are nearly 5 times as likely to borrow.
Among all students who borrow, Pell recipients are 14 percent more likely to default.

Based on our findings, it is clear that student characteristics play an important role in the outcomes of postsecondary education. It is worth emphasizing that the data that generated these results comes exclusively from for-profit institutions. Among for-profit institutions, the percentage of students who are minority and Pell-eligible is high and the variability across institutions is small. These institutions serve a much larger share of minority and Pell-eligible students than their public or private, not-for-profit counterparts. To the degree that student characteristics matter for this population, we expect the effects to be larger in an analysis that involves students from all types of institutions. As a result, programs who serve a larger share of minority and low income students are at a clear disadvantage when evaluated according to the metrics proposed by the Department.

Table 7: Odds Ratios for the Propensity to Borrow and Default by Completion Status

<table>
<thead>
<tr>
<th>Variable</th>
<th>Completers</th>
<th></th>
<th></th>
<th>Non-Completers</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Borrow</td>
<td>Default</td>
<td></td>
<td>Borrow</td>
<td>Default</td>
<td></td>
</tr>
<tr>
<td>Asian</td>
<td>0.76 *</td>
<td>0.70 *</td>
<td>0.99</td>
<td>0.78 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>African-American</td>
<td>1.22 *</td>
<td>1.35 *</td>
<td>0.88</td>
<td>0.99</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td>1.24 *</td>
<td>1.47 *</td>
<td>1.10</td>
<td>1.23 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other race</td>
<td>0.68 *</td>
<td>1.40 *</td>
<td>1.36</td>
<td>1.67 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unknown race</td>
<td>0.83 *</td>
<td>0.72 *</td>
<td>1.09</td>
<td>0.90 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pell recipient</td>
<td>3.80 *</td>
<td>1.20 *</td>
<td>5.28</td>
<td>1.09 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>1.16 *</td>
<td>0.81 *</td>
<td>1.05</td>
<td>0.68 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>1.37 *</td>
<td>0.68 *</td>
<td>1.07</td>
<td>0.78 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Veteran</td>
<td>0.47 *</td>
<td>0.86 *</td>
<td>0.60</td>
<td>0.80 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bachelors</td>
<td>1.40 *</td>
<td>0.50 *</td>
<td>1.08</td>
<td>0.75 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Certificate</td>
<td>1.12 *</td>
<td>1.86 *</td>
<td>0.63</td>
<td>1.87 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Graduate</td>
<td>1.51 *</td>
<td>0.32 *</td>
<td>1.56</td>
<td>0.22 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>0.88 *</td>
<td>1.38 *</td>
<td>1.00</td>
<td>0.95 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Over 25</td>
<td>0.87 *</td>
<td>1.00</td>
<td>0.97</td>
<td>0.88 *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.137</td>
<td>0.047</td>
<td>0.133</td>
<td>0.045</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>448,275</td>
<td>359,032</td>
<td>690,272</td>
<td>413,954</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In Table 7 above, we further analyze student characteristics by evaluating students according to whether or not they completed their programs. Among completers, African-American students and Hispanic students are approximately 22 to 24 percent more likely to borrow and, respectively, 35 and 47 percent more likely to default than white students. Among non-completers, African-American students are less likely to borrow while Hispanic students are more likely to borrow. However African-American students are statistically no different than white students in the probability of default but Hispanic students are still 23 percent more likely to default.
Among completers, Pell recipients are 3.8 times more likely to borrow and are 20 percent more likely to default than non-Pell recipients. Among non-completers, Pell recipients are five-and-a-half times more likely to borrow and are 9 percent more likely to default.

In Table 8 we look at the amount borrowed for all students given that they have borrowed any positive amount as well as separately according to completion status. The strongest predictors of the amount borrowed are the degree level and completion status. Students seeking a certificate borrow approximately $6,656 less than those seeking an associate degree. Bachelor- and graduate-degree seeking students borrow substantially more than associate-degree seekers. Students who fail to complete their programs borrow approximately $6,700 less than those who do complete their programs after accounting for the other factors in the model.

| Table 8: Student-Level Characteristic Effects on Amount Borrowed |
|---|---|---|
|                      | All Students | Completers | Non-Completers |
| Asian                | -311 *       | -260 *      | -443 *         |
| African-American     | 58           | 420 *       | -442 *         |
| Hispanic             | -299 *       | -129 *      | -114           |
| Other race           | 711 *        | 1,180 *     | 225 *          |
| Unknown race         | -1,384 *     | -44         | -1,753 *       |
| Pell recipient       | 1,620 *      | 1,728 *     | 2,231 *        |
| Female               | 339 *        | 93 *        | 702 *          |
| Married              | 1,195 *      | 1,070 *     | 1,054 *        |
| Veteran              | -1,472 *     | -1,940 *    | -1,236 *       |
| Bachelors            | 4,879 *      | 12,592 *    | 3,643 *        |
| Certificate          | -6,656 *     | -9,873 *    | -2,832 *       |
| Graduate             | 12,759 *     | 16,261 *    | 10,591 *       |
| Full-time            | -912 *       | -2,068 *    | 628 *          |
| Over 25              | 2,081 *      | 1,896 *     | 2,182 *        |
| Non-Completer        | -6,698 *     |             |                |
| R-squared            | 0.282        | 0.572       | 0.125          |
| N                    | 772,986      | 359,032     | 413,954        |

Institution fixed effects not reported
The base group for race is white. The base group for degree level is associate.
* p<0.01

With respect to race, Asian students and Hispanic students borrow less than white students while African-American students borrow about the same amount. However, this changes after separating students according to completion status. Among completers, Asian and Hispanic students borrow less but African-American students and students of other races borrow more. Among non-completers, Asian, African-American, and Hispanic students all borrow less.

Pell recipients borrow approximately $1,700 - $2,200 more depending on whether or not they graduate. Completing Pell recipients borrow $1,727 more than
completing non-Pell recipients and non-completing Pell recipients borrow $2,231 more than non-completing, non-Pell recipients.

In short, programs serving higher proportions of Pell recipients have higher D/E rates and pCDRs. Programs serving more minority students have higher pCDRs. Much of this effect is likely an aggregation of borrowing and default patterns discernable in student-level data. As the proposed rule punishes programs with higher D/E rates and pCDRs, it is likely to have the unintended consequence of disproportionately impacting programs who serve higher proportions of Pell recipients and minorities.

V. For-Profit Education Students Differ in Demographic and Socioeconomic Characteristics

Students in for-profit schools have substantially different demographic and socioeconomic backgrounds than students attending not-for-profit schools. Consider the following series of figures that are calculated using the 2011-2012 National Postsecondary Student Aid Study (NPSAS: 12), a large, nationally representative sample of institutions and students.

Figure 3 below shows selected student characteristics of students enrolled in postsecondary institutions, by sector. The first set of bars show the average age of students across sectors. Students at for-profit schools are on average 30.0 years old. In contrast, students enrolled at private not-for-profit or public colleges are significantly younger, 24.6 and 26.0 years old, respectively, on average.

Figure 3 also shows that for-profit schools are much more likely to serve veterans. Seven percent of their students are veterans, compared to just three percent of students at public or private not-for-profit institutions. About 30 percent of for-profit student students are not exclusively full-time students (meaning they are either part-time students or full-time students for only part of the year). This is similar to the 29 percent of not exclusively full-time students at private not-for-profit institutions, but just over half the 57 percent of not exclusively full-time students at public institutions.

Figure 4 shows that for-profit institutions are much more likely to serve students from racial or ethnic minorities than public or private not-for-profit institutions. The fraction of students at for-profit schools who are African-American is 26 percent, compared to only 15 percent at public schools and 14 percent at private not-for-profit schools. The fraction of students who are Hispanic at for-profit schools is 19 percent, similar to the 17 percent at public schools, but greater than the 10 percent at private not-for-profit schools. These differences shows that the set of students being served by for-profit institutions are not the same as the average student at other types of institutions.
Figure 3: Selected Student Characteristics by Sector, 2011-2012

Figure 4: Student Racial Composition by Sector, 2011-2012
Next, we turn to the financial characteristics of students and/or their parents. Figure 5 considers the percent of students who are financially independent from their parents. Most students at for-profit schools are financially independent, 80 percent, the highest of any group. In contrast, less than half of public and private not-for-profit students are financially independent, 49 and 34 percent respectively. Of the independent students, 33 percent of those at for-profit schools are single parents, compared to just 13 percent of those at public schools and 9 percent of those at private not-for-profit schools. The third set of bars show the percent of students who have dependents. 51 percent of for-profit students have dependents, which is more than twice the 25 percent of public and almost three times the 18 percent of private not-for-profit students with dependents.

![Figure 5: Student Dependency Status by Sector, 2011-2012](source: 2011-12 National Postsecondary Student Aid Study (NPSAS:12))
Figure 6 shows that for-profit students are also more likely to receive Pell grants (financial aid for low-income students), with 65 percent of students at for-profit schools receiving a Pell grant in the 2011-12 school year. At public and private not-for-profit institutions the corresponding rates are 38 and 36 percent. This suggests that for-profit students are more disadvantaged than the average public or not-for-profit student in terms of socioeconomic background. Students at for-profit schools are also particularly disadvantaged when it comes to having a parent with a bachelor degree, with only 22 percent of students reporting this characteristic, compared to 37 percent of public students and 52 percent of private not-for-profit students.

Figure 6: Selected Student Background Characteristics by Sector, 2011-2012
Finally, Figure 7 shows that for-profit students are more likely to work more than 20 hours per week, and much more likely to consider work a higher priority than school. While all college students are more likely than not to have some job (working more than zero hours per week), 48 percent of students at for-profit colleges work more than 20 hours per week, compared to 44 percent of students at public colleges and 29 percent of students at private not-for-profit colleges. Students who work were also asked whether their primary role was as an employee or as a student, and students at for-profit colleges were much more likely to consider themselves employees first (52 percent of students) compared to students at public (31 percent) and private not-for-profit (23 percent) colleges.

Figure 7: Selected Student Employment Characteristics by Sector, 2011-2012

It is important to keep these pre-education differences between the average for-profit student and the average public or private not-for-profit student in mind when comparing their educational outcomes, because they indicate that the two students might have differing counterfactual, or “but for,” earnings, and they might also have different propensities to graduate. As a result, a comparison of educational outcomes such as default rates or earnings that does not account for these differences in students will confound the effects of pre-education characteristics (for example, a student from a poor family is more likely to grow up to be poor) with the effects of the education itself. These comparisons would not be informative about the relative value added by different schools.
VI. Debt-to-Earnings and Programmatic CDR Do Not Measure Quality or Benefits of Educational Programs

A. The basis for an 8 percent debt to earnings threshold is flawed

The Department’s choice of an 8 percent threshold for the debt-to-earnings ratio is not a number that is implied by any standard economic model, or supported by research as the Department suggests. The standard economic analysis of the educational investment decision does not imply a limit on annual debt payments related to annual earnings. Rather, experts who study the economics of education use a model based on a comparison of costs with benefits, including the gains to earnings resulting from the schooling.

While the Department has stated that the 8 percent threshold is based on research, as economists we wish to make it clear that this number is not based on economic theory. In fact, as we have described, economic theory implies a quite different set of guidelines for making good decisions regarding schooling.

Based on statements in the NPRM, the 8 percent threshold appears to come from two sources: home lending guidelines and a report by Sandy Baum and Saul Schwartz.30 We will address the use of the Baum and Schwartz study first, then return to the home lending guidelines. In the report to which the Department of Education refers, Baum and Schwartz do not support the use of an 8 percent threshold for student debt payments. Rather, Baum and Schwartz explicitly criticize a blanket use of such a rule. Quoting from page 3 of their report:

In sum, 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 [which Baum and Schwartz have just explained is the origin of the 8 percent rule] has no particular merit or justification. This is not to say that 8 percent is an unreasonable number. Some of the problems listed below suggest that higher limits might be appropriate, while others suggest the opposite. It is simply to say that any benchmark needs stronger justification than has thus far been forthcoming. (Baum and Schwartz, 2006, p. 3)

Just prior to this statement, Baum and Schwartz explain some of the reasons why the 8 percent rule is not appropriate for student lending guidelines. One of those reasons derives directly from an economic model related to the one we have described in our report. That model points out that because earnings tend to increase most sharply in the early years after school completion, it is optimal to do more borrowing in those years than in later years. They explain:

To the extent that they are grounded in empirical analysis, the ratios [which were used to determine the 8 percent rule] reflect the default experience of all homeowners, not the experience of young people who have recently left school. The life-cycle model suggests that the ability and willingness of young people to maintain any given debt-service ratio is greater than that of older cohorts. The front-end and back-end ratios, based on current income, do not take into account the higher future income of some borrowers and especially of student loan borrowers. (Baum and Schwartz, 2006, p.3)

We suggest that the Department not use the Baum and Schwartz study to support the choice of an 8 percent threshold, when in fact that study concludes that the general use of such a rule is a bad idea.

Baum and Schwartz argue that the 8 percent rule that was commonly used at one time by home mortgage underwriters (but, which they point out is not commonly used now) is not appropriate for all student borrowers. This leads us back to the fact that the 8 percent number was originally taken from home mortgage standards. Baum and Schwartz explain that this number appears to come from guidelines for the fraction of annual earnings that should be devoted to non-housing debt for the average homebuyer.

1. Student borrowing is different from consumer borrowing

However, borrowing for schooling costs is different from consumer borrowing both because students tend to be at a point in their working careers when earnings are about to grow substantially, and because schooling is something that tends to cause increases in earnings. On average earnings grow sharply in the early years following the completion of schooling. For most students, it is probably smart to devote a higher share of their annual expenditures to loan repayments early in their career than they would be willing to sustain indefinitely. If education confers benefits to students – such as increased earnings throughout their post-schooling career – restricting borrowing can cause students to be worse off on net. Thus, guidelines about appropriate debt-to-earnings ratios should allow for higher levels in these early years.

The guidelines that informed the Department of Education’s choice of D/E ratio cut-offs were based on lending rules that are meant to apply to borrowers at all stages of their working life and for physical assets that do not lead to increases in earnings. Rules that apply to early career earnings should be different. They should recognize the fact that the thing the borrowing pays for – schooling – tends to increase earnings, and they should recognize the fact that because earnings tend to grow in the early working years it makes sense to borrow more in these years than in later years. A rule limiting the ratio of student debt payments to annual earnings that
does not take into account the fact that additional schooling can increase those very earnings has the potential to hurt, not protect, borrowers.

In a recent paper, economists Christopher Avery and Sarah Turner analyzed data from the Beginning Postsecondary Students Longitudinal Survey (BPS), finding that “among student borrowers in repayment six years after initial enrollment, the mean ratio of monthly payments to income is 10.5 percent.”31 (Avery and Turner 2012, p. 187) This means that the average student measured six years after enrollment has a D/E ratio over 25 percent above the passing threshold suggested in the proposed regulation.

2. Repayment amounts should be based on available options not predetermined term

The calculation of annual debt payments should be based on the repayment amounts among which students have the option to choose. The proposed rule calculates annual loan payments assuming a 10-year repayment period for certificate and associate degrees, 15 years for bachelor and master degrees, and 20 years for doctoral and first professional degrees. However, all students with Title IV loans have the options either of extending the repayment period to between 12 and 30 years through the choice of an “extended repayment”, or of reducing the payments they must make in the early years after school completion through the choice of a “graduated repayment”. Calculations reported to us by Mark Kantrowitz, Senior Vice President of Edvisors.com, based on work done in 2010, indicate that the average repayment length chosen by students for Title IV loans is at least 15 years, and possibly close to 19 years.

In addition, students with low earnings, the ones that the proposed gainful employment rule is meant to protect, have the option of reducing their Title IV payments to a lower percentage of their earnings through the choice of “income-based repayment.” For many students, and particularly for those with lower than average earnings in the years for which earnings are measured for the gainful employment rule, it is advisable to choose one of these options.

If the goal of the proposed gainful employment rule is truly to ensure that students can afford their loan payments upon completing schooling, the rule should compare their earnings to the amounts they are required to pay. If students choose to pay back their loans over a shorter period than they have to, it cannot be argued that those students are unable to afford the payments.

If it were logistically difficult for the Department of Education to determine which of these repayment options offers the lowest annual payment for each borrower, a

A simple adjustment to the rule would be to extend the repayment length used in the formula to 15 or 20 years. The allowable repayment period varies between 12 and 30 years and depends on the total amount of the Title IV loan. At a minimum, this modification would reflect a more realistic loan payment amount that an individual would be required to make on a student loan.

B. Debt-to-Earnings in Texas

The Department has indicated that programs preparing students for gainful employment should be able to meet the debt-to-earnings metrics that they have established and that failing to meet this metric would indicate that the program loads a student up with “too much debt.” However, applying this same criterion to traditional educational programs would suggest that many programs are leaving students with too much debt given their post-graduate earnings.

Newly available data on program-level earnings and debt for all public institutions in the state of Texas allow us to provide some illustrative examples of how the Department’s proposed debt-to-earnings requirements could affect other institutions if they were to be applied more broadly.\(^{32}\) The earnings data available for Texas students is restricted to only include students who are employed in the state of Texas for at least 9 months of the year. It does not include individuals who found employment outside the state of Texas, are unemployed for more than 3 months, or who have exited the labor force. Therefore the earnings data are likely to be much higher that the earnings data used to calculate the gainful employment D/E rate.

Additionally the debt information represents the lifetime cumulative debt rather than the specific debt accumulated in a given program. Therefore, the debt numbers for certificates and associate degrees are likely to be accurate. However, to the extent that a student borrowed for an associate degree, then borrowed more for a bachelor degree and had to take additional classes that did not transfer with the associate degree, the debt figures may be inflated. Alternatively (and more likely), it is possible that the debt figures will be understated for bachelor recipients since most students who transfer with an associate degree usually move from a less expensive community college to a more expensive university. If they had accumulated the portion of debt tied to their associate degree while working toward a bachelor degree from a more expensive four-year program, the debt at completion would likely be much larger.

\(^{32}\) Data available at [http://www.thecb.state.tx.us/apps/txcrews](http://www.thecb.state.tx.us/apps/txcrews).
Table 9: Texas Public Programs That Would Fail D/E or D/DE, by Degree Level

<table>
<thead>
<tr>
<th>Row Labels</th>
<th>Programs</th>
<th>Fail D/E</th>
<th>Fail D/DE</th>
<th>Fail Both</th>
<th>Percent Failing Both</th>
</tr>
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<tbody>
<tr>
<td>Certificate</td>
<td>204</td>
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<td>42</td>
<td>22</td>
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<tr>
<td>Associate Degree</td>
<td>191</td>
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<td>41</td>
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<td>2%</td>
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<tr>
<td>Bachelor Degree</td>
<td>1,166</td>
<td>576</td>
<td>490</td>
<td>454</td>
<td>39%</td>
</tr>
<tr>
<td>Grand Total</td>
<td>1,561</td>
<td>604</td>
<td>573</td>
<td>479</td>
<td>31%</td>
</tr>
</tbody>
</table>

With these caveats in mind, we find that 11 percent of certificate programs, 2 percent of associate degree programs and 39 percent of bachelor degree programs would fail the eight percent debt-to-earnings threshold. These numbers likely understate the true percentages of programs that would fail because the earnings data excludes low earning students who are unemployed or out of the labor force and because the debt data is likely lower than what the Department would use. Furthermore, these programs already receive state subsidies designed to lower the cost of education and should theoretically reduce the amount that students borrow but despite this additional assistance, a large portion of programs still fail the Department’s standard.

These numbers do not say anything regarding the quality of programs in Texas. Texas is one of the few states to have made program-level data available for use and we expect that if other states made similar data available that the results would not be substantially different. We believe this analysis shows that the Department’s criteria for evaluating GE programs is fundamentally flawed.

C. D/E and pCDR are not measuring the same thing

While the Department claims that each of the metrics in the rule is “independent”, they are both intended to measure whether students in a given program are able to pay back their loans. The Department seems to believe that the “independence” of the metrics comes from the fact one measures debt only for graduates and the other measures debt for all students in an attempt to account for the “churn” of some programs having low completion rates. This use of the term “independent” is misleading and is actually not consistent with the results of the Department’s own analysis.

In a statistical sense the term independent means that one factor is unrelated to another factor. Dependent factors can be related in many different ways from being positively related (i.e. more of one factor corresponds with more of the other) to negatively related (i.e. more of one factor corresponds with less of the other). For independent factors, knowing information about one of the factors provides no insight into the other factor since they are independent.
It is true that the metrics in the gainful employment regulation are calculated separately, but that does not imply that the metrics are independent. In fact, based on the Department’s own calculations, it is clear that the metrics are not independent and are actually negatively correlated. This means that failing one metric is correlated with passing the other.

In Table 9a of the NPRM (p. 671) the Department presents its analysis of a single year of debt-to-earnings and pCDR, and includes a breakdown of the number of programs failing each metric along with the number of programs failing both metrics. Overall, the Department analyzes 7,934 programs and identifies 1,300 of those as failing programs (16.4 percent across all sectors). The failing programs include 451 programs that fail the debt-to-earnings metrics (5.7 percent), 943 that fail pCDR (11.9 percent), and only 94 that are identified as failing both (1.2 percent). All of the programs failing both metrics are for-profit programs.

The lack of programs failing both metrics shows that the two metrics are not really independent, but are actually negatively related. If the two metrics were truly independent then knowing whether a program fails one of the metrics would give very little information about whether the program fails the other metric. In practice, if a program fails the debt-to-earnings rate it is highly unlikely to fail the pCDR metric and vice-versa.

D. Why “churn” may be good for students

1. Education may not be right for everyone
The Department claims that part of the reason for including non-graduates in the calculation of pCDR is to address the concern of “churn” or a high number of withdrawals from programs. An implicit assumption in this reasoning is that “churn” is necessarily bad for students. However, there are reasons why student withdrawals are not necessarily a negative outcome.

Allowing students the opportunity to try out college or a specific area of study is part of the purpose of subsidizing education. Finding an appropriate program for a student depends on both inputs from the student and from the program. Not all students will find the appropriate program match on their first attempt, but a rule denying those opportunities to students does not improve their wellbeing. As long as the debt incurred by students to find an appropriate program is not prohibitive, then the benefit of having the opportunity to learn which program is the best fit for a student is a valuable use of loan dollars. If students must incur high debt amounts to even attempt a program then the benefits may not outweigh the costs.

As shown in Figure 8 below for associate degree seekers, much of the “churn” that concerns the Department actually occurs very early in students’ enrollment. The line in this table shows the cumulative percent of dropouts that occur within different time periods (percent shown on the right-hand vertical axis). This shows
that about half of all dropouts from associate programs drop out within the first six months of the program. Also included on the chart are the average dollars borrowed by the different groups of non-completers. The increasing amounts moving from left to right on the chart clearly show that the shorter a student stays in the program before leaving, the less money those students borrow on average. Thus, students who accrue large amounts of debt without completing a degree are the exception rather than the rule, and much of the “churn” that concerns the Department may simply be students trying out a program before learning that a different one suits them better, or trying out college before deciding that college isn’t for them. Denying those opportunities, especially to groups typically underserved by other sectors of postsecondary education, is entirely the wrong outcome.33

Figure 8: Mean Dollars Borrowed and Cumulative Distribution of Dropouts by Number of Days Enrolled, 2010-11 Associate Degree Cohort

2. Early dropout with little debt may be good – Try before you buy

More recently several for-profit institutions have implemented a “try it before you buy it” policy. In general, institutions allow students to participate in courses for a limited period of time without cost before deciding to enroll. This allows the student to decide whether the program is the right fit for them, and allows the institution to assess a student’s commitment to learning and completing a degree. Allowing students the opportunity to discover whether a given field of study is in their best interest at a reasonably low cost would likely result in improved

33 Note that the median debt amount for dropouts up through two months is $0.
outcomes (i.e., graduation rates among those deciding to remain enrolled following the introductory period).

VII. Criticism of Cohort Definitions

A. Small population issues

As in previous iterations of the gainful employment rule, the definition of a program that the Department uses leads to many programs with very few graduates being used in the calculation of debt-to-earnings and/or very few total students being used in the calculation of pCDR. While the Department partially addresses the issue of small programs as they relate to the debt-to-earnings metrics, the issue is effectively ignored with respect to the pCDR metric.

The proposed rule would only calculate the debt-to-earnings metric in situations where a program has at least 30 graduates. Programs with less than 30 graduates would likely have high variability in outcomes from year to year and would have the possibility of being heavily influenced by single individuals in those programs. It is therefore appropriate that these programs not be assessed under the rule.

However, under the current proposed rule these programs would not be considered to pass, but rather would have no calculation made under the debt-to-earnings metrics for any cohort in which there were less than 30 graduates. For programs that have just above or below 30 graduates in most cohorts this will lead to comparisons of cohorts several years apart to determine whether the program fails in two out of three years as the three year window will only be determined based on three calculated years.

For the pCDR metric there is no minimum program size requirement. This metric is based on a single year of students entering repayment, with two additional years included if the program has less than 30 students in the single year. However, if the total number of students over the three year window is still less than 30 then the program will still be assessed based on those students. This will lead to programs with very low sample sizes having the potential for very large pCDR calculations simply based on the poor outcomes of a few students even if the outcomes for these students are not indicative of the outcomes of the typical students who have entered that program.

B. One bad “class” could make a program ineligible

While the Department claims that the temporal nature of the rule (e.g. programs must fail two out of three years of debt-to-earnings to become ineligible) is to ensure that a single “bad” class does not lead to a program losing eligibility, based on the construction of the cohorts this is simply not true. The cohorts for the debt-to-earnings metrics actually use two consecutive years of graduates in the calculation. This leads to a single year of graduates being included in two
consecutive cohorts for the calculation. For example, in the Department’s 2012 GE informational rates, students who completed programs between October 1, 2007 and September 30, 2009 were included in the calculations. Based on the rule, if the Department would have also calculated the 2013 GE rates, students who completed programs between October 1, 2008 and September 30, 2010 would have been included. This leads to all of the graduates from October 1, 2008 through September 30, 2009 being included for two consecutive calculation years.34 If the graduates during this time period had particularly poor outcomes leading to a program failing, that program would likely fail not just once, but in both calculation years causing that program to become ineligible based solely on one “bad” class.

This exact situation does not hold for the pCDR calculation since that metric is based on a single year of students. However, potentially even more problematic for the pCDR metric is that, as stated above, in cases with small numbers of students in a given year, two additional years of students will be included in the calculation. Therefore, if a small program (which is already likely to have high variation in outcomes from year to year) has a particularly “bad” class, that class will be potentially included in three consecutive years. This single “bad” class would then have the potential to cause a program to become ineligible based on the program failing in all three years in which that class is included in the calculation.

C. Current process would not allow time for an institution to adjust

The current version of the rule also does not allow time for programs to adjust or to make improvements so that they can comply with the metrics. Since the metrics are based on cohorts of students who have finished several years prior to being included in the calculation, even if institutions would drastically change their behavior as a result of a program failing in a given year, the results of that behavior change will not start to appear in the calculated metrics for several years and programs are likely to have become ineligible in the interim.

For example, if an institution is notified at the end of a calculation period that a program has failed the debt-to-earnings metric, the students that are included in that calculation completed the program three to four years prior to the calculation. If the institution takes some immediate action to try to improve its performance under the debt-to-earnings metrics, there will still be three additional calculation years that will include students who graduated before any changes were made (a cohort with students from two to three years prior, a cohort with students from one to two years prior, and a cohort of students from one year prior plus the year the changes were made). In addition, for longer program lengths some of the students would not experience the effects of any changes until after they had been enrolled in the programs for multiple years. Therefore, if there were issues with the program those issues would still be affecting cohorts of students for several years after.

34 For small programs the problem is exacerbated by the fact that a single “bad” class would appear in four consecutive calculations.
There will be similar issues if programs perform poorly under pCDR. If an institution is notified that one of its programs failed the pCDR metric and the institution takes some type of action to try and remedy its performance under that metric, the results of that action will not be seen until two additional calculation years have passed.

Given that institutions will be assessed based upon cohorts of students from several years prior, any attempts for institutions to change the outcomes for the students in those programs will not generally be meaningful as those programs are likely to become ineligible long before the effects of any changes will be felt.

**VIII. Proposed Rule Does Not Account For General Economic Conditions**

The earnings and employment rates of graduates may give a misleading indication of the benefits generated by schooling because they are affected by macroeconomic conditions, or the general state of the economy. This means that it is difficult to know whether graduates’ labor market outcomes measured at any particular time might be high or low because of the education they received or because the labor market happened to be strong or weak at the time they are measured. In the framework discussed in this section, a downturn in the economy likely reduces a student’s counterfactual (or “but for”) earnings and employment prospects. Thus, if we see a poor labor market outcome during a deep recession, it is not appropriate to infer that the poor labor market outcome was caused directly by the school she happened to attend; her labor market outcome may have been made worse by the general economic conditions, and may have been the same, better, or worse had she attended a different school. In other words, good economic times translate to better labor market outcomes and bad economic times translate to worse labor market outcomes regardless of the effectiveness of the education obtained.

**A. Contemporary labor market conditions should be considered when evaluating the short-term benefits of education**

Labor market outcomes are tied to the economic environment regardless of level of education: the average college graduate during a recession will have more trouble finding a job than the average college graduate during good economic times, just as the average high-school graduate during a recession will have more trouble finding a job than the average high-school graduate during good economic times. Having a college degree does not make one immune to the effects of the macro economy. It does, however, provide some relative protection over those with less education.
Consider the Great Recession, which began in December 2007 and officially ended in June 2009.\(^{35}\) A key indicator of a recession is an increase in the unemployment rate. The unemployment rates of people with different levels of education are presented in Figure 9 below. Despite the negative outlook for those graduating from college during a recession in comparison to those graduating from college during non-recessionary times, a college degree still provides some protection against a tough labor market. Recessions typically hit the least educated most severely.

First, notice that even under non-recessionary economic conditions, such as January 2006, unemployment rates are strongly related to schooling levels. In addition to earning less, those with fewer years of schooling, as noted above, are much more likely to experience unemployment. This is true when comparing students with a high school education to students with some college and/or an associate degree.

Second, notice that the increase in unemployment rates that happened during the Great Recession impacted all groups, but it impacted the less educated more than others. Those with a high school education saw their unemployment rates increase from 4.7 to 10.2 percent in two years, a 5.5 percentage point increase. In comparison, for those with some college or an associate degree the increase was 4.9 percentage points, and for those with at least a bachelor degree the increase was 2.7 percentage points. It is typical that recessions are differentially burdensome on the least educated.

Furthermore, the more recent employment numbers for January 2013 show that while the overall unemployment had declined to 7.9 percent, this obscures very different experiences for more and less educated Americans. For those with less than a high school degree, high school graduates, and those with an associate degree or some college the unemployment rates were 12 percent, 8.1 percent, and 7 percent respectively. For those with a bachelor degree or more, the unemployment rate was 3.7 percent.

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\(^{35}\)While the Government officially determined that the Great Recession ended in June 2009, the economic impacts of this period continue to be present in more recent years.
B. During recessions, employment outcomes tend to be worse

Academic research supports the evidence illustrated in Figure 9 and studies additional types of employment outcomes affected by macroeconomic conditions. The well-documented effects of graduating from college during a recession are negative, both in the short- and long-term. Oreopolous, von Wachter, and Heisz (2006) studied matched university-employer-employee data from 1982 to 1999 and found that a typical recession (defined as a 5 percentage-point increase in the unemployment rate) leads to an initial earnings loss of 9 percent for those graduating during the recession. This earnings loss persists, halving in 5 years and disappearing 10 years after graduation. They find that the unemployment and earnings-loss effects of graduating into a recession are distributed unevenly, with workers at the bottom of the wage distribution having larger and more persistent earnings losses, and new graduates experiencing temporarily high unemployment rates.  

Kahn (2010) studied longitudinal data from NLSY respondents graduating from college between 1979 and 1989. She found that large, negative wage effects of graduating into a bad national economy persisted for the entire 15-year period studied (an initial wage loss of 7 percent per 1 percentage-point increase in the unemployment rate, falling by 0.25 percentage-points per year after graduation). She also found evidence that cohorts graduating into worse economies held jobs with slightly lower prestige even 15 years into their careers, suggesting that they

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had trouble transitioning into better jobs. The consensus of this literature is that recessions have a significant, negative effect on the earnings of new college graduates that persists for some time after graduation. The implication of this finding on the proposed rule is that more programs would be at risk of failing to pass the debt-to-earnings ratio for cohorts graduating during a recession; programs serving low-income students (with earnings at the bottom of the distribution) would be particularly hard-hit during recessions.

More recent studies on the effects of graduating into a recession have included an analysis of the Great Recession, finding the effects of this recession to be slightly worse than those experienced in the past. Altonji, Kahn, and Speer (2013) use longitudinal data to examine the labor market outcomes of college graduates from the classes of 1976 through 2011 and find that a large recession reduces earnings by 11 percent, reduces wages by 3 percent, and reduces the probability of full-time employment by 0.095 in the first year after graduation. They find that while the earnings effects fade out over the first 7 years after graduation, the wage effects persist. They find that these effects differ across college majors, with the highest-earning majors generally suffering no earnings losses during a recession and the lowest-earning majors suffering double the earnings losses of the average-earning majors; however, their analysis of the Great Recession finds that earnings were affected more than in past recessions, and were more evenly spread across all majors, with high-earning majors no longer insulated from the effects of the recession. Fogg and Harrington (2011) studied “mal-employment,” or over-education, in the labor market for recent college graduates before and after the Great Recession, finding that college graduates saw a 9.3 percentage-point increase in mal-employment between 2000 and 2010, with 39.1 percent of employed 20- to 24-year-old college graduates employed in jobs that traditionally have not required a 4-year college degree in 2010.

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Figure 10 above illustrates the impact of the macro economy on labor market outcomes. This figure shows the official unemployment rate, calculated by the Bureau of Labor Statistics, over time since 1979. Along with this traditional measure of unemployment are several measures of underemployment as well as the rates of job loss and long-term unemployment. The gray shaded areas in the figure denote periods designated by the National Bureau of Economic Research (NBER) as recessions. Notice that all of these measures of unemployment and underemployment increase during recessionary periods, meaning that not only are people less likely to be employed during a recession as compared to a non-recessionary period, but they are also more likely to be discouraged from looking for work, working part-time because they are unable to find full-time work, or out of work for an exceptionally long period of time.

C. Recent college graduates are disproportionately impacted by recessions

As an example of the impact of recessions on the labor market, it is useful to take a look at the condition of the labor market during the recent Great Recession and during the recovery. As the data described above show, unemployment rates increase during recessions, and they increased dramatically during the Great Recession. Unemployment rates tend to increase during recessions more for those with less education. However, recent college graduates experienced particularly
poor labor market conditions during the Great Recession. A study conducted by researchers at Rutgers University measured the employment outcomes of a nationally representative sample of people who graduated from college between 2006 and 2011. The study reports results from a survey that took place in March and April of 2012.\textsuperscript{40}

The study finds that 51 percent of the recent college graduates were employed full-time. Another 12 percent were working part-time, and an additional 14 percent were employed while enrolled in additional graduate or professional schooling. In addition, 6 percent were enrolled in school and not working, and 3 percent were in the military. Beyond that, 14 percent were not employed at all, 3 percent of which reported doing volunteering. Based on these findings, excluding those who are currently enrolled in school or who are in the military, the study estimates that 82 percent of recent college graduates were employed at the time of the survey. If students who were enrolled in graduate school and employed are included in the calculation, the study estimates 85 percent of recent college graduates were employed. These estimates would imply that 15 to 18 percent of recent college graduates, not enrolled in school and not in the military, were not employed.

Another recent study published by the Federal Reserve Bank of New York reports similar findings about the labor market difficulties of recent college graduates.\textsuperscript{41} The study finds that the unemployment rate of recent college graduates, whom they define as college graduates ages 22-27, historically have significantly higher unemployment rates than college graduates as a whole. The study also finds that this relationship was starker during the period 2009-11. The authors explain that their findings “suggest that it is typical for young college graduates to have relatively high unemployment rates, and that these rates can be expected to decline as the graduates continue on in the labor force.” The report also finds that recent college graduates are less likely than college graduates as a whole to work in jobs that are perceived as requiring a college degree. In other words, many college graduates begin their career in a job for which a college degree is not explicitly required, but then are more likely over the course of their career to work in a job that primarily employs college graduates. Furthermore, the study finds that this phenomenon of recent college graduates working in jobs that do not require a college degree was more common during 2009-2011 than it had been in the two prior recessions.

Together the findings of these studies highlight the importance of considering the general economic conditions when evaluating the employment outcomes, and earnings in particular, of recent graduates. Employment outcomes of recent college

\textsuperscript{40} Stone, Charley, Carl Van Horn and Cliff Zukin. May 2012. “Chasing the American Dream: Recent College Graduates and the Great Recession,” John J. Heldrich Center for Workforce Development, Rutgers, The State University of New Jersey.

graduates more generally tend to be worse than the outcomes of college graduates as a whole. It is important to recognize that the benefits of a college education accrue over a long period of time. For this reason, the outcomes of recent graduates are likely to give a misleading measure of the long-term economic benefits from attending college. Furthermore, macroeconomic conditions tend to negatively affect employment outcomes for workers generally. This is important to keep in mind when evaluating the outcomes of college graduates at any point in time. The employment benefits from education are properly thought of as the gain in employment outcomes relative to what those outcomes would have been “but for” the education. Since conditions associated recessions worsen the “but for” employment outcomes of college students on average, it would be incorrect to infer the benefits from attending college without taking the effect of the recession into account.

D. Loan delinquency is correlated with general economic conditions

Just as the earnings and employment rates of graduates may give a misleading indication of the benefits generated by schooling because they are affected by macroeconomic conditions, loan repayment rates may give a misleading indication of the quality of a program because they are also affected by macroeconomic conditions. Consider Figure 11 that shows consumer loan delinquency rates, GDP growth, and recessionary periods since 1987.

Figure 11: 30-Day Delinquency Rate on Consumer Loans from Commercial Banks and GDP Growth, Quarterly 1987-2013
Notice first of all that recessions are marked by large decreases in quarterly GDP growth, represented by the dotted line. Around the same time the economy experiences a recession or a decrease in GDP growth, the 30-day delinquency rate on consumer loans, represented by the solid line, increases. This indicates that consumers have more trouble making their loan payments on time during periods of sluggish economic conditions. This fact is relevant to the proposed rule because it suggests that, in conjunction with having lower wages and higher unemployment, students graduating into a recession will have relatively more trouble making their student loan payments, resulting in higher pCDRs.

We do not believe it was the intention of ED to have the eligibility and ineligibility of programs for Title IV subject to the whim of the nation's economy. However, given the correlations between earnings, unemployment, and loan delinquency with general economic conditions, it seems reasonable to assume that programs will fail and become ineligible at higher rates during and immediately following recessions since D/E ratios and pCDRs will fluctuate with the economy.

IX. The Proposed Rule Protects Neither Students Nor Taxpayers From Poor Decisions

The NPRM refers to a goal of protecting both students and taxpayers. We focus mostly here on the perspective of the students because we believe these concerns are most important. Because the discussion both in the NPRM and in the public sphere has been confused with regard to some economic concepts surrounding gainful employment and the costs of for-profit postsecondary schooling, we wish to comment on those, too.

First, it is claimed that the proposed gainful employment rule is intended to protect the taxpayer’s investment. This claim is based on high default rates reported on Title IV loans in the for-profit sector. Such logic would imply that funding for community colleges and other public postsecondary institutions should be cut to protect the taxpayer since direct funding to public institutions is equivalent to loans that are never expected to be repaid. To be clear, we think cutting funding for community colleges and other public postsecondary institutions would be a terrible idea. Funding for all forms of postsecondary schooling needs to be increased. In light of the very high returns we describe above, it is a terrible mistake that funding for community colleges in particular is not increasing to allow for the increases in capacity necessary to educate all students who would benefit.

Unfortunately, the argument that protecting taxpayer dollars means monitoring what fraction of them are repaid implies precisely the wrong policy with respect to community colleges. For this reason, we believe default rates should be viewed primarily from the standpoint of the student, not the taxpayer. To the extent that default rates are informative of the benefits students are receiving from a program
relative to its costs, they should be examined. Without reference to other measures of benefits to students default rates are not a good measure of the returns to taxpayer spending. Many government expenditures on education are never repaid, but are important and good uses of taxpayer dollars.

From the standpoint of the taxpayer the expenditures devoted to schooling includes both those devoted to student loans and those that come in the form of direct spending. While for-profit colleges receive more Title IV dollars per student, public colleges and universities receive significantly more direct government funding, particularly from state and local governments. These direct subsidies are one important reason that community colleges are able to charge tuition that is significantly lower than their costs.

The true costs to taxpayers are different across these two types of expenditures. Direct subsidies are not returned, and so they must all be financed through tax revenues or deficits. Some portion of student loan disbursements must also be financed through tax revenues or deficits. However, despite defaults, a large portion of those loans is eventually repaid. The government must finance the portion that is not repaid and the interest on the loan amount during the time it is awaiting repayment.

Based on the public discussion surrounding the Department’s proposal, there exists the belief that the cost of educating students at for-profit schools is greater than at other institutions. However, when direct subsidies paid by the federal, state and local governments are considered, the per-student costs of education are similar at for-profit and public institutions, both of which are considerably less than at private not-for-profit institutions. The difference between the for-profit and public institutions is who bears the burden of this cost, taxpayers or students.

A second economic concept that has been confused in the public discussion surrounding the proposed gainful employment rule is the cost of education to the student. It is often pointed out that for-profit associate degree programs have significantly higher tuition than community college associate degree programs. It is commonly implied that students would be better off attending community college programs with lower tuitions. A key point that is made in all standard economic analyses of educational investment is that the costs of education include both the direct costs (tuition, books, etc.) and what economists call the opportunity costs. The main opportunity cost in the case of education is foregone earnings.

If one attends school full-time, the earnings she would have received from the job(s) she stops doing are real costs. In many cases, the foregone earnings account for significantly more than half of the total costs (i.e. they are more than the tuition).

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42 As the available tax revenue has decreased there has been upward pressure on tuition charges at public universities and community colleges. This trend, in addition to capacity constraints, might be expected to continue as funding sources become less available.
This means that for a student that attends school full time, the difference in cost is a smaller fraction of total costs than a comparison of tuition would indicate.

More importantly, programs that allow students to continue to work full-time while they receive an education can be less expensive than lower-tuition programs that require students to stop working. To the extent that for-profit programs allow students to continue working, whether because they offer more online options or because they are scheduled at night and on weekends to accommodate working adults, the tuition comparison may be misleading.

X. Estimated Impact of Proposed Gainful Employment Regulation

A. The Department’s impact analysis does not fully analyze the rule as it is written

Despite the fact that the Department has access to all of the necessary data, it did not fully analyze the rule as it was written. Under the rule, ineligibility is determined based on multiple years of data: ineligibility based on the D/E test is based on two out of three years of data or four years of data; ineligibility based on the pCDR rule is based on three years of data. To fully analyze the impact the rule will have on program eligibility, it is necessary to analyze multiple years of data and to estimate the share of programs that will fail the D/E and pCDR tests over multiple years as the rule specifies. However, even though the Department has access to multiple years of the data necessary to analyze the rule more completely, they chose to analyze a single year and make assumptions about the results for subsequent years. Using only a single year of data in the analysis relies heavily on the implicit assumption that the outcomes for programs in that year are representative of the outcomes in all years and that each program’s outcomes would be constant over time.43

Specifically, the Department calculates the number of programs that would pass, fail, or be in the zone for the cohort of graduates entering repayment between October 1, 2007 and September 30, 2009 (i.e. a single cohort based on debt-to-earnings). Similarly, the Department relies on a single year of students to calculate a pCDR for each program. Based on the results from this single cohort, the Department then projects the results for subsequent years by making various assumptions about the likelihood of failure given the performance of that program in the analyzed year. Most of these assumptions are not based on any additional data, but are simply values that the Department believes are reasonable (discussed in more detail below). Given that the Department has the data necessary to

43 The Department uses a second year of data to inform one set of their assumptions, but it is unclear why this second year of data (or additional years) was not actually used to analyze the rule.
calculate the metrics for many more years, it is unclear why they have relied on assumed values rather than the actual data. At best the results of the assumed outcomes may be a rough approximation of the actual impact of the rule, and at worst may be very misleading.

B. Data collected

To assess the impact of the proposed gainful employment rule, we relied on data collected from members of the Association of Private Sector Colleges and Universities (APSCU). These data include students attending these institutions who completed their attendance (either as a graduate or a non-completer) from 2007 through 2012, and contain detailed information for each student including demographic information, risk factor measures, program details, graduation status, etc. In addition to the detailed student information, we also use National Student Loan Data System (NSLDS) data for these same students collected from each institution’s School Portfolio Reports (SPR). These reports contain loan-level data that include information about the status of each student’s loans, loan amounts, and dates that each loan entered repayment, among other fields.

We analyzed data from 182 schools (identified by OPEIDs), including information on approximately 3,000 programs and representing over 1.9 million students. While there is no way to tell for sure that the sample is perfectly representative, the coverage is remarkably large, accounting for around 20 percent of all students in for-profit colleges. Also, for each institution from which we received data, we received student records on all students in that institution’s student record system. In that sense, our data include the universe of students at the institutions from which we received data. Thus, the data are representative of those 182 schools, which represent about 20 percent of all students in for-profit colleges. Furthermore, the size of the sample relative to the population we wish to measure suggests the results are likely to be quite informative of students in the for-profit postsecondary sector.

Table 10 below shows a comparison of some descriptive statistics of our sample data with data from other publicly available sources. The data we collected lines up well with other sources and in areas that don’t align closely, the explanation lies in the limitations of the publicly available sources. For example, the age of the students in the Beginning Postsecondary Survey (BPS) is lower than for the students in our sample, but the BPS data are for first-time college students and exclude students who transfer from one college to another or who return to college later in life after time away. Since colleges in the for-profit sector are more likely to enroll students who have delayed enrollment after high school, it is not surprising that the average age of the BPS population is lower than in our sample.
Table 10: Student Characteristics and Risk Factors
Comparison to Publicly Available Data

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<tr>
<td>Age</td>
<td>24.50</td>
</tr>
<tr>
<td>African-American</td>
<td>26%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>27%</td>
</tr>
<tr>
<td>Asian</td>
<td>3%</td>
</tr>
<tr>
<td>White</td>
<td>40%</td>
</tr>
<tr>
<td>Male</td>
<td>34%</td>
</tr>
<tr>
<td>Female</td>
<td>66%</td>
</tr>
<tr>
<td>Married</td>
<td>15%</td>
</tr>
<tr>
<td>Veteran</td>
<td>2%</td>
</tr>
<tr>
<td><strong>Risk Factors</strong></td>
<td></td>
</tr>
<tr>
<td>Has Dependents</td>
<td>41%</td>
</tr>
<tr>
<td>No Dependents</td>
<td>59%</td>
</tr>
<tr>
<td>Attending Part-Time¹</td>
<td>15%</td>
</tr>
<tr>
<td>Single Parent</td>
<td>29%</td>
</tr>
<tr>
<td>No High School Diploma²</td>
<td>22%</td>
</tr>
<tr>
<td>Financially Independent</td>
<td>57%</td>
</tr>
<tr>
<td>Over 25 (Delayed Enrollment)</td>
<td>61%</td>
</tr>
</tbody>
</table>

These data allow us to calculate the metrics proposed in the gainful employment regulation fairly precisely, and given the temporal nature of the sample, allow us to provide a more complete analysis of the rule than the Department has presented in the NPRM. Rather than relying on assumptions about the likelihood of programs passing or failing the metrics in subsequent years given their performance in a single year, we use several cohorts of students to analyze the performance of programs over time to inform our estimates of the potential impact of the proposed GE regulation. These data also allow us to determine which programs fail each of the metrics and determine whether the same programs or entirely different programs fail both metrics.

In two ways our data are less than ideal. The data contained on the School Portfolio Reports allow us to view the amount and status of a loan at two different times: when the loan enters repayment and the current information about the loan as of the date the data is pulled. The debt-to-earnings metrics use the information as of the date the loan entered repayment and can therefore be measured accurately for
all of the cohorts included in our data. Since programmatic Cohort Default Rate (pCDR) requires knowing the loan status as of the date that the 3-year CDR would be calculated we can only accurately measure pCDR for two cohorts of students (those who enter repayment between two and three years before the data was pulled). All other cohorts of students would have their loan status measured at either too long or too short of a time period after the students entered repayment status.

Second, we do not have access to the individual students’ social security or IRS earnings records because those are protected for privacy reasons. In their place, we calculate estimated annual earnings from the Current Population Survey (CPS) from 2010 to 2012 (measured in constant 2012 dollars). The CPS is a nationally representative survey conducted by the Bureau of Labor Statistics to measure the official monthly unemployment rate and other labor market statistics. From these data, we estimate the maximum of the average and median annual earnings for 19 to 35 year-olds in the occupations that correspond to the area of study for each program (using the CIP code to SOC code correspondence from the Bureau of Labor Statistics). To the extent that our earnings estimates are higher than what would be used in practice, our estimates will understate the potential impact on for-profit programs and students.

C. Estimated impact on programs and students

In this section we describe the methods we used to calculate the fraction of programs that would be deemed ineligible based on the debt-to-earnings and pCDR tests using the data described in the previous section. Below, we first describe the way we calculated how many programs would be deemed ineligible based on the debt-to-earnings test, and then we describe the way we calculated how many programs would be deemed ineligible based on the pCDR test.

For the debt-to-earnings rate test we start by limiting our population of students to those who graduated from their respective programs to match the fact that the rule indicates debt-to-earnings rate will be calculated based only on graduates. Next, following the proposed rule, we limit the population further by selecting only those individuals who received some type of Title IV funding. Both of these restrictions are easily identifiable in the data we collected. Finally, we created cohorts according the proposed rule where students completing during the 2-year period starting on October 1st of one year and ending on September 30th two years later are grouped together as a single cohort.

Note that the way the rule defines cohorts means that each graduating class (i.e. a year’s worth of graduates) will appear in two consecutive cohorts because the cohort definitions include two years of graduates. This means that a single graduating class with low measured earnings can cause a program to fail the debt-

\[44\] For small programs, a single class may appear in as many as four consecutive cohorts.
to-earnings test in two consecutive gainful employment cohorts. Because the proposed rule deems a program ineligible if it fails the debt-to-earnings test two out of any three years, this single graduating class would cause the program to lose eligibility.

Using the individual loan level data from the School Portfolio Reports for this population along with information collected to determine the specific program from which each student graduated, we determined the median debt associated with each program in each cohort. We calculated the annual payment on the median debt based on an interest rate of 5.42 percent and repayment term lengths of 10 years for certificate and associate programs, 15 years for bachelor and master programs, and 20 years for doctoral and first professional programs. We divided these annual loan payments by the annual earnings measures we calculated from the CPS (described above) to calculate each program’s debt-to-earnings rate in each year, and divided by discretionary earnings (earnings minus 1.5 times the poverty threshold) to calculate each program’s debt-to-discretionary earnings rate in each year. Rates were not calculated for programs with less than 30 graduates in a cohort.

Based on the debt-to-earnings rates calculated for each cohort, programs were categorized as follows:

- Passing – programs with a debt-to-earnings rate below 8 percent or a debt-to-discretionary earnings rate below 20 percent
- Zone – programs that are not passing but have a debt-to-earnings rate below 12 percent or a debt-to-discretionary earnings rate below 30 percent
- Failing – programs with a debt-to-earnings rate above 12 percent and a debt-to-discretionary earnings rate above 30 percent

Programs failing in any two out of three years in which calculations could be done were deemed ineligible to accept Title IV funding. In addition, programs that only had two years in which they could be measured but failed in both of those years were deemed ineligible as well. Programs that were either in the zone or failing for four consecutive years in which calculations could be done were also deemed ineligible. Given that we can measure up to five cohorts of students, the most 3-year periods that a program could be measured under was three, and the most 4-year periods that a program could be measured under was two.

For the pCDR calculation we started by limiting the population to a group of students (both graduates and non-completers) for whom we could measure their loan status at the appropriate time (i.e. between two and three years after entering repayment). We collected SPR extracts at two times, the end of 2012 and March of 2014. These two snapshots of students’ loan status allowed us to measure pCDR rates in consecutive years and estimate how highly correlated pCDR rates tended to be year-to-year. This correlation is important for determining the likelihood that a program that fails the pCDR test in a single year will fail the pCDR in three
consecutive years. The SPR data collected at the end of 2012 indicated the loan status at the appropriate time for students who entered repayment between December 31, 2009 and December 31, 2010. The SPR data collected in March of 2014 indicated the loan status at the appropriate time for students who entered repayment between March 31, 2011 and March 31, 2012.

For each program we calculated the pCDR as the number of students who had defaulted by the end of their respective time period divided by the total number of students in the program. Because the proposed rule makes no restrictions on program size for the pCDR calculation we calculated pCDR for all programs regardless of the number of students. In order to assess the rule over multiple years, we estimated the correlation between pCDRs in multiple calculation years. Based on our calculations of pCDR for the years we have data, we used a range of values of the year-to-year correlation in pCDR to estimate which programs in our data would fail the pCDR test in three consecutive years.

To estimate the relationship between pCDRs in different time periods we estimated a regression of pCDR from our first calculation year on the difference between the pCDR in the second year of our data and its mean. We allowed the year-to-year correlation in pCDR to vary by the enrollment size of the program since pCDR rates based on larger programs tend to be more highly correlated. The coefficients in this regression were then used to inform our assumptions about the correlation between the pCDR measures based on our data and the other years used in the impact calculations. We also used the regression to predict the pCDR rate for each program in each of the years for which we have debt-to-earnings data but not loan default data.

Since the pCDRs from the two different time periods for which we have data are different, we computed two sets of predictions: one based on the assumption that the average pCDR rate will be equal to a higher average pCDR, and one based on the assumption that the average pCDR rate will be equal to a lower average pCDR. We derive these values from the average pCDR in the two years we are able to measure pCDR in our data. Predictions based on the higher and lower average pCDR assumptions can be roughly thought of as the impact of the rule during somewhat better and worse economic times respectively. For simplicity we have labeled each of the different analyses below as based on the “low” and “high” average. For both of these assumptions, we present estimated ineligibility rates based on “high” correlation and “low” correlation scenarios.

After estimating the pCDR for each program in each year under the different methods, any program with a pCDR (either measured based on the data or estimated based on the regression predictions) that was greater than 30 percent was deemed a failing program in that year. A program that failed in three consecutive calculation years was counted as being ineligible to accept Title IV funds.
D. **Estimates of the impact of the Gainful Employment rule on programs and students**

Our data includes a total of 3,476 programs for which we have data to calculate debt-to-earnings ratios and pCDR rates. As shown in Table 11 below, among those programs in our sample we estimate that between 13.1 percent and 21.8 percent of programs would be deemed ineligible to accept Title IV funding as a result of the proposed rule. These estimates include ineligibility based both on failure of the debt-to-earnings and pCDR parts of the rule. This corresponds with between 23 and 44 percent of students in ineligible programs with larger programs more likely to become ineligible than smaller programs under all scenarios.

**Table 11: Impact Analyses of Proposed Gainful Employment Rule**

<table>
<thead>
<tr>
<th>Group</th>
<th>Percent Ineligible Programs</th>
<th>Percent Students in Ineligible Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low Average pCDR, Low Correlation</td>
<td>13.1%</td>
<td>23.0%</td>
</tr>
<tr>
<td>Low Average pCDR, High Correlation</td>
<td>14.1%</td>
<td>24.1%</td>
</tr>
<tr>
<td>High Average pCDR, Low Correlation</td>
<td>19.8%</td>
<td>36.5%</td>
</tr>
<tr>
<td>High Average pCDR, High Correlation</td>
<td>21.8%</td>
<td>44.2%</td>
</tr>
</tbody>
</table>

The figure below shows the same results graphically. Again, the range of the impact on programs shows that between 13.1 and 21.8 percent of programs may be deemed ineligible by the proposed rule, corresponding with between 23 and 44 percent of students in ineligible programs. This means that between one-quarter and almost one-half of all students in for-profit colleges are in programs that would lose Title IV eligibility.
Figure 12: Range of Impact Estimates of Proposed Gainful Employment Rule

Figure 13: Range of Impact Estimates of Proposed Gainful Employment Rule
Minority, Female, Veteran, Pell

Figure 13 shows the high potential impact of the rule on minority, veteran and Pell-eligible students. For example, our estimates show that between 25 and 40 percent of African-American students, and between 21 and 39 percent of Hispanic students...
are in ineligible programs. Similarly between 24 and 41 percent of female students, between 32 and 46 percent of veteran students, and between 26 and 46 percent of Pell-eligible students are in ineligible programs.

Note that our analyses cover graduates from the five-year time period from 2007 through 2012. As the rule takes effect over time, programs will start becoming ineligible and we expect they are unlikely to be replaced fully since these programs are the types that perform poorly under the metrics proposed by the Department, or they serve the types of students who need to borrow and who have low baseline (i.e. “but for”) earnings. Since our data only covers a five-year time period we may be underestimating the overall impact of the rule as more programs may be deemed ineligible the longer that the metrics are applied to the program. In addition, our analysis above also shows that a prolonged recession that leads to high default rates could have a very substantial impact on program failure.

E. Potential long-term impact on enrollment

The estimates we have described so far do not yet account for responses to the rule by schools or students, and as a result may differ from the effect of the rule if implemented. Schools may attempt to take actions to bring failing or restricted programs into compliance with the rule. However, the retroactive nature of this rule (assessing outcomes of students who completed before the rule would be enacted) makes this extremely difficult. In addition, students shut out from failing or restricted programs might choose to attend other programs.

For example, it has been suggested that programs with high debt-to-earnings ratios could reduce tuition as a way to reduce student debt amounts. While this is possible, we are skeptical that its effect would be as direct as has been suggested. Examining the cost of educating a student rather than the amount that a student pays shows that the costs are similar across the various providers (private not-for-profit, public, and private for-profit). However, since public institutions are heavily subsidized the cost to the student (what is paid in tuition and fees) is considerably lower. As a result, without direct subsidization (similar to public institutions) there will be some level of tuition at which the program will no longer be profitable to operate and depending on how close tuition currently is to that level, schools may not have much flexibility in lowering tuition. In addition, for institutions for which the 90/10 rule is binding it may not be possible to reduce tuition without increasing tuition for some other program.

One would expect that some of the students shut out from a program because of its ineligible status would find another program to attend. However, students’ ability to and likelihood of doing so depends on available capacity at public programs (which these students would not have chosen to attend if not for the restriction on the for-profit program), and the availability of other programs in similar fields and that are similarly convenient for the student to attend.
If students shut out from ineligible programs do attend other for-profit programs, it is possible they would cause those programs to become ineligible. Recall that the students who would attend ineligible programs are high-debt students. While debt amounts are partly related to the characteristics of the programs, they are also largely a function of student economic characteristics. The programs that absorb these students would likely experience an increase in their median debt and pCDR. Furthermore, the gainful employment rule would create an incentive for schools to avoid admitting high-debt students and students with low baseline, or but for, earnings.

There is also a question of what affect the debt warnings after a single year failure would have on the ability of a program to attract students. It seems at least possible that having such a label on a program could discourage enrollment. If this was to happen and these programs were to shrink or even close as a result, our estimates of the impact would be too low.

We are interested in the effect of the rule not just on current programs and students, but also on access for students going forward. To predict the number of students affected over the next decade, we calculate the number of students entering for-profit programs nationally each year, incorporating the average annual enrollment growth rate over the past 20 years for the for-profit sector to this number. Using the estimated student impact described above, we estimate the potential impact over the next decade.

Because there are reasons to believe our baseline estimates may overstate or even understate the impact (particularly if the debt warnings cause programs to shut down or lose substantial enrollment), and because we believe the Department of Education’s analysis underestimates the impact significantly (see the discussion on Share Shifting below), we present three sets of numbers. One is from our baseline analysis, a second assumes half of all students who would be affected by ineligible programs are able to attend anyway, and a third assumes one-quarter of all students who would be affected by ineligible programs are able to attend anyway. The latter two analyses include the effects both of schools adjusting in ways that improve a programs’ status, and of students choosing to go to programs that are different from the ones they otherwise would have attended.

The range of estimated numbers of students who would not receive postsecondary education through 2020 (the President’s targeted growth period) and through 2024 based on our impact analyses are shown in Figure 14 and Figure 15 below. Our most conservative estimate, which assumes half of the potentially affected students attend college, is that between one and two million students will be restricted access because of the proposed rule by 2020, and nearly four million within the next decade. Contrast these estimates with the Department’s estimates of between 180,000 and 360,000 students would drop out by 2024 as a result of the proposed rule. Because female, African-American, and Hispanic students are
disproportionately represented at for-profit colleges, the numbers are particularly large among these groups. The estimates from this scenario imply between 736,000 and 1.25 million fewer female students, between 268,000 and 430,000 fewer African-American students, and between 199,000 and 360,000 fewer Hispanic students may attend college as a result of the rule by 2020. As shown below, this impact nearly doubles for all groups when the projections are expanded over the next decade (to 2024).

Figure 14: Estimated Number of Students Impacted by 2020 Impact Based on Debt-to-Earnings Measures and pCDR
If 25 percent of potentially affected students attend college despite the effects of the rule, the numbers are larger, of course. In that case, we estimate that between 1.5 and 3 million students’ college enrollment would be impacted, including between 1.1 and 1.9 million female students, between 402,000 and 640,000 African-American students, and between 298,000 and 550,000 Hispanic students by 2020, and again nearly doubles when the projections are extended to 2024.

If there were no net effect of school or student responses, the number of students affected would of course be even larger. These estimates imply between 2.0 and 3.9 million fewer students would attend college through 2020, including between 1.5 and 2.5 million female students, between 536,000 and 856,000 African-American students and between 398,000 and 735,000 Hispanic students. If these same projections were done through the next decade (the year 2024) we estimate that between 3.9 and 7.5 million fewer students would attend college through 2024, with between 1.9 and 3.8 million fewer students even under our most conservative assumptions about student and program response.
XI.  pCDR and D/E identify very different programs

The programs that will fail the debt-to-income test are almost entirely different from the programs that will fail the pCDR test. This finding is consistent with findings using the Department’s data, and is in direct contrast to the Department's contention that the two metrics are independent. The reason the two tests identify different programs is that the two metrics are negatively correlated. If the debt-to-income test and the pCDR test were both measuring the same concept – gainful employment – they should be positively correlated, or in other words they should identify a similar set of programs. Not only are the two metrics not positively correlated, they are strongly negatively correlated. We estimate that programs that fail the debt-to-earnings test, i.e. programs with students that have “too much” debt, have lower pCDR rates, i.e. their students are more likely to pay back their loans. Presumably, if the debt-to-earnings test were identifying programs where students were taking on too much debt, students in those programs would be having a harder time paying back those loans. The opposite is true.

The Department’s claim that the two metrics are independent is not correct. This relationship between the two metrics does not imply independence, but rather a strong negative correlation. It is troubling that the Department is using two metrics to define the term gainful employment that very obviously are measuring very different things.

The figures that follow show that the number of programs failing both metrics is very low regardless of how we estimate the impact of the rule. Figure 16 shows the percent of programs and students becoming ineligible due to each of the metrics based on the high average and high correlation impact analysis. Note that the overlap of the two circles (i.e. programs failing both metrics) represents less than one percent of the programs and less than five percent of the students analyzed in our sample. While we would not expect these metrics to completely overlap, if the two metrics are measuring a similar concept (i.e. whether students are able to pay back their loans) we would expect much more overlap than is observed.

![Figure 16: Comparison of Program Ineligible Rates of Different GE Metrics](image-url)
The same pattern holds for each of the methods we used to estimate the impact of the proposed rule. Figure 17 shows the percent of programs becoming ineligible due to each of the metrics based on the low average and low correlation impact analysis. Again, the percent of programs failing both metrics is very low at less than one quarter of one percent.

![Figure 17: Comparison of Program Ineligible Rates of Different GE Metrics Low Average pCDR, Low Correlation Scenario](image)

These figures clearly show that the debt-to-earnings metric and the pCDR metric are not independent, but actually are strongly negatively correlated. The programs that perform poorly under one metric are almost entirely different than the programs that perform poorly under the other metric, even though both metrics are intended to define what it means for someone to be gainfully employed.

The negative correlation of the two metrics is illustrated by a comparison of the pCDR ineligibility rates of programs that pass and fail the D/E test. Perversely, programs that fail the D/E test are about half as likely as programs that pass the D/E test to be ineligible based on the pCDR test. As shown in Figure 18 below, 6.9 percent of the programs failing the debt-to-earnings test also fail the pCDR test, while 11.5 percent of the programs passing the debt-to-earnings test fail the pCDR test when estimates are based on the 2010 – 2011 CDR average. A similar pattern appears using the 2009-2010 CDR average with 14 percent of programs failing the debt-to-earnings also failing the pCDR metric, while 23 percent of programs passing the debt-to-earnings failing the pCDR metric. In both cohorts programs that pass the D/E test are nearly twice as likely to fail the pCDR test as those that fail the D/E test.
The same perverse relationship is apparent when comparing the D/E failure rates of programs that pass versus fail the pCDR test. Specifically, in our data 7 percent of the pCDR failing programs fail the debt-to-earnings test, while 11 percent of the pCDR passing programs fail the debt-to-earnings test based on either the 2009-2010 and 2010-2011 pCDR averages.

**XII. Share Shifting**

In their “Discussion of Costs, Benefits, and Transfers,” the Department makes assumptions in order to estimate the impact of the proposed regulations on Title IV programs. These assumptions fall into three areas: program performance, student response, and enrollment growth in GE programs. These assumptions are based on scant empirical evidence and sporadically faulty logic, which we detail in this section.

Table 31 of the NPRM presents the assumptions regarding future program performance under the proposed rule. This table bases its Year 1 to Year 2 estimates on observed data from students graduating in FY 2007-08 and FY 2008-09 for debt-to-earnings rates and students entering repayment in FY 2008 and FY2009 for pCDR. While basing the initial pieces of the analysis on actual data is commendable, the debt-to-earnings data is not representative of how the Department will actually calculate cohorts, since it contains only a one-year cohort

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45 This section refers to p. 722 – 758 of the NPRM.
instead of a two-year cohort period. In addition, a minimum n-size of 10 was applied in this data, whereas a minimum n-size of 30 will be required in application of the proposed rule. As a result, the observed data sample on which Table 31 is based has a higher variance than we should expect from a sample with higher n-size and is less likely to be representative of programs as a whole than if the proper n-size had been used.

The observed data as reported in Table 30 also lacks a piece of information that the Department would have had available to them in order to make the calculations that they did make but chose not to utilize. Programs are categorized as “Pass,” “Fail,” “Zone,” or “Not Evaluated,” but which of the measures a failing program has failed is not specified. The measure failed matters, because while three consecutive pCDR failures result in ineligibility, two consecutive (or non-consecutive) debt-to-earnings failures result in ineligibility. ED reports that in year 2 of the data, 49 percent of failing programs failed the debt-to-earnings rates, and as a result, assumes in Table 31 that 50 percent of the programs failing GE two years in a row have failed debt-to-earnings rates for the second time, and thus become ineligible. This implicitly assumes that all of the programs failing debt-to-earnings rates in year 2 failed debt-to-earnings rates in year 1. This assumption could be tested with the data ED has, but they have chosen not to do so, or have done so and chosen not to report the results.

The other 50 percent of the programs failing two years in a row are assumed to have failed the pCDR for the second time. This assumes no program crosses between the two types of failure, failing, for example, pCDR but not debt-to-earnings in year 1 and debt-to-earnings but not pCDR in year 2. Again, this is a testable hypothesis using the data that ED has, but the tests do not appear to have been carried out. The assumed program results in Table 31 continue to split failures evenly (50 percent debt-to-earnings and 50 percent pCDR), with the percent of programs failing each measure decreasing from 26 percent in year 3 to 14 percent in year 5 and subsequent years, maintaining both potentially faulty assumptions over the course of the impact analysis.

Each year, the Department assumes “a modest increase in the percentage of programs that improve” from failing to zone (16-38-43-50-60 percent in years 2 through 6) or passing (27-48-54-62-70 percent) and from zone to passing (29-31-35-38-43 percent). (NPRM, p. 727) We would disagree with the characterization of these increases as “modest,” with the exception of the increases from zone to passing; the increases from failing to zone or from failing to passing seem quite large.

The Department also assumes that some percentage of zone programs would become ineligible in years 5 and beyond on the basis of never achieving a “pass” in four consecutive years. As such, it is unclear to us why none of the zone programs were assumed to become ineligible in year 4, as this is the first year in which it
would be possible to become ineligible on this basis. The percent of zone programs assumed to become ineligible in years 5, 6, and beyond is based on nothing empirical; neither are the percent of programs assumed to become ineligible based on a second fail based on any empirical data, to our knowledge.

Finally, in all two-year combinations presented in Table 31, it is assumed that a program cannot go directly from receiving a pass in the first year to receiving a second fail or becoming ineligible in the second year. This implies that no programs oscillate between passing and failing or being in the zone. However, the data in Table 31 show that a program can move in either direction, i.e., from failing to passing or from passing to failing, so it seems reasonable to assume that a program which falters between passing and failing in the first two years might, in the third year, revert again to its original status.

Table 32 presents the Department’s assumptions as they relate to student response to program results. These allow for two scenarios, “low reaction” and “high reaction,” which purport to reflect the “best judgment” of ED. (NPRM, p. 729) However, the drop-out rates seem considerably low in our opinion, with only 10 to 15 percent of students predicted to drop out of college altogether when their program becomes ineligible. ED also assumes that 65 to 70 percent of students in ineligible programs will transfer to a passing program, and that between 10 and 25 percent of students in ineligible programs would choose to remain in those programs. The latter set of assumptions seems highly unlikely as these students were borrowing for their education prior to the program becoming ineligible, and by ED’s interpretation of the results from the rule the students in that program were borrowing too much (hence the program becoming ineligible). To assume that students who previously were borrowing to finance their education through the Title IV program, and who may have been borrowing significant amounts, could suddenly afford to remain in that program without the availability of Title IV funding seems entirely unrealistic.


In order to more rigorously assess whether students have available alternatives should their program be deemed ineligible, we use IPEDS data to analyze the fraction of programs at for-profit schools that have reasonable alternatives for students. We consider alternatives both 1) within the same school but in a related subject matter, and 2) at nearby different schools with similar programs. In other words, if a specific program were to shut down, we ask whether there is at least one other program that students might consider a reasonably close and accessible substitute. The availability of substitute programs speaks to whether students destined to attend the ineligible program are likely to be able to find another
program to attend, or whether those students would choose not to enter postsecondary education at all. We consider substitutes both within the same school, and at nearby schools because they 1) are likely alternatives, and 2) correspond with the assumptions described in detail in the NPRM and used by the Department to arrive at its estimate of the rule’s effect on student access to postsecondary education.

1. Reasons why the existence of substitute programs is likely to overestimate the prevalence of “student shifting”

The existence of similar programs nearby, or of similar programs at the same school, does not mean that all students displaced by the gainful employment rule would attend the substitute program. Indeed, we believe that the fraction of students at programs that have substitute programs is likely to be an overestimate of the fraction of potentially displaced students who would remain in postsecondary education. We believe the existence of substitute programs provides an overestimate of student shifting for a number of reasons:

• First, not all students would be willing to attend a program in a different area of study or a different location, even if those differences are not large in a global sense.

• Second, it is not clear that students who decide to enter another similar program would have the necessary pre-requisites or meet the basic eligibility requirements to enter the new program.

• Third, it is not clear that the existing similar programs would be willing or able to increase capacity to accept the students who would have attended the ineligible program. The closed program is ineligible at least in part because of the characteristics and choices of the students it served. Accepting students with high debt amounts and high risk of default may cause the alternative program to become ineligible itself.

• Fourth, these estimates assume that none of the alternative programs would also fail the proposed rule. However, given that gainful employment will be applied to all similar programs in the same geographic area it is likely that the costs of attending the for-profit alternatives would be similar and that the labor market outcomes of many of the programs in the area would be similar. This would lead to many of the possible alternative programs also failing, which would therefore make finding an alternative even more difficult.

• Fifth, it is unreasonable to expect new programs to open specifically to absorb the displaced students. A program offered by a different institution in the same labor market and area of study, and which served the same students as the ineligible program, would itself be at high risk to be deemed
ineligible according to the gainful employment rule. We expect that other schools would see the failure of a competitor and avoid replicating that program.

2. Estimating the availability of substitute postsecondary programs

We use data from the 2012 IPEDS to identify the number of potential substitutes for each for-profit program. The IPEDS collects information, including data on enrollment and awards granted, at all postsecondary institutions in the U.S. that receive Title IV federal aid. The IPEDS also includes the address of each school, including the zip code. We define a program based on the full (i.e., 6-digit) Classification of Instructional Programs (CIP) code and program length, crossed with a unit identifier, which in practice is typically a campus location. In other words, if at a particular campus a school offers a one-year certificate program, a two-year associate degree program, and a 4-year bachelor degree program, all with the same CIP area of study, these are considered three different programs. When we consider alternatives to that program, we include programs from a wider range of CIP codes, as described below, but not programs of different lengths. With regard to the latter, we believe it is unreasonable to expect restrictions on a student's choices to induce attendance at a longer program (i.e. to induce more schooling), and for many students shorter programs would not offer the credentials required by the profession that would have drawn them to postsecondary education.

Given the limitations of the fields included in the IPEDS data, the analysis that follows relies on definitions of alternative programs that are tied to the physical location of the program and does not consider programs that are entirely online (i.e., have no requirements that students come to a physical location). Our analysis does consider the existence of programs that combine on-location classes with online classes. While entirely online programs would in theory always be an alternative for a student, it is unclear whether these programs would be offered in all subject areas, and whether these programs would be considered by students who do not have ready access to a computer or reliable internet service. Also, given the differences we find between the assumptions in the NPRM and the estimates using IPEDS, it seems unlikely that entirely online programs are prevalent enough to explain anything but a fraction of the necessary availability of alternative programs.

For our analysis, we constructed a data set of every program listed in the 2012 IPEDS, regardless of sector (i.e., including private for-profit, private not-for-profit, and public) or program length. From these data, we focus our analysis on the subset of programs that are at for-profit institutions. This group includes 13,426 programs that are less than 2 years in length (certificate), 9,993 2-year programs (associate), and 5,402 4-year programs (bachelor). For each of these for-profit programs, we identify whether there is at least one substitute program currently in existence. We define substitute programs in various ways:
• First, we consider whether for-profit programs have substitutes within the same campus, but in a slightly different but related CIP code (i.e., within the 4-digit CIP code or 2-digit CIP code). For example, according to the 4-digit CIP code definition all registered nursing, nursing administration, nursing research and clinical nursing programs would be considered viable substitutes (programs of these types all carry CIP codes that begin with 51.16). As another example, within the same 4-digit CIP code for Allied Health and Medical Assisting (51.08) programs run the gamut from anesthesiologist assistant, chiropractic assistant, pharmacy technician, physical therapist assistant, to veterinary animal health technician programs. The comparable 2-digit CIP code would include all “Health professions and related programs” (CIP code 51).

• Next, we consider whether there are programs at other for-profit institutions in a similar CIP code and nearby (defined as either within the same 5-digit zip code or 3-digit zip code).

• Then, we consider whether there are programs at public and not-for-profit institutions in a similar CIP code and nearby.

For each of these three types of substitutes, we consider various definitions of similarity – these correspond to more and less aggregated CIP codes to define what it means to be close in subject matter, and 5- versus 3-digit zip codes to define what it means to be close in physical distance.

3. The fraction of for-profit programs with existing substitutes

We present our calculations of the fraction of for-profit programs with similar programs nearby in 6 tables that are organized in the same way – each for a different definition of “closeness” and “similarity.” Within these 6 tables, the first 3 define “close” as being within the same 5-digit zip code, while the last 3 define “close” as being within the same 3-digit zip code. Each of those 3 tables defines “similarity” of subject matter differently. Table 12 considers programs to be substitutes only if they offer subject matter that is categorized with the same full 6-digit CIP code. Table 13 broadens the definition of similarity to include all programs within the same 4-digit CIP code. Table 14 then broadens the definition of similarity further to include all programs within the same 2-digit CIP code. This is a fairly broad definition of similarity.

At the end of this section, we present a summary table that shows estimates of the number of students that would be impacted through 2024 using the various definitions of alternatives (i.e., of ‘similar’ and ‘nearby’). These estimates are calculated using the estimated number of students in ineligible programs presented in the impact section of this report. This projection is then reduced by the estimated proportion of students in programs with reasonable substitutes under the various
definitions. In that summary table, we also present comparable estimates using the Department’s assumptions for comparison purposes.

These projections assume that all students with available substitutes will attend one of the substitutes. If students are not able or willing to attend an available substitute then these impact estimates should be adjusted upward. Therefore, the impact projections presented here can be considered a lower bound on the number of students impacted through 2024.

### Table 12: Percent of For-Profit Programs with at Least One Alternative Weighted by Total Degrees Granted (Program within the Same Full CIP Code and 5-digit ZIP)

<table>
<thead>
<tr>
<th>Program Length</th>
<th>Total Number of Programs</th>
<th>Programs with Alternatives at the Same School</th>
<th>Percent of Programs with Public/Non-Profit Alternatives</th>
<th>Percent of Programs with For-Profit Alternatives</th>
<th>Percent of Programs with Any Outside Alternatives</th>
<th>NPRM Low Reaction Scenario</th>
<th>NPRM High Reaction Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 Years</td>
<td>13,426</td>
<td>0.00%</td>
<td>20.98%</td>
<td>12.22%</td>
<td>28.18%</td>
<td>20.98%</td>
<td>28.18%</td>
</tr>
<tr>
<td>2 Year</td>
<td>9,993</td>
<td>0.00%</td>
<td>14.66%</td>
<td>18.65%</td>
<td>30.36%</td>
<td>14.66%</td>
<td>30.36%</td>
</tr>
<tr>
<td>4 Year</td>
<td>5,402</td>
<td>0.00%</td>
<td>8.14%</td>
<td>7.65%</td>
<td>13.89%</td>
<td>8.14%</td>
<td>13.89%</td>
</tr>
<tr>
<td>Overall</td>
<td>28,821</td>
<td>0.00%</td>
<td>16.38%</td>
<td>13.59%</td>
<td>26.26%</td>
<td>16.38%</td>
<td>26.26%</td>
</tr>
</tbody>
</table>

Source: 2012 IPEDS.

Note: Programs are defined as an OPEID, CIP Code, and program length.

Table 12 shows the percent of students at for-profit programs for which there is at least one substitute of various types. The table restricts attention to programs with the same full 6-digit CIP code and that are in the same 5-digit zip code. The first three rows of the table each correspond to a different program length: less than 2-year, 2-year, and 4-year programs. The overall line is calculated as the weighted average of the program length estimates.

- Column 1 shows the fraction of students at programs with alternatives at the same school. Because this table only considers programs to be similar if they are categorized with the same full CIP code, by definition there are no alternatives within the same school.

- Column 2 shows the percent of students at programs for which there is an alternative at a different for-profit college in the same 5-digit zip code. Among for-profit certificate programs, only 21 percent of students are in programs for which there is at least one other for-profit college that offers a program in the exact area of study and in the same 5-digit zip code. For 2-year programs less than 15 percent of students and just over 8 percent of 4-
year students are at programs for which there is an alternative defined in this way.

- Column 3 shows the percent of students at programs that have public or non-profit alternatives within the same 5-digit zip code. For certificate programs, just over 12 percent of students have alternatives at public or non-profits, and just over 18 percent in associate programs have alternatives at public or non-profits.

- Column 4 shows the percent of students at programs that have any outside alternative within the same 5-digit zip code. Using this definition of substitutes, around 30 percent of students have any outside alternatives for certificate and associate programs and about 14 percent among bachelor students.46

- Columns 5 and 6 summarize the percent of students at for-profit colleges for whom there is any other substitute program (where substitute is defined in the same way as in the rest of the table). In column 5, we restrict our attention to for-profit college alternatives, which is relevant if the community colleges in particular will not have the capacity to absorb additional students in the coming years. In column 6, we consider alternatives from all sectors of higher education. If we only consider programs that are the same as the ones students would have attended, the calculations shown in column 6 indicate that about a quarter of students at for-profit programs could currently switch to the same program within their zip code.

The last two columns of each table show the assumptions outlined in Table 32 of the NPRM for student shifting. These are the assumptions that the Department of Education specified, and which lead directly to the assumption in the NPRM that between 85 and 90 percent of potentially displaced students will remain in postsecondary education. The assumptions presented in the NPRM specify the fraction of potentially displaced students that would shift programs either within the same school or another school, or remain in the same program (that was just deemed ineligible). The Department does not distinguish their assumptions by program length.

Note that among the group of students that the Department assumes will remain in postsecondary education are a rather large fraction (between 10 – 25 percent) of students remaining in a program that has become ineligible. We find this assumption to be entirely unrealistic, especially for for-profit programs, as the programs deemed ineligible are almost certainly going to close since the vast majority of the students in these programs pay for education using Title IV funding.

46 In table 1, columns 4 and 6 are identical because by definition students cannot find alternative programs within the same school and within the same 6-digit CIP code. In subsequent tables, these columns differ because column 6 includes within-school alternative programs.
Once this funding source is removed, students in these programs will no longer be able to pay for the program and the program will be forced to shut down due to low enrollment. We include these students as students who would potentially need to find alternative programs, as the Department seems to believe that these students will continue in postsecondary education.

**B. Broadening the definition of “similar” programs**

In Table 13 and 14, we progressively broaden the set of programs that we consider to be close enough in subject matter that displaced students might still be willing to switch rather than drop out of higher education.

**Table 13: Percent of For-Profit Programs with at Least One Alternative Weighted by Total Degrees Granted (Program within the Same 4-digit CIP Code and 5-digit ZIP)**

<table>
<thead>
<tr>
<th>Program Length</th>
<th>Total Number of Programs</th>
<th>Programs with Alternatives at the Same School</th>
<th>Percent of Programs with Alternatives</th>
<th>Percent of Programs with Public/Non-Profit Alternatives</th>
<th>Percent of Programs with Any Alternative</th>
<th>Percent of Programs with All Alternatives</th>
<th>NPRM Low Reaction Scenario</th>
<th>NPRM High Reaction Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 Years</td>
<td>13,426</td>
<td>16.26%</td>
<td>22.98%</td>
<td>13.56%</td>
<td>31.31%</td>
<td>36.77%</td>
<td>44.51%</td>
<td>90.00%</td>
</tr>
<tr>
<td>2 Year</td>
<td>9,993</td>
<td>9.73%</td>
<td>16.03%</td>
<td>25.11%</td>
<td>38.13%</td>
<td>25.04%</td>
<td>46.07%</td>
<td>90.00%</td>
</tr>
<tr>
<td>4 Year</td>
<td>5,402</td>
<td>12.80%</td>
<td>8.73%</td>
<td>8.43%</td>
<td>15.19%</td>
<td>21.06%</td>
<td>26.93%</td>
<td>90.00%</td>
</tr>
<tr>
<td>Overall</td>
<td>28,821</td>
<td>13.35%</td>
<td>17.90%</td>
<td>16.60%</td>
<td>30.65%</td>
<td>29.76%</td>
<td>41.75%</td>
<td>90.00%</td>
</tr>
</tbody>
</table>

Source: 2012 IPEDS.

Note: Programs are defined as an OPEID, CIP Code, and program length.

In Table 13, we consider the fraction of for-profit students for which there are alternative programs within the same 4-digit CIP code:

- Column 1 shows that approximately 13.4 percent of for-profit students are at schools with other programs of the same degree length, within the same 4-digit CIP code. For certificate students that number is 16 percent. For 2- and 4-year programs the corresponding number is slightly below 10 percent and just below 13 percent respectively.

- Column 2 shows that approximately 18 percent of for-profit students have another similar program of the same length at a different for-profit school in the same zip code. Less than 23 percent of for-profit students in certificate programs, about 16 percent of for-profit students at 2-year programs, and less than 9 percent at 4-year programs have alternatives of this kind.

- A comparison of the calculations from the IPEDS with the NPRM assumptions in column 6 shows that there are far fewer students for whom similar
programs, defined by 4-digit CIP, exist at other schools in the same zip code than are assumed to transfer, or switch schools in this way, in the NPRM. Whereas the IPEDS shows that alternatives of this sort exist for anywhere between 27 and 46 percent of students, the NPRM assumes between 85 and 90 percent of displaced students will attend another program or remain in the same program.

Table 14 considers the availability of programs within the same 2-digit CIP code, a far broader definition of similarity in subject matter. Defined this broadly, the fraction of students for which there is an alternative program gets closer to the assumptions in the NPRM, but is still far short of their assumed values.

It is notable that the NPRM makes no distinction about whether students would really choose to switch subject matter so broadly – across 6-digit CIP codes, but within the same 2-digit CIP code. However, even with this very broad 2-digit CIP code definition of subject matter similarity, far fewer students have alternatives at other schools than the NPRM assumes.

The 2-digit “Health Professions and Clinical Related Sciences” CIP (51) illustrates the breadth of the programs at the associate level contained therein, including: dietician assistant, massage therapist, medical illustrator, medical insurance coder, surgical technician, EMT, mental health counselor, medical transcription, occupational therapist, optometric technician, licensed practical nurse, and medical radiologic technician programs.

Table 14: Percent of For-Profit Programs with at Least One Alternative Weighted by Total Degrees Granted (Program within the Same 2-digit CIP Code and 5-digit ZIP)

<table>
<thead>
<tr>
<th>Program Length</th>
<th>Total Number of Programs</th>
<th>Programs with Alternatives at the Same School</th>
<th>Percent of Programs with For-Profit Outside Alternatives</th>
<th>Percent of Programs with Public/Non-Profit Alternatives</th>
<th>Percent of Programs with Any For-Profit Alternatives</th>
<th>Percent of Programs with Any Outside Alternatives</th>
<th>Percent of Programs with Any Alternatives</th>
<th>NPRM Low Reaction Scenario</th>
<th>NPRM High Reaction Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 Years</td>
<td>13,426</td>
<td>29.19%</td>
<td>25.87%</td>
<td>17.20%</td>
<td>36.73%</td>
<td>49.09%</td>
<td>57.07%</td>
<td>90.00%</td>
<td>85.00%</td>
</tr>
<tr>
<td>2 Year</td>
<td>9,993</td>
<td>24.11%</td>
<td>18.91%</td>
<td>29.11%</td>
<td>44.35%</td>
<td>39.97%</td>
<td>58.70%</td>
<td>90.00%</td>
<td>85.00%</td>
</tr>
<tr>
<td>4 Year</td>
<td>5,402</td>
<td>30.17%</td>
<td>10.71%</td>
<td>10.28%</td>
<td>18.68%</td>
<td>36.68%</td>
<td>44.48%</td>
<td>90.00%</td>
<td>85.00%</td>
</tr>
<tr>
<td>Overall</td>
<td>28,821</td>
<td>27.61%</td>
<td>20.62%</td>
<td>20.03%</td>
<td>35.99%</td>
<td>43.96%</td>
<td>55.27%</td>
<td>90.00%</td>
<td>85.00%</td>
</tr>
</tbody>
</table>

Source: 2012 IPEDS.

Note: Programs are defined as an OPEID, CIP Code, and program length.

Column 2 shows that even with this broad definition of subject matter similarity, there are far fewer for-profit substitutes available than the NPRM assumes. Only approximately 21 percent of for-profit students have a program at a different for-profit college in the same 2-digit CIP and in the same zip code. The same is true for 26 percent of certificate students, for fewer than 19 percent of for-profit associate
degree students, and for fewer than 11 percent of for-profit bachelor degree students.

The summary estimates in columns 5 and 6 show that significantly fewer for-profit college students have alternatives, even defined as broadly as the 2-digit CIP, within the same zip code than are assumed to shift programs in the NPRM. Depending on whether community colleges or public and private 4-year colleges are considered viable options for for-profit college students to transfer to, the estimates suggest that between 38 and 59 percent of students have alternatives so broadly defined. We note that even with this overly broad definition of “similar,” the estimates are very close to the scenario we present in our impact analyses in which 50 percent of displaced students remain in education. If the other for-profit programs are similarly impacted by the gainful employment regulation and become ineligible, then only about 20% of students have a reasonable alternative even under this broad definition (column 3).

C. Expanding the definition of “nearby” to 3-digit zip codes

Table 15 through Table 17 repeat the analysis shown in Table 12 through Table 14, but where we consider the existence of substitute programs within the same 3-digit zip code rather than within the same 5-digit zip code. The sizes of 3-digit zip codes vary, but a couple of examples suggest that in at least some cases 3-digit zip codes are probably too large to represent reasonable distances that many students would be willing to travel to attend college. The entire city of Chicago is a single 3-digit zip code, as is the entire island of Manhattan. In other cases, 3-digit zip codes may more reasonably represent the concept of “nearby”. The estimates of the prevalence of alternatives are, of course, higher when this larger geographic area is considered.

Table 15 presents results that define substitute programs within the same full (i.e. 6-digit) CIP code and 3-digit zip code. According to this definition of similar and nearby, the percent of students with any alternative, including community colleges and other for-profit institutions, is still much less than what is assumed by the Department of Education, about 75 percent versus between 85 or 90 percent.
options for all colleges face capacity problems in the coming years, and on public and private 4-year are higher in colon and 58 percent of certificate students, this number is 76 percent. And, only 67 percent of associate and 58 percent of bachelor degree students have a similar alternative. The numbers are higher in column 6, but these rely significantly on community colleges, which face capacity problems in the coming years, and on public and private 4-year colleges, which commonly have selective admissions policies and so may not be options for all for-profit students.

Table 16 considers programs in the same 4-digit CIP code and 3-digit zip code. Whereas the percent of students with alternatives at other for-profit schools within the same 5-digit zip code was far less than the NPRM assumptions, the fractions within the same 3-digit zip code are more comparable.

However, as can be seen in column 5, only 69.7 percent of for-profit students have any for-profit alternative within the same 3-digit zip code and 4-digit CIP. For certificate students, this number is 76 percent. And, only 67 percent of associate and 58 percent of bachelor degree students have a similar alternative. The numbers are higher in column 6, but these rely significantly on community colleges, which face capacity problems in the coming years, and on public and private 4-year colleges, which commonly have selective admissions policies and so may not be options for all for-profit students.

Table 15: Percent of For-Profit Programs with at Least One Alternative Weighted by Total Degrees Granted (Program within the Same Full CIP Code and 3-digit ZIP)

<table>
<thead>
<tr>
<th>Program Length</th>
<th>Total Number of Programs</th>
<th>Programs with Alternatives at the Same School</th>
<th>Percent of Programs with For-Profit Outside Alternatives</th>
<th>Percent of Programs with Public/Non-Profit Alternatives</th>
<th>Percent of Programs with Any For-Profit Alternatives</th>
<th>Percent of Programs with Any Public/Non-Profit Alternatives</th>
<th>NPRM Low Reaction Scenario</th>
<th>NPRM High Reaction Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 Years</td>
<td>13,426</td>
<td>0.00%</td>
<td>65.41%</td>
<td>69.96%</td>
<td>79.67%</td>
<td>65.41%</td>
<td>79.67%</td>
<td>90.00%</td>
</tr>
<tr>
<td>2 Year</td>
<td>9,993</td>
<td>0.00%</td>
<td>53.62%</td>
<td>67.75%</td>
<td>76.15%</td>
<td>53.62%</td>
<td>76.15%</td>
<td>90.00%</td>
</tr>
<tr>
<td>4 Year</td>
<td>5,402</td>
<td>0.00%</td>
<td>48.91%</td>
<td>67.57%</td>
<td>72.20%</td>
<td>48.91%</td>
<td>72.20%</td>
<td>90.00%</td>
</tr>
<tr>
<td>Overall</td>
<td>28,821</td>
<td>0.00%</td>
<td>58.23%</td>
<td>68.74%</td>
<td>77.05%</td>
<td>58.23%</td>
<td>77.05%</td>
<td>90.00%</td>
</tr>
</tbody>
</table>

Source: 2012 IPEDS.

Note: Programs are defined as an OPEID, CIP Code, and program length.

Table 16: Percent of For-Profit Programs with at Least One Alternative Weighted by Total Degrees Granted (Program within the Same 4-digit CIP Code and 3-digit ZIP)

<table>
<thead>
<tr>
<th>Program Length</th>
<th>Total Number of Programs</th>
<th>Programs with Alternatives at the Same School</th>
<th>Percent of Programs with For-Profit Outside Alternatives</th>
<th>Percent of Programs with Public/Non-Profit Alternatives</th>
<th>Percent of Programs with Any For-Profit Alternatives</th>
<th>Percent of Programs with Any Public/Non-Profit Alternatives</th>
<th>NPRM Low Reaction Scenario</th>
<th>NPRM High Reaction Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 Years</td>
<td>13,426</td>
<td>16.26%</td>
<td>70.83%</td>
<td>80.41%</td>
<td>88.30%</td>
<td>76.22%</td>
<td>90.00%</td>
<td>85.00%</td>
</tr>
<tr>
<td>2 Year</td>
<td>9,993</td>
<td>9.73%</td>
<td>62.11%</td>
<td>83.36%</td>
<td>88.11%</td>
<td>67.49%</td>
<td>90.00%</td>
<td>85.00%</td>
</tr>
<tr>
<td>4 Year</td>
<td>5,402</td>
<td>12.80%</td>
<td>54.17%</td>
<td>73.53%</td>
<td>78.45%</td>
<td>57.83%</td>
<td>80.56%</td>
<td>90.00%</td>
</tr>
<tr>
<td>Overall</td>
<td>28,821</td>
<td>13.35%</td>
<td>64.69%</td>
<td>80.14%</td>
<td>86.39%</td>
<td>69.74%</td>
<td>86.62%</td>
<td>90.00%</td>
</tr>
</tbody>
</table>

Source: 2012 IPEDS.

Note: Programs are defined as an OPEID, CIP Code, and program length.
Table 17 presents results for the broadest definitions of similarity and geographic proximity that we consider. All programs with the same 2-digit CIP code and within the same 3-digit zip code are considered as possible alternatives. For reasons described above, we believe students will consider a large portion of the programs identified in this way not to be viable alternatives. We consider this definition of substitutes to be overly broad and as a result we believe the estimates in Table 17 substantially overstate the extent of student shifting that is likely to occur.

Table 17: Percent of For-Profit Programs with at Least One Alternative Weighted by Total Degrees Granted (Program within the Same 2-digit CIP Code and 3-digit ZIP)

<table>
<thead>
<tr>
<th>Program Length</th>
<th>Total Number of Programs</th>
<th>Programs with Alternatives at the Same School</th>
<th>Percent of Programs with For-Profit Alternatives</th>
<th>Percent of Programs with Any Alternative</th>
<th>Percent of Programs with Alternatives</th>
<th>NPRM Low Reaction Scenario</th>
<th>NPRM High Reaction Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 Years</td>
<td>13,426</td>
<td>29.19%</td>
<td>77.68%</td>
<td>92.44%</td>
<td>95.64%</td>
<td>85.29%</td>
<td>96.99%</td>
</tr>
<tr>
<td>2 Year</td>
<td>9,993</td>
<td>24.11%</td>
<td>69.39%</td>
<td>92.52%</td>
<td>95.45%</td>
<td>77.52%</td>
<td>97.00%</td>
</tr>
<tr>
<td>4 Year</td>
<td>5,402</td>
<td>30.17%</td>
<td>60.74%</td>
<td>84.33%</td>
<td>85.72%</td>
<td>72.57%</td>
<td>90.52%</td>
</tr>
<tr>
<td>Overall</td>
<td>28,821</td>
<td>27.61%</td>
<td>71.63%</td>
<td>90.95%</td>
<td>93.71%</td>
<td>80.35%</td>
<td>95.78%</td>
</tr>
</tbody>
</table>

Source: 2012 IPEDS.
Note: Programs are defined as an OPEID, CIP Code, and program length.

It is only when this broad definition is used and community colleges, 4-year public and private not-for-profit colleges are considered viable alternatives are the estimates in line with the assumptions in the NPRM. Without relying on schools from other sectors, the estimates in Table 17 still show a smaller prevalence of substitute programs (80 percent in column 5) than the NPRM assumes (85 to 90 percent).

It is worth reiterating that the fraction of programs with alternatives, no matter how defined, is probably best thought of as an overestimate of the fraction of displaced students who would shift to one of those alternatives (i.e., the actual fraction of students who shift to alternative programs in practice is likely to be smaller). Many students who attend for-profit colleges choose the program they attend because the very specific subject matter excites them, or because the location makes it feasible to attend school while working full-time. More generally, the more different the available alternative programs are in subject matter, the less likely displaced students will shift to the alternative program. And, the farther the alternative programs are from a student’s first-choice location, the less likely the student will shift to that distant alternative. Also, given that the gainful employment regulation will also be applied to all of the alternative programs, many of those alternatives will also fail since the programs operate under similar cost structures and in the same labor markets.
D. The Department overstates the number of students who are likely to find alternative programs

Of critical importance to an analysis of the proposed gainful employment rule is its effect on student access to postsecondary schooling. In our impact analyses, we provided estimates of the magnitude of that effect that were substantially greater than what the Department of Education published in the NPRM. As we explain in this report, the Department arrives at a smaller number of students estimated to be deterred from higher education because it assumes that between 85 and 90 percent of students displaced by the rule will find a different program to attend. We believe this assumption is far too optimistic, and we show in this report that an analysis of Department of Education data does not support it.

Far fewer than 90 percent of students at for-profit programs have alternatives of the sort that are assumed for them in the NPRM. The various analyses we have done suggest that the scenarios we presented in our impact analyses – in which 25 or 50 percent of displaced students will find alternative programs to attend – are much more reasonable. The difference in potential impact on students is substantial. Whereas the Department’s optimistic assumptions predict that between 180,000 and 360,000 students would be deterred from higher education during the next decade; our assumptions that appear to be more closely supported by the data suggest that between 2 and 7.6 million fewer students would enter postsecondary schooling by 2024. If this reduction in student access were to happen, it would of course work considerably against President Obama’s goal of adding 8 million more college graduates by 2020.

XIII. For-Profit Institutions Provide a Large Percentage of Credentials in Particular High-Growth Occupations

While the for-profit sector continues to provide a small percentage of postsecondary credentials overall, for particular occupations for-profit institutions provide a large percentage of the credentials awarded in the United States. Table 18 presents data on occupations and projected employment change over the next decade from the BLS alongside data from IPEDS on the percentage of credentials awarded by for-profit institutions. The IPEDS data are originally organized by CIP code and matched to occupations using the CIP-to-SOC crosswalk developed by ED.

The occupations are divided into three categories based on the level of most-frequently awarded credential. For example, the first set of occupations includes those for which the most frequently awarded credential is a certificate. In this category, we see that the majority of certificates granted to aspiring medical assistants (82.4 percent) were awarded by for-profit institutions. While this is a lower-wage job ($29,370) relative to the median job in the U.S. across all education levels in 2012 ($34,750), it pays almost double the Federal minimum wage
($15,080) and the BLS projects “much faster than average” employment growth in this occupation (29 percent) over the next decade. (Overall, BLS projects employment in the economy to grow by 10.8 percent over the same time period.)

Other predominantly certificate-awarding programs with a high percentage of certificates awarded by for-profit institutions and large projected employment growth over the next decade include pharmacy technicians (73.1 percent of certificates awarded by for-profits; 19.9 percent projected employment growth), dental assistants (76.9 percent of certificates awarded by for-profits; 24.5 percent projected employment growth), and heating, air conditioning, and refrigeration mechanics and installers (48.8 percent of certificates awarded by for-profits; 20.9 percent projected employment growth).

Among predominantly associate-degree awarding programs, for-profit institutions awarded the majority of associate degrees to drafters, veterinary technologists and technicians, correctional officers and jailers, and first-line supervisors of office and administrative support workers.

The third category, entitled “Other Credential-Awarding Programs,” includes occupations for which for-profit institutions award a substantial portion of credentials including certificates, associate degrees, bachelor degrees, and graduate degrees. Across all degrees, for-profits award 18.5 percent of credentials, but award credentials to 43 percent of those aspiring to become automotive service technicians and mechanics, 38.3 percent of those hoping to become security and fire alarm systems installers, and 37.9 percent of aspiring computer network support specialists.

From these data, it is clear that for-profit institutions play a vital role in preparing high school graduates for some “middle-skill” occupations with relatively high median pay and in high demand. Suppose that a large percentage of the programs in one or more of these areas were to lose Title IV eligibility due to failing the debt-to-earnings ratio two out of three years or not “passing” the debt-to-earnings ratio in four years. These professions would lose a large source of new, credentialed candidates, and the cost of training for these high-growth professions would then fall completely to the student and her family, leading to exactly the type of inequality Title IV was created to prevent.
Table 18: Projected Growth and Median Wages
Occupations Credentialed by For-Profit Institutions

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Predominantly Certificate-Awarding Programs</th>
<th>Predominantly Associate-Degree Awarding Programs</th>
<th>Other Credential-Awarding Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SOC Code</td>
<td>Annual Wage</td>
<td>Projected Employment Change 2012-22</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2012</td>
<td>Employment 2012</td>
</tr>
<tr>
<td>Pharmacy technicians</td>
<td>29-2052</td>
<td>$38,300</td>
<td>355,300</td>
</tr>
<tr>
<td>Surgical technologists</td>
<td>29-2065</td>
<td>$41,790</td>
<td>98,500</td>
</tr>
<tr>
<td>Medical records and health information technicians</td>
<td>29-2071</td>
<td>$34,160</td>
<td>186,300</td>
</tr>
<tr>
<td>Dental assistants</td>
<td>31-9091</td>
<td>$34,500</td>
<td>303,200</td>
</tr>
<tr>
<td>Medical assistants</td>
<td>31-9092</td>
<td>$29,370</td>
<td>560,800</td>
</tr>
<tr>
<td>Phlebotomists</td>
<td>31-9097</td>
<td>$29,730</td>
<td>101,300</td>
</tr>
<tr>
<td>Skincare specialists</td>
<td>39-5094</td>
<td>$28,640</td>
<td>44,400</td>
</tr>
<tr>
<td>Medical secretaries</td>
<td>43-6013</td>
<td>$31,350</td>
<td>525,600</td>
</tr>
<tr>
<td>Electricians</td>
<td>47-2111</td>
<td>$49,840</td>
<td>583,500</td>
</tr>
<tr>
<td>Automotive body and related repairers</td>
<td>49-3021</td>
<td>$38,380</td>
<td>154,200</td>
</tr>
<tr>
<td>Heating, air conditioning, and refrigeration mechanics and installers</td>
<td>49-9021</td>
<td>$43,640</td>
<td>267,600</td>
</tr>
<tr>
<td>Heavy and tractor-trailer truck drivers</td>
<td>53-3032</td>
<td>$38,200</td>
<td>1,701,500</td>
</tr>
<tr>
<td>Predominantly Associate-Degree Awarding Programs</td>
<td>17-3012</td>
<td>$55,700</td>
<td>29,600</td>
</tr>
<tr>
<td>Drafters, all other</td>
<td>17-3019</td>
<td>$48,110</td>
<td>15,600</td>
</tr>
<tr>
<td>Legal support workers (except court reporters)*</td>
<td>29-2056</td>
<td>$40,950</td>
<td>402,200</td>
</tr>
<tr>
<td>Veterinary technologists and technicians</td>
<td>33-1012</td>
<td>$56,700</td>
<td>102,700</td>
</tr>
<tr>
<td>Correctional officers and jailers</td>
<td>33-3012</td>
<td>$39,040</td>
<td>452,800</td>
</tr>
<tr>
<td>First-line supervisors of office and administrative support workers</td>
<td>43-1011</td>
<td>$48,330</td>
<td>1,418,100</td>
</tr>
<tr>
<td>Bookkeeping, accounting, auditing, payroll, timekeeping, and brokerage clerks; statistical assistants*</td>
<td>(b)</td>
<td>$35,647</td>
<td>2,058,400</td>
</tr>
<tr>
<td>Other Credential-Awarding Programs</td>
<td>15-1121</td>
<td>$79,680</td>
<td>520,600</td>
</tr>
<tr>
<td>Computer systems analysts</td>
<td>15-1122</td>
<td>$86,170</td>
<td>75,100</td>
</tr>
<tr>
<td>Information security analysts</td>
<td>15-1143</td>
<td>$91,000</td>
<td>143,400</td>
</tr>
<tr>
<td>Computer network architects</td>
<td>15-1152</td>
<td>$59,090</td>
<td>174,600</td>
</tr>
<tr>
<td>Computer network support specialists</td>
<td>49-2006</td>
<td>$31,340</td>
<td>14,600</td>
</tr>
<tr>
<td>Electronic equipment installers and repairers, motor vehicles</td>
<td>49-2008</td>
<td>$41,030</td>
<td>58,000</td>
</tr>
<tr>
<td>Security and fire alarm systems installers</td>
<td>49-3023</td>
<td>$36,610</td>
<td>701,100</td>
</tr>
</tbody>
</table>

Note: Median wages highlighted green/red are above/below the overall median wage of $34,750 (measured across all jobs regardless of degree level). Annual full-time full-year wages based on federal minimum wage is $15,080; based on highest state minimum wage (Washington) is $19,385.60; based on highest city minimum wage (San Francisco) is $22,339.20. Projected employment changes highlighted green/red are above/below the overall projected employment change of 10.8%. Percentage of credentials awarded by for-profits highlighted green/red are above/below the percentage of that type of credential awarded by for-profits. For-profits award 44.3% of all certificates, 22.2% of all Associate degrees, and 18.5% of all credentials (certificates, Associate degrees, Bachelor’s degrees, and graduate degrees). "Legal support workers (except court reporters)” and "bookkeeping, accounting, auditing, payroll, timekeeping, brokerage clerks; statistical assistants” report weighted means of the median incomes within each SOC code included in the employment category:
(a) Legal support workers (except court reporters) includes paralegals and legal assistants (23-1011), title examiners abstractors, and searchers (23-2093), and legal support workers, all other (23-2099).
(b) Includes bookkeeping, accounting, and auditing clerks (43-3031), payroll and timekeeping clerks (43-3051), brokerage clerks (43-4011), and statistical assistants (43-9111).

XIV. More Capacity is Needed to Educate All Students Who Would Benefit Relative to the Costs of Education

The President has called for the U.S. to lead the world in college degrees by 2020. We believe this is a laudable goal, and that many students will benefit if the nation meets it. In order to reach this goal, it is estimated that upwards of 8 million more students must complete postsecondary programs over the next decade than would do so if there were no growth.
There are many reasons to support the President’s push for more students to receive some college education. Primary among these is the high return to education that we described above. Postsecondary schooling is perhaps as important for economic success as it has ever been, and almost certainly since the early part of the last century. Changes in the economy and in the types of goods and services that are produced in the U.S. have made skills more and more valuable over the past 30 years (see e.g. Katz and Murphy, 1992; Goldin and Katz, 2008). At a time when earnings inequality is distressingly high, increased educational attainment has the potential to help reduce these earnings gaps and to improve the economic wellbeing of many non-traditional students.

Yet at the very time when the skills are most in demand and postsecondary schooling is such a key to economic wellbeing, much of the higher education sector has not increased its capacity. In fact, most state governments are in such difficult fiscal shape that unless some dramatic changes in funding for public colleges occurs these schools are likely to be dramatically restricted. At the very time when more students need to be educated, community colleges are not growing and in many cases are already at capacity. The tragedy is that the students most likely to be affected by insufficient growth in the higher education sector are from groups that have historically had low access, and who may have very high returns (see the discussion of Goldin and Katz, 2008 and Card, 1999 above).

### Table 19: Enrollment Growth by Type of Postsecondary Institutions Through 2011

<table>
<thead>
<tr>
<th>Number of Years</th>
<th>Total</th>
<th>Public</th>
<th>Private Not-for-Profit</th>
<th>Private For-Profit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Percent Growth in Enrollment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30 years</td>
<td>69.7%</td>
<td>56.6%</td>
<td>52.7%</td>
<td>1185.3%</td>
</tr>
<tr>
<td>20 years</td>
<td>46.2%</td>
<td>33.6%</td>
<td>39.3%</td>
<td>749.5%</td>
</tr>
<tr>
<td>10 years</td>
<td>31.8%</td>
<td>23.5%</td>
<td>24.0%</td>
<td>270.9%</td>
</tr>
<tr>
<td>5 years</td>
<td>18.2%</td>
<td>14.6%</td>
<td>11.8%</td>
<td>83.6%</td>
</tr>
</tbody>
</table>

| Average Annual Growth Rate |       |        |                        |                   |
|-----------------|-------|--------|                        |                   |
| 30 years        | 2.3% | 1.9%   | 1.8%                   | 39.5%             |
| 20 years        | 2.3% | 1.7%   | 2.0%                   | 37.5%             |
| 10 years        | 3.2% | 2.4%   | 2.4%                   | 27.1%             |
| 5 years         | 3.6% | 2.9%   | 2.4%                   | 16.7%             |

Source: 2012 Digest of Education Statistics, Table 223.

And, during this time of remarkable increases in the returns to higher education, and of changes in the U.S. economy that have made high-level skills more and more valuable, there has not been commensurate growth in the nation’s capacity to educate students beyond high school. Consider the annual growth rates in enrollment in different sectors of postsecondary education, shown in Table 19.
above. Over the past 30 years, according to data collected by the Department of Education, the annual average enrollment growth rate in public and private not-for-profit postsecondary schools has been 1.9 and 1.8 percent, respectively. Recall that this is during a period when the economic returns to a college education have possibly doubled (see e.g. Goldin and Katz, 2008). The lack of expansion in postsecondary education is part of the reason for the U.S. falling behind in the fraction of population that are college graduates, what the President points to as motivation for his call to increase the number of college completers.

Contrast these numbers with the annual enrollment growth rate at for-profit postsecondary institutions. The comparable average annual growth rate at these schools has been 39.5 percent over the past 30 years. Only this small portion of postsecondary schooling has grown as the demand for college education has increased. We emphasize that the question of quality is the key. If for-profit colleges are providing students with education and skills that lead to positive economic benefits after accounting for costs, then this growth in education capacity is an important positive development that should be encouraged for the good of students and of the economy. If not, then this growth is something to be concerned about. In that case, we need to learn more about why the high-quality programs are not expanding to meet the needs of the many students who would benefit from them.

Again, the focus should be on quality. Measures of debt relative to early career earnings, or of default rates as they are calculated in the proposed rule, are not measures of program quality. It is easy to think of very high-quality programs that lead to very high levels of debt. Consider, for just a few examples, Harvard, MIT and medical and law school graduate programs. Students coming out of those programs – who are not from families that can afford to pay their tuitions for them – leave with very high debt loads. However, one would not argue that Harvard's high tuition (the reason for the high debt loads) is a sign of Harvard being a low-quality institution.

Calculations we have done indicate that if the debt-to-earnings ratio test were applied to medical schools at a student level, the poorest one-third of students in the U.S. would not be allowed to become doctors. And many more would be forced to choose between owning a home and paying for their child’s medical school. These calculations also indicate if one followed the 8 percent rule, in order to attend medical school it would be necessary to pay $90,000 without borrowing. The Survey of Consumer Finances, sponsored by the Federal Reserve Board, indicates that the median net-worth of non-whites and Hispanics was $28,200. In other words, if the 8 percent debt-to-earnings rule were applied at a student level, the vast majority of non-white and Hispanic students would not have a chance of becoming doctors.

Returning to recent growth rates in postsecondary capacity, the historical numbers shown above are likely to actually overstate the growth in capacity at community
colleges in the near future. Many states are in bad fiscal shape, and as a result funding of community colleges may be cut. If this is to happen, it is possible that the capacity of the nation’s community colleges to educate students could be restricted. It is troubling that this could happen to schools that serve a disproportionate share of low-income, low-wealth and racial and ethnic minority college students. Because the economic returns are so high, and earnings inequality is so dramatic, public policy should be encouraging growth in postsecondary options for students. Policy should try to ensure that students make informed decisions regarding education investments. And, to the extent necessary regulation should focus on program quality, which should be measured by the economic benefits that accrue both to students and to the economy more generally, compared with the costs paid both by students and by taxpayers.

XV. Response to Request for Input

Throughout the NPRM the Department requested comment on specific aspects of the proposed regulation. The following section provides direct responses to those that our research has examined (and detailed in the sections above). We would welcome the opportunity to discuss any of these responses, or other aspects of our research, with the Department directly.

**NPRM:** “Although recognition of exceptional programs is not expressly addressed in the proposed regulations, we invite comment on ways in which the best programs could, consistent with our authority under the HEA, be identified and rewarded and how best practices could be highlighted and shared with others.” (NPRM, p. 66)

**RESPONSE:** Exceptional programs would provide the highest lifetime “net benefits” to their graduates. Net benefits are defined as lifetime benefits, i.e., increased earnings relative to what the student would earn “but for” the education over a graduate’s lifetime, minus lifetime costs, i.e., the tuition, fees, and foregone earnings during the student’s education. The Department’s current D/E metric measures the levels of debt payments and earnings several years after graduation; as such it does not provide any measure of the benefits provided by the education, and mismeasures the costs, as detailed in Section II, Part A. An improved metric for identifying both exceptional programs and poorly performing programs would estimate average risk-adjusted lifetime earnings gains and subtract from these average costs of program attendance.

**NPRM:** “Although we have proposed the pCDR measure to assess the outcomes of all students who attend a program, both students who complete the program and those who do not, we invite comment as to whether the D/E rates measure should also consider the outcomes of students who do not complete the program, in addition to those who do.” (NPRM, p. 97)
**RESPONSE:** As the D/E metric is currently calculated, it does not measure the gains, or outcomes, of a student graduating from a program, but rather the level of his earnings following his education. A student who would have had low earnings but for a college education is also likely to have low (but higher) earnings with a college degree. It is the difference between her actual earnings and what her earnings would have been but for the education that measures the gains to the student and that should be of interest in terms of education policy. Measuring the level of a graduate’s earnings does not account for differences in counterfactual earnings and will tend to overestimate the quality of education received by an individual with higher counterfactual earnings (for example, a privileged student who attended a good high school) and underestimate the quality of education received by an individual with lower counterfactual earnings (for example, a student from a disadvantaged background who dropped out of high school and later completed a GED).

If the levels of earnings of program graduates are poor measures of program quality, then the levels of earnings of non-completers will be even poorer measures of program quality. If a student drops out of a program less than three months after enrolling, she is unlikely to experience any earnings gains from her time spent in the program. If a student remains in a bachelor program for two years, she will likely experience some earnings gains, though not as much as she would have gained had she remained in the program and completed her degree. As shown in Figure 8 (Section VI, Part D), approximately half of non-completers drop out in the first six months after enrollment, and approximately three-quarters drop out in the first year. Including the outcomes of non-completers in the D/E measures for a program without accounting for how long they remained enrolled in the program would confound the estimates of returns to a program even if the earnings were being measured correctly, as gains, instead of incorrectly, as levels.

Because the earnings are measured as levels, and not gains, including non-completers in the calculation of the D/E measures is likely to further bias these estimates, because the likelihood of dropping out of college is correlated with socioeconomic factors such as being underprepared for college-level work, being a single parent, or being a first-generation college student.47 These factors are also likely to be correlated with lower levels of earnings.

Finally, in Section VI, Part D of this report, we address the concern of the Department with “churn,” or a high number of withdrawals from programs, provide evidence in Figure 8 that most of the “churn” that concerns the Department occurs

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very early in students’ enrollment, and posit that students learning that college, or this program in particular, is not for them earlier rather than later is good for both students and programs. Programs should not be penalized for allowing non-traditional students an opportunity to discover whether pursuing additional education would be beneficial for them. Including non-completers in the D/E and pCDR metrics will likely lead to more selective admittance criteria that will effectively restrict access to those who have traditionally been underserved by other educational sectors, and who would potentially benefit the most from furthering their education.

**NPRM:** “Note also that, although we have proposed an “n-size” of 30 in the proposed regulations, we have also invited comment on an n-size of 10.” (NPRM, p. 106)

**RESPONSE:** In statistics, there is no “safe” number of observations that constitute the smallest permissible sample from which to “draw inference,” or calculate statistics. Instead, we recognize that as sample size, or “n-size,” increases, so increases the reliability of the statistics estimated from the sample. In other words, if we were attempting to estimate the mean or median earnings for a group of individuals from a sample of 10, those estimates would be less reliable than those from a sample of 30.

Figure 19 demonstrates this principle. Using data from the 2010-12 CPS, we calculated median earnings for individuals working in occupations that map to bachelor degrees with the CIP code “52.0101 – Business/commerce, general.” The median wage using all individuals in the data is $47,240. We then sampled 10 random individuals from the data 1,000 different times, resulting in 1,000 different estimates of the median wage of these individuals. The distribution of these estimates of median earnings is illustrated by the blue line. As you can see, about 18 percent of the samples of 10 had medians in the $45,000 to $50,000 range, which contains the true median wage. About 6 percent of the samples had medians in the (much lower) $30,000 to $35,000 range, and about 2 percent of the samples had medians in the (very much lower) $20,000 to $25,000 range. A similar pattern occurs for sample medians higher than the true median. In short, the most likely median when sample size is 10 will be near the true median, but there is a good chance that the sample median will not be near the true median. This is what it means for a sample measure to be unreliable.

We then sampled 30 random individuals from the data 1,000 different times, resulting in another 1,000 different estimates of the median wages of these individuals. The distribution of these estimates of median earnings is illustrated by the red line. The data still has the same true median of $47,250, and now about 31 percent of the sample medians fell in the $45,000 to $50,000 range containing the true median. Only about 2 percent of the samples had medians in the (much lower) $30,000 to $35,000 range, and only 1 out of the 1000 samples (0.1 percent) had a median in the (very much lower) $20,000 to $25,000 range. The distribution
represented by the red line illustrates that sampling 30 random individuals leads to more reliable estimates of the true median. These estimates are more likely to be close to the true median than estimates using a sample-size of 10.

**Figure 19: Sample Median Estimates, Sampling 10 vs. 30 vs. 100 Individuals**

Finally, we sampled 100 random individuals from the data 1,000 different times, resulting in another 1,000 different estimates of the median wages of these individuals. The distribution of these estimates of median earnings is illustrated by the green line. The tall spike near the true median shows that about 55 percent of the sample medians fell in the $45,000 to $50,000 range containing the true median. In fact, all of the sample medians of size 100 range between $35,000 to $60,000 (within $12,750 of the true median). None of the samples had medians in the much lower or very much lower ranges that were observed when sampling 10 or 30 individuals as described above. The progression from the blue line, to the red line, to the green line illustrates that as sample size increases, so does the reliability of the estimates calculated from that sample.

It is important to keep in mind that all of these samples, of 10, 30, and 100 individuals, are drawn from the same original data with the same true median earnings. This means that the earnings number that we are attempting to estimate is always the same: $47,250. Ideally, any policy that is based upon the level of earnings of an individual would use the true mean or median, but in reality we must rely upon a sample mean or median consisting of the number of individuals we have to use for our estimate. And when relying upon a sample mean or median, larger sample size, or “n-size,” translates to more reliable estimates. Imagine three programs that culminate in the same debt and the same earnings for their
graduates, but with three different cohort sizes: 10, 30, and 100 graduates. The program with 10 graduates is more likely to fail D/E simply because they have a small sample size and thus less reliable estimates than the program with 30 graduates. Similarly, the program with 30 graduates is more likely to fail D/E than the program with 100 graduates. For these reasons, we believe that 30 is a more appropriate “n-size” than 10.

**NPRM:** “We seek comment on whether there are other measures we should consider that would further the Department’s stated policy goals. We restate our interest in ensuring the viability of the regulations through measures and thresholds that rest on a solid and well-reasoned basis and request that commenters submit supporting rationale, studies, and data for their proposals. We invite comment, however, on whether it may be possible to accomplish the intended goals of the GE measures without establishing a two-metric eligibility framework or whether there are other measures that should be considered.” (NPRM, p. 124)

**RESPONSE:** An improved metric would identify programs that fail to increase students’ lifetime earnings in excess of their net discounted costs, in line with the way that labor economists model an individual’s decision to pursue further education as discussed in Section II, Part A. This would require estimating average risk-adjusted lifetime earnings gains and subtracting average costs of program attendance.

In Section III, Part A, we discuss the analogy of a value-added model for evaluating teacher quality by measuring the gains in the teacher’s students’ test scores rather than their end-of-year test-score levels. Just as the value-added model contains less bias than the levels model in measuring teacher quality, this improved metric would contain less bias than the current D/E metric, which measures levels of earnings and debt payments several years after graduation. As a result, a rule based on this metric would not limit how much a student could borrow based on his earnings level, but instead based on the gains that he might expect to receive from his schooling.

This metric would also provide the correct incentives to schools and programs; instead of seeking to educate the students with the highest expected **levels** of earnings post-graduation, they would be incentivized to educate the students with the highest expected **gains** of earnings post-graduation. This is an important distinction, as the level of a graduate’s earnings is correlated with her counterfactual, or “but for” earnings, which in turn is correlated with her socioeconomic characteristics. Schools and programs making admissions decisions based on the expected levels of earnings post-graduation would seek students from more privileged backgrounds in order to minimize the risk of failing or becoming ineligible under the D/E or pCDR metrics as written in the proposed rule. Schools and programs making admissions decisions based on the expected gains to earnings...
post-graduation may not feel as constrained by a student's background characteristics.

Should the Department choose to move forward with a two-metric framework, the two metrics should be correlated with each other to insure that they are measuring the same underlying phenomenon. This is not the case under the current framework. As discussed in Section XI the D/E metric and the pCDR metric are not independent, but actually are strongly negatively correlated. The programs that perform poorly under one metric are almost entirely different than the programs that perform poorly under the other metric, even though both metrics are intended to define what it means for a program's graduates to be gainfully employed.

**NPRM:** “Although some negotiators supported the continuation of the amortization schedule from the 2011 Prior Rule, others were concerned that the 15- and 20-year time periods are too long, would allow for excessive tuition charges, and are not likely to reflect the actual time to repayment for most borrowers. We invite comments on the proposed amortization provision as well as on a 10-year amortization period for all credential levels and a 20-year amortization period for all credential levels.”

(NPRM p. 148)

**RESPONSE:** As discussed in Section VI, Part A, the calculation of annual debt payments should be based on the repayment amounts that students have the option to choose; all students with Title IV loans have the options either of extending the repayment period to between 12 and 30 years through the choice of an “extended repayment,” or of reducing the payments they must make in the early years after school completion through the choice of a “graduated repayment.” In addition, students with low earnings, the ones that the proposed gainful employment rule is meant to protect, have the option of reducing their Title IV payments to a lower percentage of their earnings through the choice of “income-based repayment.” If the goal of the proposed gainful employment rule is truly to ensure that students can afford their loan payments upon completing schooling, the rule should compare their earnings (or more preferably, earnings gains) to the amounts they are required to pay. If students choose to pay back their loans over a shorter period than they have to, it cannot be argued that those students are unable to afford the payments.

If it is logistically difficult for the Department of Education to determine which of these repayment options offers the lowest annual payment for each borrower, we recommend a simple adjustment to the rule that would extend the repayment length used for each credential level to 15 or 20 years. The allowable repayment period varies between 12 and 30 years and depends on the total amount of the Title IV loan. At a minimum, this modification would reflect a more realistic loan payment amount that an individual would be required to make on a student loan. In response to the concerns of some negotiators that 15- and 20-year time periods do
not reflect the actual time to repayment for most borrowers, calculations reported to us by Mark Kantrowitz, Senior Vice President and Publisher of Edvisors.com, indicate that the average repayment length chosen by students for Title IV loans is at least 15 years, and possibly close to 19 years.

NPRM: "We seek comment on the proposed method for determining the interest rate for the D/E rates calculations, and further invite proposals on other methods to set the interest rate. Specifically, we invite comment on whether rates should be averaged over a time period other than six years, varying based on the length of the program, or whether a weighted average of the actual interest rates associated with the loans included in the median loan debt calculation should be used." (NPRM, p.153)

RESPONSE: According to the Direct Loans website, all Federal Direct loans made since July 1, 2006 have had a fixed (as opposed to variable) interest rate as of the date of first disbursement of the loan. Mathematically, the correct way to calculate a student’s overall interest rate on Federal Direct loans would be a weighted average of the fixed interest rates at the times each loan was disbursed according to the amount of each loan. The correct way to calculate a program cohort’s overall interest rate would then be a weighted average of each student’s interest rate according to their debt load.

While calculating the rate this way is infeasible, under a set of reasonable assumptions, an approximation can be reached. Assume, for example, that each bachelor program takes 4 years to complete and that equal amounts of borrowing occur during each of those 4 years. The interest rate for a 1-year bachelor cohort should then be calculated as the unweighted average of the fixed interest rate for undergraduate students during the 4 years up to and including their graduation year. The interest rate for a 2-year bachelor cohort should be calculated as the unweighted average of the average interest rate for each 1-year cohort making up the 2-year cohort.

NPRM: "We invite comment on the proposed transition period, including whether the transition calculation should apply to all programs or, as in the proposed regulations, only to programs whose draft D/E rates are in the zone or are failing." (NPRM, p. 164)

RESPONSE: The proposed transition period in the first few years of the proposed rule is intended to allow the D/E calculations to reflect “immediate efforts by institutions to improve programs and reduce debt” (NPRM, p. 163). As discussed in detail in Section VII, Part C, we are concerned that because the metrics are based on cohorts of students who have finished several years prior to being included in the calculation, the current version of the rule does not allow time for programs to adjust or to make improvements so that they can comply with the metrics. Even a drastic change to institutional behavior as a result of a program failing in a given
year will not be reflected in the calculated metrics for several years and programs are likely to have become ineligible in the interim. The transition period allows for some of these changes to be reflected in the D/E metric earlier, but only does so in the first few years of the proposed rule. Despite being preferable in this way, measuring the labor market outcomes of students sooner rather than three years post-graduation is likely to contribute additional error to the earnings estimates.

Suppose, for example, that an institution changes a program in a substantial way after the transition period of the proposed rule. It will be several years before the effects of these changes impact the D/E or pCDR measures. If the impact is negative and results in a fail, any attempts to make subsequent changes to the outcomes for the students in this program will not generally be meaningful as the program is likely to become ineligible long before the effects of any changes will be felt. This is not a process that will encourage openness to change or responsiveness to changes in the labor market on behalf of institutions subject to GE rule.

A potential drawback to the transition period is discussed in detail in Section II, Part B; earnings growth is the steepest earliest in a worker's career, and measuring earnings earlier rather than later tends to underestimate the earnings potential of an individual. The transition period proposes to measure the earnings of individuals not three years post-graduation, but one year post-graduation, discounting the possibility of several years' worth of promotions and raises. In addition, as discussed in Section VIII, Part D, recent college graduates are impacted disproportionately during recessions, as marked by higher levels of unemployment and underemployment and lower wages. Measuring graduates' earnings one year post-graduation during a recession would potentially drastically underestimate even their three-year post-graduation earnings.

While allowing institutions time to make program adjustments is important, we stress that the basis of the D/E metric, which measures earnings levels rather than gains, is fundamentally flawed. While students may experience significant gains relative to their counterfactual or "but for" earnings that exceed the cost of education, those earnings levels may still be below those that would enable a program to meet the D/E criteria. In these cases adjustments may not be possible.

**NPRM:** “We invite comment on whether the proposed regulations should permit institutions to expand the applicable cohort surveyed under circumstances in which the size of the applicable cohort may make it difficult for the institution to satisfy the survey standards or meet the matching requirements proposed in connection with appeals based on State-sponsored database earnings information.” (NPRM, p. 209)

**RESPONSE:** One reason that many researchers shy away from collecting their own data via surveys is that survey-response rates are typically very low. For example, a Pew study entitled “Assessing the Representativeness of Public Opinion Surveys”
from May 2012 reported an average contact rate of 62 percent, average cooperation rate of 14 percent, and average response rate of 9 percent in their telephone surveys. In addition to high levels of effort expended to obtain relatively few data points, researchers worry about “sample selection,” or that the sample of respondents to the survey might differ in some important way to those not responding to the survey.

If a program were to have a response rate to their earnings survey similar to the average Pew survey response rate, they could expect an average of 9 graduates to respond for every 100 surveyed. This means even a fairly large cohort of 300 graduates will have, on average, 27 respondents to the earnings survey, a number which falls below the current n-size of 30. Even worse, consider a program with a cohort of 30 graduates. A 9-percent response rate for this program implies that 2 or 3 graduates will respond to the survey.

As discussed previously, larger sample sizes provide more statistical reliability and smaller sample sizes provide less statistical reliability; survey responses with n-size below 30 are not likely to provide an accurate assessment of program graduates’ incomes. In order to increase the n-size of survey responses we believe it is advisable to permit institutions to expand the applicable cohort surveyed.

While we advise expanding the applicable cohort in order to increase n-size and thus the reliability of earnings estimates therein, we are unable to comment on how this expansion will aid programs in satisfying the survey standards, as these have not yet been published by the Secretary. \(^48\) We advise that the standards be published before seeking public comment upon these standards.

As regards the matching requirements proposed in connection with appeals based on State-sponsored database earnings information, the NPRM requires institutions to demonstrate “that the number of students for whom earnings data were obtained is 30 or more” (NPRM, p. 493) while no such requirement is mentioned regarding the Department’s use of SSA earnings data. In fact, it is unclear whether or not the Department will calculate D/E rates for programs with n-size close to but above 30 for which the SSA cannot match some of the earnings information, bringing the n-size down below 30. As we have previously demonstrated the pitfalls of calculating a mean or median using a small n-size, we recommend that the Department institute a similar requirement on itself and not calculate or publish D/E rates for programs in which the SSA matches earnings for less than 30 graduates.

While sample size is an important consideration in calculating accurate earnings appeals, we stress that the basis of the D/E metric, which measures earnings levels rather than gains, is fundamentally flawed. An alternate earnings appeals process

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\(^48\)“The secretary will publish in the Federal Register the Earnings Survey Form that will include a field-tested sample survey as well as the survey standards.” (NPRM, p. 492)
would more accurately measure the benefits of a program by measuring the gains to earnings rather than the level of earnings.

**NPRM:** "As explained in “§668.401 Scope and purpose,” our focus in the proposed regulations is on students who receive title IV, HEA program funds for enrollment in a GE program. However, we invite comment as to whether institutions should be permitted to include the earnings information of individuals who did not receive title IV, HEA program funds for enrollment in the program, and on what basis. That is, how would D/E rates based on the earnings of individuals who did not receive title IV, HEA program funds demonstrate that the program satisfies the gainful employment requirement for students who did receive title IV, HEA program funds?” (NPRM, p. 210)

**RESPONSE:** If the intent of the regulation is to assess the quality of a program, then the earnings gains of all graduates, regardless of whether the student accepted Title IV funding, should be considered.

**NPRM:** “We have not included enrollment limits in the proposed regulations as we believe that providing warnings to students and prospective students about potentially ineligible programs, along with the information that would be available through the required disclosures, provide meaningful protections and will sufficiently enable students and their families to make informed decisions about their educational investment. However, we invite comment on whether enrollment limits should be imposed on programs that could become ineligible and how those limits could be practically implemented.” (NPRM, p. 254)

Standard economic theory suggests that if all parties are fully informed, imposing quotas or limits on quantity leads to inefficiencies and a lower state of wellbeing for those who would have voluntarily entered into a transaction but are unable to do so because of the quota. There are two questions that should be addressed clearly prior to making a decision in this matter. First, if enrollment caps are enforced then what factors will determine who will be eligible to enroll and who will not? Second, what are the costs to the individuals who are unable to enroll and how do those costs measure up to the assumed benefit of not enrolling in a potentially failing program?

The answer to the first question is necessary before an accurate analysis of the second question can be performed. Will the enrollment cap apply to current students or only to prospective students? If it applies to current students then which current students will be allowed to enroll and which won’t? There will likely be some students who will be able to continue their program and finish prior to the date upon which a program would lose eligibility. Students who complete programs may have better job prospects and earnings after completion of the program than they would have if they were to not complete the program, and are less likely to
default on loans. Even if these earnings are low, they may be better than what would have been available otherwise. Should these students not be permitted to enroll they may be disadvantaged by not being able to finish the program they started and have already incurred costs for.

**NPRM:** “The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A “section” is preceded by the symbol “§” and a numbered heading; for example, §668.410 Consequences of GE measures.)
- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?” (NPRM, p. 369)

**RESPONSE:** The department did not specify which year’s poverty guidelines are used in the calculation of debt to discretionary income. We would suggest using the same year in which the income data is pulled. However, in the examples given the SSA income came from 2011 and the poverty guidelines used were from 2013.

**XVI. Conclusions and Recommendations**

Throughout this report we have emphasized the importance of higher education, now more than ever, in bridging the earnings gap between the “rich” and the “poor”. As a result, we believe that the focus of the Department of Education should be on ensuring access to education for all students for whom the benefits are likely to outweigh the costs. As outlined above, the current rule is fundamentally flawed and has the potential to deny access to millions of students into programs that would improve economic conditions for those whom might have experienced the greatest benefits. The proposed rule does not measure the quality of a program, nor does it create a set of criteria that consistently identify programs that the department could reasonably say prepare students for gainful employment.

The currently proposed rule is inconsistent with the foundation upon which appropriate individual education decisions should be evaluated: specifically, whether the long-term gains from additional education outweigh the short-term
costs. As a result, the currently proposed rule will harm those students it is trying to protect because:

1. It focuses on early career earnings levels rather than the long-term earnings gains.
2. It does not account for the “counterfactual” or “but-for” outcome of students when evaluating economic outcomes such as employment, earnings, and credit risk.
3. It does not account for the effects that changes in the macroeconomy might have on earnings and default rates.

By focusing on early career income levels and shorter than necessary repayment schedules the Department will likely deem programs providing beneficial earnings gains (gains such that the increase in lifetime earnings exceeds the costs of education) as ineligible for Title IV funding. At the same time the Department’s proposed rule will not restrict eligibility from programs that result in little or no gain in lifetime earnings as long as their graduates’ post education earnings levels are relatively high because their graduates’, earnings “but-for” the additional education are high. The focus on earnings levels rather than gains is harmful to both students and taxpayers.

In addition to preventing access to programs that may generate long-term gains, the gainful employment rule will create an incentive for schools to become more restrictive in their admittance criteria. Given the Department’s current proposal, institutions are likely to avoid low-income students who must borrow to pay for college, and avoid students in groups that tend to have low earnings. If this were to occur it is possible that there could be a disproportionately large decline in enrollment among those who have traditionally had less access to higher education (particularly traditional higher education). For this reason, we think that the rule should be completely rethought.

As shown in our analyses above, the proposed rule could have a substantial impact on students attending for-profit programs. Using five years of data we find that between 13 and 22 percent of programs would have become ineligible for Title IV funding. Since the proposed rule is more likely to impact larger programs the impact on students is even greater with between 23 and 44 percent of students enrolled in ineligible programs. Racial and ethnic minority, female, and veteran students, along with Pell recipients will be particularly impacted.

The rule will impact many more programs and students during macroeconomic downturns, and fewer programs and students when macroeconomic conditions improve. These fluctuations are independent of the curriculum or teaching approach of a given program. Again, without more appropriate measures the rule is likely hurting those the Department is claiming to protect.
The proposed gainful employment rule would impact a massive number of students. Far too many programs will lose eligibility by a rule that does not evaluate whether programs provide appropriately measured benefits to students. While the Department chooses to assume that most of the students in impacted programs will continue their educational endeavors in other programs, our analysis of the available educational alternatives does not support this finding. Our analysis shows that most students in ineligible programs are not likely to find a reasonable alternative.

Ignoring for the moment the fundamental flaws of the rule described above, and even assuming that the metrics that the Department proposes are appropriate, there are critical issues that must be addressed.

1. **Metrics should be positively correlated.** Foremost among the issues with the proposed metrics is the fact that the two proposed measures of gainful Employment are negatively correlated. The negative correlation of the two metrics means pCDR and D/E cannot be measuring the same thing. Our analyses show that the likelihood that a program fails the pCDR metric is higher for programs passing the D/E measure than for programs failing the D/E measure. If the two metrics were measuring the same thing we would expect the opposite to be true. This outcome highlights the arbitrary way in which the Department has defined what it means for a program to prepare students for gainful Employment. If there is to be a single definition of gainful Employment, multiple metrics must be positively correlated (and one would hope with a relatively high degree of correlation).

2. **Pre-enrollment characteristics should be considered when evaluating student outcomes.** As we have explained throughout this paper, the earnings benefits from schooling are properly measured by a comparison of someone’s earnings to what he or she would have earned absent the schooling. The economic outcomes that a student will experience will be influenced by his or her pre-enrollment characteristics, and these must be considered when evaluating student outcomes or program quality. Contrary to the Department’s assessment, programs serving a higher proportion of Pell recipients have statistically significantly higher D/E and pCDR rates. Programs that serve more minority students have statistically significantly higher pCDR rates. As a result the proposed rule would have a disproportionate impact on programs serving higher proportions of Pell and minority students.

3. **The 8 percent debt to earnings measure is not appropriate for borrowing for education.** The Department continues to rely on an 8 percent D/E threshold for passing program (a program can be above 8 percent but below 12 percent, but not for four consecutive analytic years) based on the Baum and Schwartz study, even though the study concludes that the general use is a bad idea. Furthermore, borrowing for education is
different than consumer borrowing. Borrowing for education tends to increase one’s earnings, thus limiting the ratio of student debt payments to annual earnings in a way that does not account for the fact that earnings tend to grow in the early working years has the potential to hurt, not protect, borrowers.

4. **The annual debt payments used in the calculation of debt to earnings ratios should be the lowest debt payment that each student has the option of choosing.** We applaud the department for considering different repayment schedules for various degree levels, however if the goal of the rule is to protect students from having required debt payments that are too high, the rule should recognize that students are legally able to reduce those payments by either extending the length of the loan or by entering into income-based repayment. Any student who is having trouble making Title IV loan payments in the early years after completing school can reduce his annual loan payments using one of these options.

5. **The rule should account for the fact that macroeconomic events, such as recessions, can cause negative employment and loan repayment outcomes, and that these events are often not predictable at the time students enroll in programs.** As we discuss above, earnings and default rates are correlated with the broader macroeconomic conditions. Since it can be difficult to predict at the time a student enters a program what the macroeconomic conditions will be when he completes and is looking for a job. It would be a mistake to attribute the effects of a general economic downturn to individual schools or programs. We expect that with no adjustments, the proposed rule would designate more programs ineligible during recessions, and fewer during booms. However, all else equal, the total economic cost of education is lower during recessions because the opportunity cost of foregone earnings is lower. As a result, the rule will lead to more limited access when demand is likely to be highest, and total economic cost is likely to be lowest.
ATTACHMENTS
September 6, 2013

Secretary Arne Duncan
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Secretary Duncan:

The U.S. Chamber of Commerce is deeply troubled that neither of its nominations to the Gainful Employment Negotiated Rulemaking Committee with extensive experience with issues important to the broad business community was selected to serve, and we urge you to reconsider these nominations. While the Rulemaking Committee does include a member of the U.S. Chamber with expertise in veterans employment issues, it does not have sufficient representation from industry to substantively add to the rulemaking process. The U.S. Chamber believes the Committee must not move forward with such a significant gap in representation. The Committee should be inclusive of a diversity of stakeholders necessary to achieve the objectives set forth by the rulemaking process. While we understand that you selected some participants for the panel with backgrounds in the private sector, you appointed no one that truly represents the employer community. This oversight is significant, and therefore the Chamber respectfully requests your reconsideration of our nominations.

The U.S. Chamber believes very strongly in higher education reform and has worked extensively on issues impacting access and affordability, as well as transparency and accountability. The U.S. Chamber represents the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The issues to be addressed through the Committee are critically important to our members and we are very interested in taking part in the process and contributing to the discussion.

Please find attached the original nomination letter submitted to the U.S. Department of Education on behalf of the U.S. Chamber of Commerce. Thank you for your continued consideration of our nominations and we look forward to your response.

Sincerely,

R. Bruce Josten

Enclosure

cc: Wendy Macias
The Honorable Tom Harkin
Chairman
Committee on Health, Education, Labor and Pensions
United States Senate
SD-428
Washington, D.C. 20510

Dear Chairman Harkin:

Each of us places the highest priority on protecting the interests of students and protecting the taxpayers’ investment in federal student aid. We all agree that the rising cost of higher education, increases in default rates, as well as questionable student outcomes at many institutions of higher education are disturbing trends that warrant Congress’ attention. However, we are increasingly concerned that the Majority’s singular focus on for-profit institutions is ignoring more widespread problems in higher education and undermining the committee’s ability to provide meaningful solutions to these problems.

Since the first for-profit hearing on June 24, 2010, Ranking Member Enzi has made numerous requests on behalf of the Minority that these hearings be broadly focused on the challenges faced by students attending all institutions of higher education. Doing so would place the problems identified by the Majority’s investigation in the proper context, and would help to identify those problems that are unique to the for-profit sector and those that are pervasive throughout all sectors of higher education. Additionally, it would produce a record upon which meaningful legislative solutions could be developed.

Unfortunately, the Majority has ignored this request and produced four disorganized and prejudicial hearings, which have been most remarkable for a concerning lack of objectivity or any clear goal. As a result, the record includes the testimony of a witness now accused of improperly attempting to influence a Department of Education rulemaking process, the potentially false testimony of another witness, the Majority’s unprofessional treatment of Republican-selected witnesses, and a Government Accountability Office report so flawed that the managing director of the investigative unit was reassigned and the entire unit was reorganized. Furthermore, the hearings have not involved any discussion of constructive solutions for dealing with the problems in higher education.

We agree that there are serious problems in higher education, particularly with some schools in the for-profit sector. However, the need to address these problems does not warrant the biased and unprofessional conduct we have witnessed during the past four hearings. It is unacceptable and uncharacteristic of the way this committee or this institution has historically conducted its business.
Therefore, we respectfully request that you reconsider your plan to hold the hearing tentatively scheduled for May 10, 2011, and instead work with us to find constructive solutions to the problems faced by all institutions of higher education. Should you decide to decline this request, we will not participate in the next hearing on for-profit institutions.

We recognize the prerogative of the Majority to set the committee's agenda. However, it is also the Majority's responsibility to conduct fair and objective hearings that ensure the integrity of our work, and assist each of us in finding solutions to the challenges facing our nation.

Sincerely,

Michael B. Enzi
United States Senator

Lamar Alexander
United States Senator

Richard Burr
United States Senator

Johnny Isakson
United States Senator

Rand Paul
United States Senator

Orrin G. Hatch
United States Senator

John McCain
United States Senator

Pat Roberts
United States Senator

Lisa Murkowski
United States Senator

Mark Kirk
United States Senator

cc: Senate Majority Leader Harry Reid
Senate Minority Leader Mitch McConnell
December 7, 2010

Gene Dodaro  
Acting Comptroller General  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, D.C. 20548

Dear Mr. Dodaro:

I write to you with serious concerns about the numerous changes made to the Government Accountability Office’s (GAO) August 4, 2010 testimony to the Senate Health, Education, Labor and Pensions (HELP) Committee. These revisions raise a number of troubling questions about the testimony provided to the Committee.

On August 4, 2010, Gregory Kutz, Managing Director of the GAO’s Forensics, Audits and Special Investigations division, testified to the Senate HELP Committee about the findings of an undercover investigation of recruiting practices at 15 for-profit institutions of higher education. The findings were summarized in Mr. Kutz’s written testimony, which was entitled “For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices.” Specifically, Mr. Kutz alleged that “4 colleges encouraged fraudulent practices and that all 15 made deceptive or otherwise questionable statements to GAO’s undercover applicants.” The GAO subsequently revised and reissued Mr. Kutz’s testimony on November 30, 2010.

The GAO indicated that the testimony was being reissued “to clarify and add more precise wording on pages 9 and 12 and to some of the examples cited in Table 1 on page 8 and Appendix I, pages 19-27”. However, the revisions appear much more substantial. As the attached document provided by GAO staff illustrates, over 50 changes were made to 12 pages of the original testimony. The majority consist of word changes, new or revised facts, and additional information about statements made by school officials. These changes appear to undermine many of the allegations made in Mr. Kutz’s testimony, and suggest
that information was either intentionally or recklessly omitted and/or misrepresented.

This is simply unacceptable. GAO has alleged serious violations of the Higher Education Act, including criminally fraudulent behavior by several institutions. Two of the allegations are currently being investigated by the Department of Education’s Office of Inspector General based on GAO’s work. In addition, these allegations are the basis of an exhaustive and costly document request made by the Chairman, as well as disciplinary action taken against employees at the institutions targeted by the investigation.

I appreciate the fact that GAO found abuses at some of the schools and support GAO’s efforts to investigate waste, fraud and abuse. However, the revisions made in the reissued testimony raise serious questions about the quality and rigor of this particular investigation.

Congress relies on GAO to provide objective and factually accurate reports to inform its work. As your website indicates, GAO’s mission is to “provide Congress with timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced.” The reissued testimony raises serious concerns about GAO’s commitment to this mission. Therefore, I request that you withdraw your previous testimony and submit for the record your revised testimony. Additionally, I request that you provide us with an immediate and detailed explanation of each change made to the reissued testimony, and also request that you provide a copy of all written correspondence, email or otherwise, regarding the decision to issue a substantially revised version nearly four months after testifying before the Committee.

Congress takes its oversight responsibilities seriously. Therefore, it is essential that GAO’s work is objective and unbiased.

Sincerely,

Michael B. Enzi
Ranking Member
Dear Colleagues:

As you know, President Obama has asked higher education leaders to bring him ideas about education reform. On behalf of the ten campuses and the nearly 230,000 students at the University of California, I write to recommend the federal government convene an interagency working group to explore ways to increase accountability for the federal student aid dollars received by all participating institutions, including public and private universities, and for-profit and non-profit colleges.

Officials from the White House, the U.S. Departments of Education, Treasury, Justice, and Veteran Affairs, as well as representatives from the Consumer Financial Protection Board, the Federal Trade Commission and others, should investigate and develop comprehensive policies that will realistically protect students, expand opportunities for educational success, and save federal dollars that can be used to provide additional aid to deserving students.

Special attention should be directed to the institutions that have low graduation rates and high student loan default rates. For example, students who attend for-profit colleges represent only ten percent of the total postsecondary population, but they receive approximately 25 percent of total Department of Education student aid funds. In addition, those ten percent account for nearly half of all student loan defaults. Twenty-two percent of students enrolled in for-profit colleges will default within three years. In comparison, the default rates for UC’s campuses are among the lowest in the country. UC’s three-year loan default rate is 3.9 percent.
It is time to target the federal government's efforts where they can do the most good. Instead of a broad "gainful employment" rule, an interagency working group could propose actions under existing authority without new rules and/or legislation that would allow the federal government to take more immediate and effective steps to preserve and protect our nation's student financial aid system. Drawing upon the best practices in California and emerging across the country, the working group could:

- Utilize metrics that take full advantage of information that higher education institutions already provide federal agencies on a regular basis. This includes expanded data the federal government has as a result of requiring schools to monitor individual limits on Pell Grants and subsidized student loans, as well as quarterly reconciliation statistics that could be used to create a "loan-repayment rate" that is difficult to manipulate.
- Investigate the use of current cohort default rates together with the percent of enrolled students borrowing, as California is doing (described below), to identify and curtail abuses in the short run, and to suspend institutional participation at schools with high cohort default rates.
- Analyze and publicize information that can be derived from the minimal "gainful employment" thresholds that were originally devised for Higher Education Act Title IV participation.
- Develop policies and guidance that would end the flow of federal taxpayer dollars to institutions where students have high student loan debt and little prospect of repaying what they owe, and instead assure that federal dollars support students who are enrolled in successful programs and institutions.
- Explore ways to improve outreach efforts to specific populations, including veterans, to ensure they have relevant information about institutional accountability and how their military and veterans benefits coordinate with student financial aid.

A new standard recently implemented in California demonstrates that it is possible to improve the effectiveness of publicly-funded student aid programs using information schools already provide, and to do so in a practical and meaningful way.

In the 2011-12 State budget, the California State Legislature adopted tightened eligibility standards for colleges participating in the Cal Grant program, the State's need-based educational aid program. The new standards require institutions, where at least 40 percent of enrolled students borrow student loans, to have a six-year graduation rate of at least 30 percent and a federal three-year cohort loan default rate of less than 15.5 percent in order to participate in the Cal Grant program. The State Legislative Analyst's Office (LAO) reported that 80 percent of California's
for-profit colleges (154 schools) were disqualified from participating in the Cal Grant program under the new State standards, even though most continue to be eligible for the federal student aid programs. This resulted in a savings of $50 million and protected students by reducing the financial incentives to enroll in institutions that were disqualified from the Cal Grant program. The LAO suggested improvements to the participation rules, including the use of a Loan-Repayment Rate (LRR) and a debt-to-income ratio to gauge school performance (instead of a cohort default rate that can be easily manipulated) and a recommendation that the 30 percent six-year graduation rate be implemented for all participating Cal Grant schools.

The new standards implemented in California easily apply to federal financial aid programs and, if implemented, would improve college outcomes for students. Following the results in California, low-income students, who may be eligible for educational support, are more likely to enroll in institutions where student loan default rates are lower and where completion and graduation rates are comparatively higher. Implementing new standards, parallel to those set in California, would directly align with President Obama's higher education initiatives to improve accessibility, affordability, and accountability.

I am committed to working with you to protect students and the federal investment in student aid. I appreciate your consideration of these immediate recommendations, and I pledge my time and support to help meet our mutual longer-term goals for maintaining the U.S. position as the world leader in higher education excellence.

Yours very truly,

Janet Napolitano
President

cc: Members, Federal Trade Commission
Memorandum

Date: March 1, 2011

To: GAO Employees

From: Comptroller General – Gene L. Dodaro

Subject: Executive Announcements

Since the Forensic Audits and Special Investigations team was formed in 2005 the team’s body of work has resulted in numerous accomplishments and benefits to the Congress and the public. To ensure good work continues and to bring greater management attention to the group and more seamlessly integrate its work with GAO’s program teams as well as the audit and investigative sides of the unit, today I am announcing several changes. These enhancements will also ensure greater attention to the issues that led to the need to produce the errata to the for-profit schools report and by the subsequent inspection.

The team will be restructured and renamed the Forensic Audits and Investigative Service (FAIS) team and I am pleased to announce that Rick Hillman, the current Managing Director of the Financial Markets and Community Investments team, has agreed to serve as the Managing Director of the new FAIS team. I am also pleased to announce that as part of this new FAIS team structure, Greg Kutz will serve as Director of Audit Services. Another executive will be brought in as Director of Investigative Services and a search is underway for that individual.

This new structure will provide greater emphasis on both forensic audits and investigations. We also will enhance the matrixed efforts the team conducts working with other teams across the agency to focus on investigative results that demonstrate the impact of identified management control and other problems. We will also increase the focus on some of our high-risk work such as the detection, correction and prevention of improper payments. The new FAIS team will be subject to GAO’s rigorous regular internal inspections and external peer reviews. The inspection report on the for-profit school work identified areas to improve quality control and we will also move expeditiously to implement each of those recommendations and any new recommendations that come from the ongoing inspections of FAIS’ portfolio of work. We are looking at FAIS staffing, workload and enhanced training to ensure we are well positioned to support the important work the team does both individually and with the support of other mission teams.

These changes are effective immediately. I hope you will join me in wishing Rick and Greg much success in their new positions.
Richard J. Hillman

Rick Hillman will bring strong leadership to manage this restructuring. As a career-long GAO employee, Mr. Hillman has served GAO in many capacities. Mr. Hillman is currently Managing Director in the Financial Markets and Community Investment team and has led that team since 2005. In 1997, Mr. Hillman was promoted into GAO’s Senior Executive Service as an Associate Director in the General Government Division working in the financial institutions and markets issues area. Prior to that, he was a Band III analyst in the Office of Program Planning and the Office of the Assistant Comptroller General for Planning and Reporting. Mr. Hillman also served for over six years in senior and supervisory information systems analyst positions in GAO’s Information Management and Technology Division.

Mr. Hillman joined GAO’s headquarters office entry-level program in 1976. He subsequently worked in GAO’s Washington Regional Office until his reassignment to work in the accounting and financial auditing group in the Accounting and Financial Management Division.

Mr. Hillman graduated with honors with a B.S. degree in accounting from the University of Scranton. He also has completed additional course work in government management and in computer technology and information systems issues. He has earned numerous GAO honors throughout his career including GAO’s Comptroller General’s Award in 2009, Distinguished Service Award in 2003, and Meritorious Service Awards in 1986 and 1996 and other individual performance and teamwork awards.

Greg Kutz

These changes will allow us to take better advantage of Greg Kutz’s wealth of experience in forensic and other audit services. Mr. Kutz has been Managing Director of the Forensic Audits and Special Investigations Unit (FSI) and has served in that capacity since 2005. In 1991, Mr. Kutz joined the Government Accountability Office after 8 years at KPMG Peat Marwick. As a Senior Executive at GAO, Mr. Kutz has testified at congressional hearings over 80 times primarily on matters related to fraud, waste and abuse and other special investigations. Mr. Kutz has been responsible for reports issued by GAO and testimony relating to credit card and travel fraud and abuse, improper sales of sensitive military and dual use technology; tax fraud and abuse, wage theft, Hurricane Katrina and Rita fraud, and a variety of other high profile investigations. Mr. Kutz is a Certified Public Accountant (CPA), Certified Fraud Examiner (CFE), and Member of the Association of Certified Fraud Examiners Professional Standards and Practices Committee. He was also a 2010 Service to America Medals Finalist for Law Enforcement and Justice.