THE DEPARTMENT OF EDUCATION LACKS AUTHORITY TO ADOPT ITS PROPOSED DEFINITION OF "GAINFUL EMPLOYMENT"

In the Negotiated Rulemaking for Higher Education 2009-10, the Department of Education (the "Department") has proposed promulgating a regulation defining the term "gainful employment" in 20 U.S.C. §§ 1001 and 1002. The proposed regulation would deny federal financial assistance to students enrolled in certain programs of study if the Department determines that the cost of the program—measured by average debt payment levels for students in the program—is too high in light of the anticipated salary for graduates of the program. Because the Department lacks statutory authority to enact such a regulation, it should not pursue this proposal any further.

I. BACKGROUND

A. **Statutory Background**

Title IV of the Higher Education Act of 1965 as amended (the "HEA") provides a comprehensive program of federal financial assistance for students seeking postsecondary education and the many colleges and universities providing such an education. *See* 20 U.S.C. §§ 1070-1099(d). To ensure that its students are eligible for this assistance—and to receive any funding itself—an educational institution must meet an array of requirements mandated by Congress.

A threshold requirement for ensuring student eligibility for financial assistance is that an institution fall within the statutory definition of an "institution of higher education."[1] Section 1002 of title 20 sets forth the definition of an institution of higher education "for purposes of student assistance programs." It provides that "the term 'institution of higher education' for purposes of Title IV of this chapter … includes, in addition to the institutions covered by the definition in section 1001 of this title," both "a proprietary institution of higher education" and "a postsecondary vocational institution" as defined further in the section. *Id.* § 1002(a)(1).

Section 1002(b) defines a "proprietary" institution as follows:

[1] *See* 20 U.S.C. § 1070 ("It is the purpose of this part, to assist in making available the benefits of postsecondary education to eligible students (defined in accordance with section 1091 of this title) in *institutions of higher education* …." (emphasis added)); *id.* § 1091(a) ("In order to receive any grant, loan, or work assistance under this subchapter … a student must … be enrolled or accepted for enrollment in a degree, certificate, or other program … leading to a recognized educational credential at an *institution of higher learning* that is an eligible institution in accordance with the provisions of section 1094 of this title …. (emphasis added)); *id.* § 1094(a) ("In order to be an eligible institution for purposes of any program authorized under this subchapter …, an institution must be an *institution of higher learning* or an eligible institution (as that term is defined for the purpose of that program) …. (emphasis added)).

> For the purpose of this section, the term "proprietary institution of higher education" means a school that—
>
> (A) *provides an eligible program of training to prepare students for gainful employment in a recognized occupation*;
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> (B) meets the requirements of paragraphs (1) and (2) of section 1001(a) of this title;
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> (C) does not meet the requirement of paragraph (4) of section 1001(a) of this title;
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> (D) is accredited by a nationally recognized accrediting agency or association recognized by the Secretary pursuant to part G of Title IV of this chapter; and
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> (E) has been in existence for at least 2 years.

Id. § 1002(b)(1) (emphasis added).

Of principal importance for present purposes is the highlighted language above: "*provides an eligible program of training to prepare students for gainful employment in a recognized occupation.*" This is the statutory basis for the Department's proposed gainful employment regulation. That language also appears in § 1002(c)(1)(A), which defines a "postsecondary vocational" institution, and in § 1001(b)(1), which defines certain public or nonprofit institutions of higher learning that do not offer a bachelor's degree (or provide at least two years of credit toward a bachelor's degree) but do offer a program of not less than one year.

Once a college has qualified as an institution of higher education, it must adhere to numerous requirements imposed on participating institutions. *See infra* § II(A). Additionally, each program at the college must satisfy a separate set of congressionally mandated criteria. These criteria consist primarily of clock hour and weeks of instruction requirements based on the level of instruction (associate degree, graduate or professional degree). *See* 20 U.S.C. § 1088(b).

B. The Proposed Regulation

On September 9, 2009, the Department published a notice in the Federal Register announcing its intent to establish two negotiated rulemaking committees to prepare proposed regulations under the HEA. *See* 74 Fed. Reg. 46,399 (2009). The "Program Integrity" committee held three sessions. For the second session, the Department proposed (among other things) two possible approaches to defining the term "gainful employment" for purposes of Title IV eligibility. Prior to the third session, the Department provided proposed regulatory language for discussion.

The proposed regulation would define "gainful employment" in a recognized occupation as follows:

> An institution is considered to provide an eligible program that prepares students for gainful employment in a recognized occupation if the Secretary determines at the end of each three-year period that the debt to earnings ratio associated with the program is eight percent or less. If the debt to earnings ratio for a program is more than eight percent, the Secretary may nevertheless consider that program to be an eligible program if it satisfies an alternative measure ….

34 C.F.R. § 668.6(a)(1) (proposed).[2] To calculate the debt-to-earnings ratio, the Secretary would determine "the median loan debt of students who completed or graduated from the program … during the [prior] three-year period and us[e] the median loan debt to calculate an annual loan payment based on a 10-year repayment schedule …." *Id.* § 668.6(b)(1). This annual payment would then be compared to the "annual earnings" of the 25th percentile of "persons employed in occupations related to the training provided by the program," as measured by "the Department of Labor's Bureau of Labor Statistics data." *Id.* § 668.6(b)(2) & (3).

Alternatively, a "program with a debt to earnings ratio of more than eight percent may continue to qualify as an eligible program" if the "students who completed or graduated from the program [in the last three years] have a 90 percent loan repayment rate" or the eight percent debt-to-earnings ratio is satisfied using actual earning data for students graduating in the last three years. *Id.* § 668.6(c).

Because a college cannot control the salary paid in a particular profession or students' ability to pay for college absent financial aid, the proposed regulation will effectively impose a cap on the price of tuition—the only variable colleges can control. Colleges that wish to provide a course of study will need to adjust the tuition price for that program based on the relevant Department of Labor salary survey data and its students' past borrowing practices.

II. ANALYSIS

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Here, Congress has not granted the Department the authority to condition eligibility for federal financial assistance on satisfying a prescribed debt-to-earnings ratio.

[2] A prior version of the final proposed language is set forth in a Department "Issue Summary" published during the course of the Negotiated Rulemaking. *See* Department of Education Issue Summaries, Issue Paper #6, *available at* http://www.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-session3-issues.pdf. The full text of the final proposed regulation is attached to this memorandum as Attachment A.

A. No Provision Of The Higher Education Act Authorizes The Department To Impose A Maximum Average Debt-To-Earnings Ratio

Institutions of higher education whose students are eligible to receive federal financial assistance under the HEA are highly regulated. But among the scores of applicable statutory sections, there is no provision that authorizes the Department to declare programs of study ineligible for participation in federal student financial aid programs based on the average debt-to-earnings ratio.[3]

The statutory scheme determining eligibility for participation in federal student financial assistance programs is complex and comprehensive. As noted above, for a proprietary institution of higher education to even qualify for participation, it must provide an "eligible program of training to prepare students for gainful employment in a recognized occupation." *See id.* § 1002(b)(1)(A). Additionally, an institution must admit only students who have graduated from a secondary school (or the equivalent). *Id.*§ 1001(a)(1). The institution also must be authorized as a matter of state law to provide a program of education in the State where it is located. *Id.* § 1001(a)(2). The institution must also be accredited by a nationally recognized accrediting agency, *id.* § 1002(b)(1)(D),[4] and have been in existence for at least two years, *id.* § 1002(b)(1)(E). Proprietary and vocational schools also must meet additional enrollment and management standards in order to fall within the definition of an "institution of higher learning." *See id.* §§ 1002(a)(3) (limitations on "correspondence courses"), 1002(a)(4) (limitations on bankruptcy filings).

In addition to satisfying these threshold criteria, institutions also must comply with a host of other requirements in order to participate in federal student aid programs. For example, Congress mandated that "[f]or purposes of qualifying institutions of higher education for participation in programs under this title," the Secretary also must determine the "administrative capability and financial responsibility of an institution of higher education." *Id.* § 1099c(a). Congress prohibited discrimination by "[i]nstitutions of higher education receiving Federal financial assistance." *Id.* § 1011. Section 1094 alone mandates that institutions comply with *twenty-nine separate requirements*, ranging from adopting certain health and safety programs to

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[3] The proposed regulation states that the Department "may" consider a program to be eligible if it satisfies one of the alternative measures described above in § I(B) (a ninety percent loan repayment rate or actual student earnings that satisfy the proposed debt-to-earnings ratio). Because the availability of these alternatives would be purely at the discretion of the Secretary, the Department must have the authority to enact the primary definition. In any event, Congress has already legislated on the issue of loan repayment rates by excluding institutions with high cohort default rates from participation in certain Title IV programs, and the Department, therefore, cannot promulgate regulations that contradict the congressional scheme. *See, e.g.*, 20 U.S.C. § 1085(a)(2)(B) & § 1087c(d) (institutions with cohort default rates of over twenty-five percent (and increasing to thirty percent in 2012) will be suspended from participation in FFEL and Direct Loan programs).

[4] This requirement is applied to all institutions of higher education. *See* 20 U.S.C. §§ 1001(a)(5), 1001(b)(1), 1002(b)(1)(D), 1002(c)(1)(A).

imposing restrictions on incentive pay. *See, e.g.*, 20 U.S.C. §§ 1094(a)(10) (required drug abuse prevention program), (a)(12) (mandated campus security policy), (a)(20) (prohibiting incentive pay based on success in securing enrollments or financial aid), & (a)(26) (disclosure requirements to victims of crimes perpetrated by students).

Once a college is qualified as an institution of higher education for the purposes of financial assistance, each program at the institution must satisfy an additional set of congressionally enumerated requirements. In general, to be eligible for Title IV assistance, a program must require a specified number of hours of study. *Id.* § 1088(b)(1). To qualify as an eligible program for the Federal Family Loan Education Program ("FFELP"), a program can require fewer hours of study so long as it satisfies certain completion and placement rate requirements as well as satisfies such other criteria as proscribed by the Department. *Id.* § 1088(b)(2).

Finally, the individual federal assistance programs impose financial limitations of their own. Most notably for present purposes, each of the programs imposes a cap on the amount of money that can be borrowed each year and in aggregate by a single student. *See id.* § 1087dd(a)(2)(A) (limiting annual borrowing under the Perkins loan program to $5,500 for undergraduate borrowers and $8,000 for graduate or professional students); *id.* § 1087dd(a)(2)(B) (limiting total borrowing under the Perkins loan program to $60,000 for graduate or professional students, $27,500 for a student who has successfully completed two years of a program of education leading to a bachelor's degree, and $11,000 for other students); *id.* § 1078(b)(1)(A) (for the FFEL and Direct Loan programs, limiting annual subsidized Stafford loans to $3,500 for the first year of undergraduate education, $4,500 for the second year, $5,500 each year after the second year, $8,500 for graduate and professional students, and other amounts for programs of coursework necessary for enrollment in an undergraduate, graduate, professional, or teaching credential program); *id.* § 1078(b)(1)(B) (limiting total debt under the FFEL and Direct Loan programs for subsidized Stafford loans to $23,000 for undergraduates and $65,500 for graduate or professional students); *id.* § 1078-8(d)(2) (setting the annual limits for unsubsidized Stafford loans under the FFEL and Direct Loan programs to $12,000 for graduate and professional students and the aggregate maximum as the sum of the allowed subsidized Stafford loans plus the amount allowed annually for the unsubsidized Stafford loans); *id.* § 1078-8(d)(3) (limiting annual loans at the unsubsidized Stafford loan rate plus $2,000 for the various categories of undergraduates (as described *supra*) that have dependant status and limiting aggregate amount of unsubsidized Stafford loans for undergraduate students to $31,000); *id.* § 1078-8(d)(4) (limiting annual and aggregate borrowing for independent undergraduate students, with an aggregate limit of $57,500).

Yet, notably, there are no provisions imposing any limitations related to average student debt-to-earnings ratios. Nowhere has Congress either imposed a maximum debt-to-earnings ratio or authorized the Department to do so. Indeed, other than the aggregate loan limits discussed above, there are no limits relating to the two primary components of a debt-to-earnings ratio: tuition prices and salary. There are no caps on tuition prices or minimum average salary requirements. Congress simply has chosen not to make students ineligible for federal assistance based on the cost of the education they are seeking or the income they are expected to receive.

B. Congress Expressly Rejected Imposing A Maximum Cost-To-Earnings Ratio On Institutions

Indeed, Congress has previously rejected the imposition of a maximum cost-to-earnings ratio on institutions of higher education. In the Higher Education Amendments of 1992 (Pub. L. No. 102-325), Congress enacted a provision that required States to establish standards for the review of all institutions of higher education that met certain at-risk criteria. One of the factors to be considered was "the relationship of tuition and fees to the remuneration that can be reasonably expected by students who complete the courses or programs." *Id.* § 494C(d)(7) ("If the stated objectives of the courses or programs of the institution are to prepare students for employment, the relationship of tuition and fees to the remuneration that can be reasonably expected by students who complete the courses or programs and the relationship of the courses or programs (including the appropriateness of the length of such courses) to providing the student with quality training and useful employment in recognized occupations in the State.").

Congress later expressly rejected regulation of the cost of a program in relation to the expected earnings of its graduates. In the Higher Education Amendments of 1998 (Pub. L. No. 105-244), Congress repealed the section of the U.S. Code (former 20 U.S.C. § 1099a-3) containing the requirement that States review the cost of tuition relative to expected earnings. *See* Pub. L. No. 105-244 § 491. Congress did not transfer this specific requirement (or the others repealed) to the federal government for enforcement, but rather removed the set entirely. The report of the Committee on Education and the Workforce of the House of Representatives stated that the reason for the removal of these requirements was that they were "unnecessary and overly burdensome." H.R. Rep. 105-481, at 148 (1998). There is no reason, moreover, to think a *debt*-to-income ratio would be analyzed any differently. Since 1998, Congress has not given any indication that it intends to permit consideration of a factor it affirmatively rejected, let alone allow the imposition of an absolute limit, as the Department has proposed here.

C. Rather Than Set Maximum Debt-To-Earnings Ratios For Programs, Congress Has Provided Relief For Individual Borrowers, Sought To Encourage Debt Management, And Attempted To Foster Tuition Cost And Salary Transparency

Instead of imposing a maximum debt-to-earnings ratio, Congress has sought to address the increasing costs of higher education using other means.

1. Individualized Debt Relief

Rather than exclude entire programs of study from financial assistance if they do not meet maximum average debt-to-earnings ratios, Congress has provided for debt relief for individual borrowers in the form of forbearance and income based repayment programs. Most recently, Congress passed legislation recognizing the need for flexibility to address income disparities and potentially high debt-to-earnings ratios of graduates. As part of the College Cost Reduction and Access Act (Pub. L. No. 110-84), Congress created the Income-Based Repayment program, which caps monthly loan payments at a percentage of the borrower's income during periods of financial hardship. *See* 20 U.S.C. § 1098e. It has specified the conditions under which the monthly limits are triggered and the procedure under which debt relief is administered.

Congress has also addressed this issue within individual loan programs. For the William D. Ford Federal Direct Loan Program, Congress outlined five potential repayment plans for student borrowers. *See id.* § 1087e(d). These repayment plan options include standard repayment, graduated repayment, extended repayment, income contingent repayment, and income-based repayment pursuant to 20 U.S.C. § 1098e. Additionally, Congress has mandated that an institution of higher education that distributes Federal Perkins Loans "shall grant a borrower forbearance of principal and interest or principal only, renewable at 12-month intervals for a period not to exceed 3 years…if the borrower's debt burden equals or exceeds 20 percent of such borrower's gross income." *Id.* § 1087dd(e)(1). Finally, the FFELP program requires guaranty agencies to grant borrowers forbearance, renewable at twelve month intervals, if the borrower has a debt burden of Title IV loans that equals or exceeds twenty percent of income. *See id.* § 1078(c)(3)(A).[5]

2. Debt Management Study And Education

In addition to permitting individual students with a qualifying debt-to-earnings ratio to reduce or delay payments, Congress has mandated study and education as a method for addressing debt management. The Department is required to conduct a "student aid recipient survey" that includes a description of the debt burden of loan recipients, their capacity to repay debt, and the impact of the debt on the students' course of study and post-graduation plans. *See id.* § 1015a(k)(1)(D). Congress has also enacted several provisions requiring borrower education on debt management. *See id.* §§ 1092(b)(1)(A)(ii) (institutions are required to provide exit counseling for borrowers, including debt management strategies and notice of the consequences of defaulting on a loan); § 1083a(a) (guaranty agencies participating in the FFELP program are required to develop and make available "high-quality educational programs and materials" for borrowers that include training on debt management).

3. Tuition Cost And Salary Disclosure Requirements

Finally, rather than effectively cap tuition prices by setting a maximum debt-to-earnings ratio, Congress has opted to facilitate market processes by mandating disclosure of education costs. Part C of Subchapter 1 of Chapter 28 is entitled "Cost of Higher Education." One section of that part mandates that the Department (1) develop methodologies and definitions permitting

[5] The statute also provides for forbearance if the borrower is serving in a medical or dental internship or residency program or a national service position or is eligible for interest payments to be made due to service in the Armed Forces. *Id.* at 1078(c)(3)(A).

the reporting of college costs, (2) collect cost data, and (3) make that data available. *See id.* § 1015(a) & (b). The section then dictates:

> Such data shall be available in a form that permits the review and comparison of the data submissions of individual institutions of higher education. Such data shall be presented in a form that is easily understandable and allows parents and students to make informed decisions based on the costs for typical full-time undergraduate students.

Id. § 1015(b). Section 1015 also calls for the Department to study college costs. *See id.* § 1015(c).

Section 1015a—entitled "Transparency in college tuition for consumers"—goes a step further. It calls upon the Department to create a website that lists postsecondary education schools (by type and State) that have the highest tuition and fees and the highest tuition and fees net of financial aid. *See id.* § 1015a(c)(1). Schools with the greatest increases in costs and net costs also must be listed and additionally must submit a report explaining the increases and describing "the steps the institution will take toward the goal of reducing costs." *Id.* § 1015a(c)(1) & (e).

In addition to requiring disclosure of costs to prospective students, Congress has also required disclosure of the other piece of information that the Department now proposes to consider for them: average salaries for different occupations. Section 1015a(i) mandates that the Department make available on its "College Navigator website" for "each institution of higher education that participates in programs under Title IV" a "link to the appropriate section of the Bureau of Labor Statistics website that provides information on regional data on starting salaries in all major occupations." *Id.* § 1015a(i)(w).[6]

In short, rather than take the approach proposed by the Department—setting a maximum debt-to-earnings ratio for programs eligible for federal financial assistance—Congress has chosen to address the problem of high tuition costs and high debt-to-earnings ratios by permitting individual loan forbearance (at a significantly higher debt-to-earnings ratio), promoting debt management, and fostering tuition cost and salary transparency.

D. The Statutory "Gainful Employment" Requirement Does Not Support The Department's Attempt To Impose A Debt-To-Earnings Limit

The Department's proposed regulation implicitly recognizes that Congress has not itself imposed any limitation on debt-to-earnings ratios or expressly authorized the Department to do

[6] Congress ended that statutory section with a provision that sought to keep college affordable by giving states an incentive to maintain their past levels of support for public institutions and for financial aid at private institutions. *See* 20 U.S.C. § 1015f(a).

so. The Department points to no statutory provision imposing such a limitation or giving the Department authority to promulgate regulations doing so. Indeed, as noted above, no such provision exists. Facing this unambiguous congressional scheme, the Department is forced to contort the term "gainful employment" in the sections of the HEA defining an "institution of higher education." The Department's interpretation of the phrase "gainful employment" to authorize massive federal intervention into the functioning of the market for higher education—by setting a maximum debt-to-earnings ratio and thereby effectively capping tuition prices—finds no support in the statutory language on which the Department relies.

Courts interpret statutes according to their plain meaning. *United States v. Kirby*, 74 U.S. 482 (1968). Here, the Department's interpretation of the phrase "gainful employment" to exclude programs from federal student assistance eligibility is contrary to the plain meaning of the statutory language. The requirement that a college "provide an eligible program of training to prepare students for gainful employment in a recognized profession" has nothing to do with the cost of the program or the average debt incurred by students in the program.

The "gainful employment" requirement merely instructs that to be eligible for Title IV aid, an institution must prepare students for certain types of employment. The word "gainful" modifies only "employment." It does not modify the entire process of embarking on a program of study, borrowing money to pay for it, and then obtaining a job. Indeed, it is not the "program of training" (20 U.S.C. § 1002(b)(1)(A)) that must be gainful. The term "program of training" is in no way modified by the salary leverage it provides. As noted above, requirements for an "eligible program"—minimum length of study requirements and in some cases minimum completion and placement rates—are set forth independently in the Act. *See id.* § 1088(b). Under the statutes, the only thing that must be "gainful" is the subsequent "*employment*" for which a particular program qualifies its students. Consistent with prior Department decisions cited below, "gainful" as applied to employment only means that the work pays—as compared to a program that provides avocational training.

Other government agencies and Federal courts that have considered the term "gainful employment" in other situations have come to the same conclusion—"gainful employment" means work that pays. A number of courts have addressed the meaning of "gainful employment" in the ERISA context. They have concluded that "gainful employment" is employment from which a claimant may "earn a reasonably substantial income rising to the dignity of an income or livelihood." *Tracy v. Pharmacia & Upjohn Absence Payment Plan*, 195 Fed. Appx. 511, 519 (6th Cir. 2006); *see also Helms v. Monsanto*, 728 F.2d 1416, 1421 (11th Cir.1984); *Torix v. Ball Corp.*, 862 F.2d 1428, 1431 (10th Cir. 1988). The Sixth Circuit noted that gainful employment is more than just "nominal" employment. *Tracy*, 195 Fed. Appx. at 519. Additionally, several agencies have defined the term and generally conclude that "gainful" employment is work that pays or is of the type that normally pays. *See, i.e.,* 25 C.F.R. § 26.1 (Bureau of Indian Affairs defining "gainful employment" as "work resulting in self-sufficiency"), 26 C.F.R. § 1.21-1 (Department of Treasury defining "gainful employment" as "employment may consist of service within or outside the taxpayer's home and includes selfemployment…work as a volunteer or for a nominal consideration is not gainful employment”), 20 C.F.R. § 416.972 (Social Security Administration defining “gainful work activity” as “work activity that the claimant does for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized”). None of these courts or agencies defines gainful employment to dictate a specific value that would be considered “gainful” for a particular person.

The definition of “gainful employment” found in legal and standard dictionaries also supports the interpretation of “gainful employment” as work done for pay. Black’s Law Dictionary defines “gainful employment” as “work that a person can pursue and perform for money.” *Black’s Law Dictionary* (8th ed. 2009). The American Heritage Dictionary of Business Terms defines it as “employment that is beneficial to both the employer and the employee.” *American Heritage Dictionary of Business Terms* (1st ed. 2009). Further, dictionary definitions of “gainful” include “profitable,” “remunerative,” and “lucrative.” *See generally American Heritage Dictionary of the English Language*, *Random House Dictionary*, and *American Edition of the Oxford English Dictionary*. These definitions do not support any notion that the term “gainful employment” encompasses a specific and complex ratio and a required income threshold.

If Congress had intended to give the Department the authority to intervene in the functioning of the market for higher education by setting a maximum debt-to-earnings ratio and thus effectively capping tuition price, it surely would have said so in terms more plain than the “gainful employment” provisions. Congress does not set forth the “fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001). For example, when Congress means to give price-setting authority to a government agency, it says so.[7] It has not done so in the HEA.

Indeed, Congress itself has recognized that the Department lacks authority to regulate the price of tuition. The House of Representative’s report on the College Access and Opportunity Act of 2005 stated that “affordability” was a necessary principle of higher education reform, but 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). At the time of that House report, the language of the “gainful employment” provisions

[7] For example, the Federal Energy Regulatory Commission (“FERC”) is authorized to regulate the price of certain natural fuels. Under section 4(a) of the Emergency Petroleum Allocation Act of 1973, FERC was instructed to achieve “to the maximum extent practicable” nine general objectives, including “equitable distribution of crude oil, residual fuel oil, and refined petroleum products *at equitable prices* among all regions and areas of the United States ….” 15 U.S.C. § 761 (1975) (emphasis added); *see also Shell Oil Co. v. Federal Energy Admin.*, 527 F.2d 1243, 1245 (Temp. Emer. Ct. 1975). Similarly, when in 1937 Congress wanted to grant the Secretary of Agriculture the ability to set milk prices, it stated that explicitly, authorizing the Secretary to issue milk market orders to “[classify] milk in accordance with the form in which or the purpose for which it is used, and *fixing, or providing a method for fixing, minimum prices* for each such use classification.” 7 U.S.C. § 608c(5)(A) (emphasis added).

was the same as it is today. While the College Access and Opportunity Act of 2005 was not enacted, the committee report is strong evidence that the Department lacks price setting authority.[8] And if the Department cannot mandate price caps directly, it also cannot do so indirectly by imposing a maximum debt to income ratio. *See, e.g., Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 328 (1961) (a federal agency cannot "do indirectly what it cannot do directly.").

The Department's proposal is also inconsistent with its own prior understanding of the "gainful employment" requirement. The Department has considered the meaning of the phrase "gainful employment in a recognized occupation" in administrative decisions addressing whether to disqualify schools from Title IV eligibility. Those decisions have held that "[i]t is implicit that the statutorily intended goal or result of such a program be preparation for gainful employment in such an occupation; not that such a goal or result be potentially derived or incidentally available at the conclusion of the program." *E.g., In re Academy for Jewish Educ.*, No. 94-11-EA, 1994 WL 1026087, at 3 (Dep't of Educ. Mar. 23, 1994); *see also In the Matter of Bnai Arugath*, No. 94-73-EA, 1994 WL 1026098, at 2 (Dep't of Educ. June 16, 1994) (stating "it is not sufficient to simply show that gainful employment in a recognized occupation is potentially *derived or incidentally available* at the completion of the school's program…"(emphasis in original)); *Matter of Derech Ayson Rabbinical Seminary,* 109 Ed. Law Rep. 1473, 1995 WL 931579, at 5 (Dep't of Educ. Jan. 12, 1995) (denying institutional eligibility and holding "the fact that students subsequently have obtained jobs may be an incidental benefit of the program, [but] this was not the primary goal of the program."). As far as we are aware, the Department has never indicated that to determine whether employment is "gainful," the student body's average debt-to-earnings ratio must be considered.

The Department's consistent interpretation of the provision is important because "[i]t is well established that when Congress revisits a statute giving rise to a long-standing administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 274-275 (1974)). The evidence is most persuasive "in situations where there is some indication that Congress noted or considered the regulations in effect at the time of its action." *Peoples Fed. Saving & Loan Ass'n of Sidney v. Commissioner*, 948 F.2d 289, 302-03 (6th Cir. 1991). Here, Congress considered the definition of "gainful employment" in 2008 and decided not to change it. In the Higher Education Opportunity Act, Congress changed the definition of a proprietary institution of higher education. In addition to preparing students "for gainful employment in a recognized occupation," as of July 1, 2010, institutions will also be able to qualify for participation by administering a liberal arts program. *See* Pub. L. No. 110-315, tit. I, § 102(d)(1), 122 Stat. 3083,

[8] *See United States v. Enmons*, 410 U.S. 396, n.14 (1973) (considering the legislative history of an unenacted bill "wholly relevant to an understanding of" a subsequently enacted statute containing the same operative language). Here, the "gainful employment" language had been enacted at the time of the cited House report and was reenacted after this report.

3086 (effective July 1, 2010). Rather than change that definition of "gainful employment in a recognized occupation," Congress added a further exception in the statute. If Congress did not approve of the Department's long-standing interpretation of that phrase and wanted to impose limits on student debt-to-earnings levels or the price of tuition, Congress could have changed the statutory language at that time. Instead, Congress chose to add a new provision, leaving the "gainful employment" language—and the Department's historic administrative interpretation—in place, thereby ratifying the Department's interpretation as consistent with congressional intent.

Finally, the Department's proposed interpretation of "gainful employment" should be rejected because it would lead to absurd results. *See Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). A particular occupation—for example, a dental assistant—might be considered "gainful employment" for students at College X, which charges a low tuition, but the precise same job would be considered not gainful for students attending College Y, which charges a higher tuition. But the nature of a type of employment should not change based on where a student goes to school. Moreover, particular occupations might be deemed "gainful" at colleges where few students borrow money but not "gainful" at colleges whose student body is less affluent. Under the Department's proposal, students in a position to pay for more of their education without loans than the average student could be entirely foreclosed from financial aid even though their expected salary would be more than sufficient to cover the debt they would incur. It is also difficult to understand how the Department's proposal would address the fact that the same degree can prepare students for vastly different jobs. For example, two students obtain arts degrees at the same institution with the same tuition price and may incur the same debt, one of whom goes to work for a video gaming company and makes a six figure starting salary and the other of whom ends up being an assistant at a small art gallery making much lower wages. The Department's proposal might well deny aid for the entire arts program, even though some students would more than earn back the cost of tuition.

If Congress had intended to limit program eligibility based on a projected student debt-to-earnings ratio, it would have done so clearly, as it specifically did by imposing dozens of other criteria. The Department's attempt to impose a maximum debt-to-earnings ratio by purporting to "interpret" the phrase "gainful employment" is ultra vires.

III. CONCLUSION

Congress has not authorized the Department to regulate program eligibility for student aid based on projected debt-to-earnings ratios. Nor has Congress authorized the Department to control tuition prices—the immediate effect of the Department's proposed regulation. Indeed, Congress repealed a provision giving States authority to consider the price of tuition relative to expected student earnings. Instead, Congress has attempted to address the problem of increasing student debt load and rising tuition costs through individualized loan forbearance, debt management education, and tuition cost and salary transparency measures. As a result, the Department is left to attempt to interpret the phrase "gainful employment" to take into account average debt-to-earnings ratios. But the plain language of the phrase cannot bear the Department's interpretation, which runs contrary to the Department's long-standing interpretation of the provision. For these reasons, the proposed new definition of "gainful employment" is well beyond the Department's authority, and the Department should withdraw its proposal from consideration.

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March 22, 2010

Attachment A

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

Subpart A—General

*   *   *   *   *

§ 668.6 Gainful employment in a recognized occupation.

(a) General. (1) An institution is considered to provide an eligible program that prepares students for gainful employment in a recognized occupation if the Secretary determines at the end of each three-year period that the debt to earnings ratio associated with the program is eight percent or less. If the debt to earnings ratio for a program is more than eight percent, the Secretary may nevertheless consider that program to be an eligible program if it satisfies an alternative measure under paragraph (c) of this section.

(2) For purposes of this section—

(i) A program refers to any educational program offered by the institution under §668.8(c)(3) or (d),

(ii) A three-year period is the period covering the three most recently completed award years;

(iii) In accordance with procedures established by the Secretary, the institution must report for each student who completes or graduates from a program—

(A) The Classification of Instructional Program (CIP) code for the program;

(B) The date the student completed or graduated from the program; and

(C) The amounts the student received from institutional loans, and private educational loans.

(b) Debt to earnings ratio. As illustrated in Appendix A to this subpart, the Secretary calculates the ratio for the three-year period by—

(1) Determining the median loan debt of students who completed or graduated from the program (loan debt includes title IV, HEA program loans (except Parent PLUS), institutional loans, and private educational loans) during the three-year period and using the median loan debt to calculate an annual loan payment based on a 10-year repayment schedule and the current annual interest rate on Unsubsidized Federal Stafford Loans or Direct Unsubsidized Loans.

(2) Using the most current Bureau of Labor Statistics (BLS) data, available at http://www.bls.gov/oes/current/oes_stru.htm, to determine the annual earnings, at the 25th percentile, made by persons employed in occupations related to the training provided by the program. The Secretary may use national or regional BLS earnings data; and

(3) Dividing the amount of the annual loan payment by the annual earnings, rounding down to the nearest one tenth.

(c) Alternative measures. A program with a debt to earnings ratio of more than eight percent may continue to qualify as an eligible program if—

(1) Loan repayment rate. The Secretary determines that students who completed or graduated from the program have a 90 percent loan repayment rate. The loan repayment rate is calculated by—

(i) Determining the number of student borrowers who entered repayment during the three-year period, except that this number does not include borrowers who at the end of the period are in an in-school deferment status or on any military-related deferment status;

(ii) Of the number of borrowers who entered repayment, determining the number of borrowers who are actively repaying their loans. For this purpose, a borrower is considered to be actively repaying a loan if he or she made scheduled loan payments under a loan repayment plan and at the end of the three-year period the borrower—

(A) Is not delinquent or in default on the loan; or

(B) Is not in a deferment or forbearance status; and

(iii) Dividing the number of borrowers who are actively repaying their loans under paragraph (b)(2)(ii) of this section by the number of borrowers who entered repayment under paragraph (b)(2)(i) of this section and multiplying the result by 100; or

(2) Actual earnings. (i) The institution submits information acceptable to the Secretary showing that students who completed or graduated from the program during the three-year period had earnings, from occupations related to the training provided by the program, that are higher than the BLS earnings used in calculating the debt to earnings ratio under paragraph (b)(1) of this section; and

(ii) By using the actual earnings to recalculate the debt to earnings ratio, the institution meets the eight percent requirement in paragraph (a)(1) of this section.

(d) Deadline for submitting documentation. The institution must submit the documentation required under paragraph (c)(2) of this section no later than 45 days after the day the Secretary notifies the institution a program does not satisfy the debt to earnings requirement under paragraph (a) of this section or the loan repayment rate measure under paragraph (b)(1) of this section.

(e) New and additional programs. (1) The institution must apply the Secretary under 34 CFR 600.10(c)(1) to have a new program designated as an eligible program, and as part of that process the institution must provide the CIP code for that program. Until program-specific loan data are available, the Secretary calculates the debt to earnings ratio for a new program by using the median loan debt incurred by students who completed or graduated from any program offered by the institution during the most recent three-year period.

(2) If an additional program replaces, or will replace, a program the institution offers, or previously offered, that fails or failed to satisfy the debt-to-earnings ratio requirement with a program that prepares students for the same or related occupation, the institution must apply to the Secretary under 34 CFR 600.10(c)(1) to have the additional program designated as an eligible program. As part of that applicable process, the institution must provide the CIP code for that program. The Secretary calculates the debt to earnings ratio for the additional program by using the loan debt of student sin the previous program and the loan debt of students in the replacement program, until loan debt data are available for the additional program for a three-year period.

(3) Before offering a new or additional program under this paragraph, the institution [shall] obtain documentation from employers not affiliated with the institution affirming that the program curriculum aligns with recognized occupations at those employers.

Note: The Department would calculate the debt to earnings ratio at the end of the first year after the rules take effect. After that, we would calculate the ratio every three years (we could calculate it annually and provide it to schools so they know what's likely to happen at the end of the 3 year period).

Appendix A to Subpart A of Part 668—Calculating the Debt-to-Earnings Ratio

The Office of Management and Budget (OMB) maintains a Standard Occupational Classification (SOC) system which is a numerical coding system that classifies occupations for the purpose of collecting, calculating, or disseminating data. Through that system, and associated data collections, the Bureau of Labor Statistics (BLS) makes available hourly and annual wage data that is updated over a three year cycle. For each standards SOC occupation, data on the mean and 10th, 25th, 50th (median), 75th and 90th percentile are available.

For any CIP that is associated with multiple SOCs, the 25th percentile annual wage is calculated by—

Step 1: Determining all SOCs associated with the CIP using the O8NET – SOC to CIP crosswalk available at http://online.onetcenter.org/crosswalk/CIP/;

Step 2: Obtaining from BLS the employment and annual 25th percentile wage for each SOC associated with the CIP, by entering the SOC at http://www.bls.gov/oes/current/oes_stru.htm;

Step 3: Multiplying the employment by the annual 25th percentile wage for each SOC associated with the CIP to calculate the TOTAL 25th percentile wages;

Step 4: SUMMING the employment in each SOC associates with the CIP;

Step 5: SUMMING the TOTAL 25th percentile wages associated with the CIP;

Step 6: Dividing the TOTAL 25th percentile wages associated with the CIP by the SUM of the employment in each SOC associated with the CIP to arrive at a weighted average 25th percentile annual wage;

Step 7: For any classification of instructional program (CIP) that is associated with a single SOC, the 25th percentile annual wage is used to determine the relationship between debt and earnings;

The median loan debt of students who completed the program during the three-year period is determined by:

Step 8: For each of those students, using the TOTAL amount received from any title IV, HEA loan program (except Parent PLUS), institutional loan, and private education loan (compiled from data submitted by the institution and data in NSLDS);

Step 9: ARRANGING the values in Step 8, including values of zero where students did not incur any loan debt, in order from lowest to highest, and selecting the middle value. If there is an even number of values, the median is the average o the two middle values;

Step 10: CALCULATING the annual loan payment on the median loan amount in Step 9 based on a 10-year repayment schedule (120 payments) and the current Unsubsidized FFEL/Direct Loan interest rate;

Step 11: For multiple SOC's, DIVIDING the amount of the annual loan payment in Step 10 by the annual earnings in Step 6, rounding down to the nearest one tenth; and

Step 12: For a single SOC, DIVIDING the amount of the annual loan payment in Step 10 by the annual earnings in Step 7, rounding down to the nearest one tenth.