EDMC
Education Management Corporation

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VIA WWW.REGULATIONS.GOV

Jessica Finkel
U.S. Department of Education
1900 K Street, NW, Room 8031
Washington, D.C. 20006-8502

Re: Program Integrity: Gainful Employment
Docket ID ED-2010-OPE-0012

Dear Ms. Finkel,

Education Management Corporation ("EDMC") appreciates the opportunity to submit these comments to the U.S. Department of Education ("ED" or the "Department") in response to the July 26, 2010 notice of proposed rulemaking ("NPRM") regarding requirements related to "gainful employment." As reflected in our comments below, EDMC is profoundly concerned that the proposed regulations are legally flawed, lack sufficient and appropriate empirical support, and reflect misguided policy. Nevertheless, EDMC aims to engage constructively with ED and to offer suggested modifications that we believe will substantially improve the proposed regulations and limit the unintended consequences that the proposed rule undoubtedly cause.

For nearly four decades, EDMC has delivered education that builds careers to over 250,000 alumni across the country. Institutions owned by EDMC currently provide post-secondary education to more than 136,000 students and employ approximately 20,000 people at 101 locations in 31 states and Canada. EDMC offers accredited degree programs through four education systems that stretch from coast to coast—Argosy University, The Art Institutes, Brown Mackie Colleges, and South University—as well as Western State University College of Law in California. Over 90% of EDMC's students are enrolled in degree programs, with more than 60% in programs at the baccalaureate level and above. Graduates of EDMC institutions include Pulitzer Prize winners, top-level corporate executives, high-ranking public officials, and successful professionals in a variety of fields, including pharmacy, psychology, education, law and the creative arts.

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EDMC is proud of its record of student success, particularly the success of students who otherwise may have gone unserved by traditional models of higher education. EDMC institutions educate a diverse group of students. The total student population at EDMC institutions currently is 46% minority and 64% female. As of October 2009, 52% of the student body were non-traditional students, including 35% who are working adults. As of May 2010, approximately half of EDMC's students were eligible for Pell grants. EDMC is serving those students well. According to 2007-08 IPEDS data for four-year institutions with more than 40% of their students receiving Pell Grants—a lower-income, higher-risk population—the graduation rate at EDMC's institutions exceeded those of public and private non-profit schools, as well as the proprietary school sector. According to the same data, the average two-year cohort default rate for the same student population in 2007 at EDMC's institutions was lower than the rate at public institutions and other proprietary schools and comparable to the rate at private non-profit schools. These data point to the positive difference EDMC is making in the lives of the very students who are critical to our nation's ability to achieve President Obama's goal of becoming the world leader in college graduates by the year 2020. *See* Making College Affordable, http://www.whitehouse.gov/issues/education/higher-education.

EDMC also is proud to serve as one of the leaders of the proprietary education sector in this country, and strongly believes that a vibrant proprietary education sector is integral to achieving President Obama's higher education goals. Currently, 1.8 million students are enrolled in proprietary schools that receive federal student financial aid. *See* 75 Fed. Reg. 43,616, 43,617 (July 26, 2010). The majority of these students represent groups that traditionally have been underserved by non-profit and public colleges and universities. Approximately 60% are women, and approximately half are minorities. Minority enrollment in proprietary institutions in particular has grown significantly faster than in public and non-profit institutions. For example, the number of African-American students at two-year and four-year proprietary undergraduate programs has grown 89% from 2004 to 2008, compared to ten percent at public schools and five percent at private non-profit schools. *See* National Center for Education Statistics, Enrollment in Postsecondary Education, Fall 2004 4-5 tbl.1 (Feb. 2006); National Center for Education Statistics, Enrollment in Postsecondary Education, Fall 2008: First Look 8-9 tbl.1 (Apr. 2010) (EDMC calculations). Students at proprietary institutions also tend to have lower incomes, and the majority are completing their education without parental financial support. Approximately 52% of students at proprietary institutions are financially independent and have annual incomes under $30,000, compared to 28% at public two-year programs, and 19% at public four-year programs. *See* National Center for Education Statistics, 2007-08 National Postsecondary Student Aid Study (NPSAS:08) (EDMC calculations using NCES QuickStats). Almost one-third of proprietary students are single parents. Finally, students at proprietary institutions also tend to be "high risk"—that is, to have additional risk factors that heighten their chances of not completing their programs. ED considers over half of students in two-year and four-year programs at proprietary institutions to be "high risk". In contrast, "high risk" students make up only 39% of students in public two-year programs, and only six percent of students in public four-year programs. Watson Scott Swail, *Imagine America Foundation, Graduating At-Risk Students: A Cross-Sector Analysis* 15 fig. 4 (2009). A proprietary college offers customization and flexibility to these students who, due to economic, scheduling, and other obstacles, may not otherwise be able to complete a degree program successfully.

While EDMC understands ED's desire to limit student indebtedness, we respectfully submit that ED lacks statutory authority to proceed in the manner that it has chosen and that the proposed regulations conflict with the Higher Education Act of 1965, as amended ("HEA"). We are aware that Career College Association ("CCA"), among others, has submitted comments on the constitutional and legal deficiencies of the proposed regulations. Rather than reiterate here those deficiencies, EDMC adopts CCA's comments as its own for purposes of this comment letter. EDMC strongly urges ED to reconsider the proposed regulations and to work with all educational institutions and students to address legally, fairly, and effectively ED's policy goals.

If ED determines to proceed with metrics to measure "gainful employment," we respectfully submit that ED can substantially improve those metrics through collection and evaluation of appropriate and comprehensive data, or, if ED declines to engage in such additional regulatory analysis, modest modifications to the proposed tests. Our comments in this letter thus focus on two primary points:

1. EDMC believes that the proposed regulations are flawed because the Regulatory Impact Analysis (the "Analysis") prepared by ED in support of the regulations is materially deficient. As explained below, the Analysis reflects inaccurate and incomplete data and misrepresents the effects that the proposed regulations will have on students, particularly low-income and minority students, as well as on the institutions that they attend. At the very least, the flaws in the data counsel in favor of postponing issuance of final regulations until ED collects and reviews more representative and complete data and adjusts the gainful employment tests accordingly.

2. If ED decides to proceed with the proposed regulations despite the legal and analytical deficiencies referenced above, EDMC respectfully submits that certain modest modifications to the gainful employment tests are necessary to limit unintended and potentially crippling consequences for students and institutions and to ensure that the final gainful employments tests reflect a fairer and more rational approach. Those modifications include but are not limited to the following:

- Use the higher of Bureau of Labor Statistics ("BLS") earnings data or actual earnings of graduates to calculate debt-to-income tests – 34 C.F.R. § 668.7(c)(3).
- Use a 15-year repayment schedule to calculate debt-to-income tests for degree programs – 34 C.F.R. § 668.7(c)(2).
- Count all loan payments in the principal repayment test[1] – 34 C.F.R. § 668.7(b)(2)-(3).
- Phase-in the regulations so that students are not improvidently harmed and institutions have an opportunity to conform their programs – 34 C.F.R. § 668.7.
- Exempt graduate programs from the gainful employment tests – 34 C.F.R. § 668.7.

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[1] We believe that the "loan repayment rate" is more accurately referred to as the principal repayment test because the proposed test counts only principal payments as repayments for purposes of calculating the repayment rate.

➢ Eliminate growth restrictions and employer verifications – 34 C.F.R. § 668.7(d) & (e).

We believe that our proposed modifications are consistent with ED's objectives and will help to ensure that ED and institutions achieve their shared goal of providing all students, especially those from traditionally underserved populations, with high-quality postsecondary education.

* * *

I. Because the Regulatory Impact Analysis and the proposed gainful employment tests are based on flawed data and analysis, ED should postpone issuance of the final rule in order to collect and consider more appropriate and comprehensive data.

ED's Analysis failed to consider adequately data about the effect of the proposed regulations on low-income, minority, and other at-risk students. Additionally, ED relied on materially insufficient and flawed data to develop the proposed gainful employment tests. EDMC respectfully requests that ED postpone promulgation of a regulation on gainful employment until it has collected and analyzed fully appropriate and comprehensive data related to any gainful employments tests and the regulatory effects of such tests.

A. ED failed to consider fully low-income and other disadvantaged students in its analysis of the proposed regulations.

The Analysis fails to address adequately a central and alternative explanation for the performance of proprietary institutions with respect to the proposed gainful employment tests: The performance of proprietary institutions on the proposed principal repayment and debt-to-income tests is a reflection of the higher number of low-income and other disadvantaged student populations that proprietary institutions enroll. ED's only attempt to discuss this point—an off-hand rejection of a study by Jonathan Guryan and Matthew Thompson and an unsubstantiated conclusion that "[w]hile there are undoubtedly student and family factors that contribute to defaults, institutions are not neutral actors"—does not address the clear import of the Guryan and Thompson study, namely that socioeconomic status does affect a student's ability to repay debt. *See* 75 Fed. Reg. at 43,654 (recognizing that the report found "half of the difference in defaults could be explained by student characteristics"); J. Guryan and M. Thompson, *Report on Gainful Employment: Executive Summary*, Charles River Associates for the Career College Association (Apr. 2, 2010). Other studies have come to a similar conclusion.[2]

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[2] *See* U.S. Gov't Accountability Office, *Proprietary Schools: Stronger Department of Education Oversight Needed to Help Ensure Only Eligible Students Receive Federal Student Aid*, Highlights (2009), *available at* http://www.gao.gov/new.items/d09600.pdf ("[H]igher default rates at proprietary schools are linked to the characteristics of the students who attend these schools. Specifically, students who come from low income backgrounds and from families who lack higher education are more likely to default on their loans, and data show that students from proprietary schools are more likely to come from low income families and have parents who do not hold a college degree."); Don Hossler, et al., *What Matters to Student Loan Default*, The Project on Academic Success, Indiana University at 3 (2008), *available at* http://pas.indiana.edu/pdf/DefaultFull.pdf (finding that cohort default rates tend to be higher at proprietary institutions because students who attend those institutions "tend to borrow more, to come from lower income families, and to belong to a racial or ethnic minority group - characteristics that are all associated with increased likelihood of default.").

Moreover, ED's Analysis does not address the clear import of its own data: The performance of institutions—and not only proprietary institutions, but *all* institutions—on the principal repayment test is directly correlated to the socioeconomic composition of their student populations. According to data in the Analysis, the percentage of Pell-eligible students at institutions that passed the principal repayment test was consistently lower than the percentage of Pell-eligible students at institutions that failed the test. For public four-year institutions, for instance, 24.89% of the student population of institutions that passed the principal repayment test received Pell Grants, whereas 46.34% of the students at such institutions that did not pass the principal repayment test received Pell Grants—a nearly two-fold increase. A similar trend can be observed for the proprietary sector. For example, the student bodies at four-year proprietary institutions that passed the principal repayment test were 40.49% Pell Grant recipients while the student bodies at the institutions that failed that test were 56.41% Pell Grant recipients (a roughly 40% difference). *See* 75 Fed. Reg. at 43,670.

The principal repayment rate data that ED released on August 13, 2010 ("August 13 Data") puts an even finer point on the relationship between the percentage of Pell-eligible students at an institution and that institution's performance on the principal repayment rate test. Mark Kantrowitz, an economist and financial aid expert, analyzed the August 13 Data and concluded that "Pell Grant recipients contribute to a low loan repayment rate at all colleges." *See* Mark Kantrowitz,, *The Impact of Loan Repayment Rates on Pell Grant Recipients*, at 3 (Sep. 1, 2010). As Kantrowitz explained, ED's data demonstrate that "the average repayment rate is 66% at colleges where less than a tenth of the students receive Pell Grants, compared with 26% at colleges where more than two-thirds of the students receive Pell Grants." *Id.* at 1. Furthermore, the differences in principal repayment rates among proprietary, non-profit, and public institutions are relatively small, especially with respect to institutions with higher percentages of Pell Grant recipients.[3] For example, the principal repayment rates by sector at institutions with 50%-59.9% Pell Grant recipients were 30.2% at public institutions, 34.0% at non-profit institutions, and 33.9% at proprietary institutions. *Id.* at 2. Similarly, proprietary institutions with less than 10% Pell Grant recipients passed the principal repayment test at a rate comparable to their non-profit and public counterparts. *See id.* (principal repayment rate 58.0% at public institutions, 68.6% at non-profit institutions, and 53.3% at proprietary institutions). As Kantrowitz noted, "graphing this data demonstrates an almost linear relationship between the percentage Pell Grant recipients and the average loan repayment rates . . . ." *Id.* The significance of this data was clear to Kantrowitz: "A college that enrolls primarily at-risk students who qualify for the Pell Grant is extremely unlikely to have a loan repayment rate in the eligible or restricted zones." *Id.* at 3.

Thus, data released after the NPRM indisputably show that institutions that fare poorly on the principal repayment test do so due to a high number of low-income and minority students. These data call into question a central premise of the proposed rule—that the gainful employment tests are a rational proxy for determining whether a program is successfully preparing its students for gainful employment in recognized occupations. The data also point to a more fundamental problem with the proposed rule, namely that it will not address the factors

[3] Not all institutions with large percentages of Pell Grant recipients had low principal repayment rates according to ED's August 13 data. As Kantrowtiz explains, "[t]here are anomalies with schools at 80% or more Pell Grant recipients, probably due to sparse data."

that lead to loan repayment problems for many low-income and disadvantaged populations. In fact, the proposed principal repayment test would create an incentive for institutions to minimize admissions of low-income students, a population which historically has been underserved by higher education.

Because much of the data discussed above were not released until after the release of the NPRM, ED did not have an opportunity to consider fully the data's clear import: That there is a direct relationship between the income-status of a program's student population and its performance on the principal repayment test. EDMC therefore urges ED to postpone issuance of the proposed rule and consider further the relationship between income-status and programs' performance on the proposed debt measures. Several options are available to address the concerns from the data. EDMC's preferred approach is for ED to abandon a definition of gainful employment based on a principal repayment rate and debt-to-income ratios. If ED maintains an approach that includes such tests, however, EDMC respectfully requests that ED modify them to account more fully for low-income students. For example, ED could disaggregate principal repayment rates by Pell Grant recipient status. Furthermore, ED should collect comprehensive data on the relationship between the debt-to-income measures and income-status and analyze fully that data. EDMC would welcome the opportunity to assist ED in developing appropriate gainful employment metrics.

EDMC believes that further consideration and modifications are particularly necessary because the proposed rule will impose severe hardships on disadvantaged populations by disproportionately eliminating the educational programs they attend. As ED has recognized, "for-profit institutions tend to enroll a larger proportion of low-income students than do other institutions on average." 75 Fed. Reg. at 43,654. Because the proposed rule will eliminate or restrict many programs at proprietary intuitions, the proposed rule will most significantly affect low-income students. This result was the very conclusion that Kantrowitz made after he examined the August 13 Data:

> The loan repayment rates are likely to have a significant impact on Pell Grant recipients, since Pell Grant recipients are disproportionately enrolled at institutions with loan repayment rates under the 35% threshold. Institutions with a higher percentage of Pell Grant recipients have a lower loan repayment rate. Generally, institutions that have 40% or more of Pell Grant recipients are unlikely to satisfy the 45% loan repayment rate threshold. Similarly, institutions that serve 50% or more of Pell Grant recipients are unlikely to satisfy the 35% loan repayment rate percentage. Colleges with loan repayment rates under the 35% threshold represent 26.5% of Pell Grant recipients. Colleges with loan repayment rates between 35% and 45% represent 21.7% of Pell Grant recipients.

See Mark Kantrowitz, *Summary and Analysis of Gainful Employment NPRM* at 15 (Aug. 15, 2010).

ED has failed to explain why a disproportionate effect on programs that serve the most disadvantaged students is acceptable in light of the HEA's statutory purpose to provide aid to students in need who otherwise may not be able to receive educational training. *See, e.g.*, 20 U.S.C. § 1070(a) (a goal of Title IV is "making available benefits of post-secondary education

to eligible students"); *id.* § 1070(a)(4) (a priority of HEA is to "prepare students from low-income families for postsecondary education"); *id.* § 1087kk (determining "amount of need of any student for financial assistance" based on cost of attendance and the amount that student or student's family can contribute). Programs at proprietary institutions—which often have flexible class schedules and more inclusive admission standards—provide the most viable option to many working adults, racial and ethnic minority students, and students from low-income populations. Eliminating these programs is unacceptable in light of the HEA's mandate to help these student populations. EDMC believes that the inevitable effects of the proposed regulations on disadvantaged populations call into question whether the proposed gainful employment tests are rationally related to ED's stated goal of aiding students.

B. The proposed regulations do not comply with basic rulemaking requirements because the data on which they are based were non-representative and used inappropriately.

EDMC believes that the proposed regulations are flawed because the data on which ED relied, namely the Missouri data and the Florida study, were non-representative of affected institutions and students and do not address the points for which ED chose to use them. *See Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1582 (10th Cir. 1985) (a basic principle of administrative rulemaking is that a federal agency must demonstrate a "rational connection . . . between the facts before the agency and the rule-making choice made" (citation omitted)); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985) (invalidating rule based on a study that "came under significant criticism regarding the adequacy of its data base to generalize to national totals and the accuracy of the statistics relied on"). Better data are needed to develop legitimate gainful employment tests that are rationally related to ED's objectives.

1. ED miscalculated the effects of the proposed rule through its reliance on data that under-represent racial and ethnic groups, proprietary educational programs, and student education debt.

ED's Analysis of the debt-to-income tests' effects relied primarily on data collected from Missouri. *See* 75 Fed. Reg. at 43,668. The NPRM asserts that "Missouri is an appropriate and generally applicable lens to assess the potential effects nationally" because its "distribution of educational institutions is broadly similar to the nation" and its student population "is broadly representative with the exception of race and ethnicity." *Id.* at 43,668-69. Yet the actual data belie that claim.

As ED recognized, the Missouri data do not reflect accurately the U.S. racial and ethnic population. *Id.* at 43,669 ("[T]he Missouri data is broadly representative with the exception of race and ethnicity."). For example, the Missouri completer cohort, which consists of students who earned a credential from public and proprietary institutions in that state between 2006 and 2008, greatly under-represents the Hispanic completer cohort for the nation as a whole. *See* ED, *Gainful Employment Analysis Missouri Methodological Notes* at 5 (hereinafter "Missouri Data"), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/ge-analysis-missouri.pdf. In 2008, 32% of students who completed programs at less-than two-year proprietary institutions across the nation were Hispanic, while only two percent of students at such schools in Missouri were Hispanic. *Id.* More generally, the overall student population in

Missouri was non-representative of the student population nationally. As of 2007, the percentage of non-White students in Missouri was approximately 50% smaller than the percentage of non-White students nationally. *Id.* at 5.

Without data representative of the nationwide racial and ethnic population—and in particular Hispanics, the country's largest and fastest growing minority group—the Analysis did not accurately gauge how institutions that serve large minority populations will fare on the debt-to-income tests. The Analysis thus could not, and accordingly did not, assess how many minority students likely would be displaced from their educational programs, how many of those students had other realistic educational choices, and whether negative effects on minority students were justified in light of other regulatory alternatives that do not affect as heavily such student groups. It is critical that ED address these issues because the educational gap between white and minority students continues to grow. *See* National Center for Public Policy and Higher Education, Income of U.S. Workforce Projected to Decline if Education Doesn't Improve at 4 (Nov. 2005) ("The educational gap between whites and Hispanics/Latinos (as measured by the percentage of the working–age population with a bachelor's degree or higher) has almost doubled over the last two decades growing from 12 percentage points in 1980 to 19 percentage points in 2000. The gap between whites and African-Americans has expanded from 11 percentage points in 1980 to 15 percentage points in 2000."). Despite these deficiencies, ED used the data to extrapolate the likely effect of the proposed regulations on institutions across the country. Such an extrapolation was inappropriate and ED should correct this error by collecting and analyzing new data that are representative of the nationwide racial and ethnic population.

The Missouri data were inadequate in other ways as well. Most notably, the data do not provide a reliable sample from which to draw conclusions about the effect of the proposed regulation on proprietary institutions. As ED acknowledged, the data do not include 38% of Missouri proprietary institutions.[4] If the Missouri data were not even representative of proprietary education programs in Missouri, it follows that the data were not an appropriate means by which to evaluate the effects of the proposed rule on proprietary education programs and the students they serve across the nation. Further, based on EDMC's review of the August 13 Data released by ED, students attending proprietary institutions in Missouri represent approximately 1.14% of total students attending proprietary institutions in the country. Given that programs at about two-fifths of Missouri's proprietary institutions are not even included in the data, the Missouri data represent just a fraction of a percent of all proprietary institutions in the country. The Analysis therefore could not gauge the true effect of the proposed rule on students at proprietary institutions nationally. Those data inadequacies with respect to the Missouri proprietary sector are especially concerning because the proposed rule applies primarily to proprietary institutions.

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[4] The data did not include cosmetology programs, a significant component of Missouri's proprietary institutions. *See* 75 Fed. Reg. at 43,669 ("However, data availability limited the analysis to the public and for-profit sectors and excluded cosmetology programs, a significant component of institutions that have only one program."); Missouri Data at 5 (cosmetology programs "comprise approximately 38% of Missouri's for-profit institutions"). In addition, despite the fact that many programs at proprietary institutions are non-degree granting, the Missouri data excluded "non-degree-seeking students."

EDMC also notes that the Missouri data under-represent the effect of the proposed regulations because the data exclude institutional and private debt. Because institutional and private debt are factored into the debt-to-income tests, the Analysis did not capture the total amount of debt for students at many programs. As a result, ED's estimate of the number of programs that would be affected by the debt-to-income test falls short of the likely actual effect if the proposed regulations were to be implemented.

2. ED misread or misconstrued the findings in the Florida study and inappropriately relied on it to draw conclusions about the costs of proprietary education.

ED explained as follows its rationale for aiming the new gainful employment standards primarily at proprietary institutions: "The proposed standards for institutions participating in the title IV, HEA programs are necessary to protect taxpayers against wasteful spending on educational programs of little or no value that also lead to high indebtedness for students." 75 Fed. Reg. at 43,618. In support of this rationale, ED relied on a study by the State of Florida that ED claims shows that proprietary institutions are "more expensive for taxpayers on a per-student basis due to their high prices and large subsidies." *Id.* However, ED misread or misconstrued the actual conclusions in the Florida study. The study found that, compared to the proprietary institutions included in the study, two of the five public programs cost more per-student when state subsidies were included. *See* Florida State Legislature, *Office of Program Policy Analysis & Government Accountability: Public Career Education Programs Differ from Private Programs on Their Admission Requirements, Costs, Financial Aid Availability, and Student Outcomes*, at 9 (hereinafter "OPPAGA Report"), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1018rpt.pdf. Such a finding does not support ED's assertion that the OPPAGA Report concluded that proprietary education is "more expensive for taxpayers on a per-student basis due to their high prices and large subsidies," but instead supports the conclusion that some proprietary programs are less expensive than public programs and some are not. The OPPAGA Report therefore undermines one of ED's policy rationales for the proposed rule.

More generally, ED erred in relying on the OPPAGA Report to assess the relative costs of proprietary education, as the study was not designed to address whether proprietary education is more expensive to taxpayers than other forms of education. The OPPAGA Report focused only on five "public and private career education programs," and as such did not purport to examine the costs of all proprietary education programs relative to the costs of all educational programs at public and non-profit institutions. *See* OPPAGA Report at 3. Because the OPPAGA Report was not designed for the purpose that ED used it, ED improperly relied on it here. *Humana of Aurora*, 753 F.2d at 1583 (invalidating rule based on study that "was never designed or intended by its makers to answer the questions or support the propositions the Secretary wished").

The Florida study is actually of limited value in assessing the relative costs of proprietary and public and non-profit education because it did not account fully for the cost-savings of proprietary institutions. The OPPAGA Report appropriately recognized that proprietary institutions are often less expensive than public institutions because "[s]tudents' costs represent a relatively small percentage of total program costs at public institutions. While the costs of

private programs are paid for by students, state appropriations fund approximately 70% of program costs at public institutions." OPPAGA Report at 9. However, the OPPAGA Report did not factor in additional cost savings attributable to proprietary education based on the millions of dollars in state and federal taxes that proprietary institutions pay to public coffers. In contrast, public institutions receive substantial subsidies, and non-profits are exempt from paying taxes. To the extent that ED relies on the Florida study, it must account for these obvious limitations.[5]

* * *

For the reasons described above, EDMC respectfully requests that ED postpone promulgation of a regulation on gainful employment until after it has collected and analyzed fully valid and appropriate data related to appropriate metrics and the regulatory effects of such metrics.[6] At the request of the Chairmen of the respective committees of jurisdiction over higher education in the Senate and the House, and other members of Congress, the Government Accountability Office (GAO) is currently studying the proprietary education sector, and the U.S. Congress is conducting an inquiry into the sector's recruiting practices. To the extent ED's goal is to enhance its regulation of proprietary education, it should await the conclusion of the GAO study and congressional inquiry to determine whether an approach other than gainful employment tests as proposed—which do nothing to address recruiting practices—is the appropriate regulatory course to take. The evaluation process should also consider the impact of the proposed rule on existing regulations such as the 90/10 rule and cohort default rates. The proposed rule would significantly alter the landscape of federal student financial aid regulation, and Congress should have input before final regulations are promulgated.

EDMC does not intend to sit idle while ED engages in data collection and analysis. We appreciate that ED wants institutions to ensure that students are aware of program costs, typical debt incurred for a program, occupations related to the program, and graduation and placement rates. Accordingly, to the extent information is readily available, we intend to comply

[5] The OPPAGA Report made several other conclusions that ED should have considered. For example, it concluded that private career-focused programs graduate more students than public career-focused programs. *See* OPPAGA Report at 11 ("Private career education programs were generally more effective in producing program graduates."). As the report concluded, "a key measure of program performance is the degree to which students complete the program's training requirements." *Id.* Moreover, while the study found that students in public programs passed licensure tests at a slightly higher rate, it nevertheless concluded that "students from public and private career education programs earned comparable wages upon entering the workforce." OPPAGA Report at 12.

[6] For example, ED should delay implementation of the rule to consider a study, soon to be published by Robert Shapiro and Nam Phan, showing that proprietary institutions train and graduate students more effectively and at a lower cost to taxpayers than non-profit and public institutions. *See* Robert Shapiro and Nam Phan, *The Public Costs of Higher Education: A Comparison of Public, Private Not-for-Profit, and Private For-Profit Institutions* at 52 (2010) (forthcoming). As demonstrated in the study, the cost per-enrollee for programs leading to associate's degrees is over $4,000 higher at public institutions than at proprietary institutions. *Id.* at 52. From a per-graduate perspective, an associate's degree from a two-year public institution costs almost $35,000 more per graduate than from a proprietary institution. *Id.* Moreover, the graduation rate at proprietary schools averages 65 percent, compared to 58 percent at non-profit and 28 percent at public institutions. *Id.* at 50 tbl.23. Because of proprietary schools' cost-efficiencies and graduation outcomes, the Shapiro and Phan analysis estimates that delivering the President's 2020 goal of 5 million associate's and certificate degrees with proprietary schools would yield $33 billion in savings to taxpayers. *Id.* at 49.

voluntarily with the gainful employment disclosure requirements set forth in the June 18, 2010 NPRM before such requirements are effective. *See* 75 Fed. Reg. 34,806 (June 18, 2010).

II. If ED proceeds with the current proposed rulemaking, certain modest modifications to the regulations are necessary to address legal, policy, and fairness concerns.

If ED declines to postpone issuance of a gainful employment rule, EDMC respectfully requests that ED make a number of modest changes to the proposed regulation, as explained more fully below.

A. Use the higher of Bureau of Labor Statistics ("BLS") earnings data or actual earnings of graduates to calculate debt-to-income tests – 34 C.F.R. § 668.7(c)(3).

ED proposes to use average actual earnings data from the Social Security Administration ("SSA") or another federal agency to calculate the debt-to-income tests. *See* 34 C.F.R. § 668.7(c)(3). For the reasons set forth below, EDMC strongly urges ED to return to the approach that it proposed during negotiated rulemaking to use the higher of BLS earnings data or actual earnings of graduates to calculate the debt-to-income ratios. We further believe, as described below, that a modest adjustment to ED's original proposal is necessary to account appropriately for inherent differences between degree and nondegree programs.

More specifically, we respectfully request that ED base "annual earnings" for purposes of the ratios on the higher of:

(a) the most current BLS national or regional earnings data, at the 50th percentile, for persons employed in occupations related to training provided by a degree program and the most current BLS national or regional earnings data, at the 25th percentile, for persons employed in occupations related to training provided by a non-degree program; or

(b) actual earnings data submitted by the institution that demonstrates a substantial number of students who completed 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 data.

EDMC proposes that ED use the BLS data because the actual earnings data does not produce debt-to-income tests that are tailored to the intended purpose of the proposed rule. Actual earnings data capture the earnings of program completers, whether those completers currently are employed in the sector for which the program prepared them or in another industry. Program completers may choose to work in fields that are unrelated to the program for a range of personal and other reasons that are unconnected to the institution's program or the availability of related jobs. In addition, SSA earnings data could include other sources of income (e.g., if the student works on the side in an unrelated field) or could under-represent the student's earnings potential (e.g., if the student opts to work part-time) or actual earnings. EDMC believes that actual earnings data therefore are not necessarily representative of whether a program completer is earning money in an occupation for which the relevant program prepares students.

In contrast, BLS earnings data better measure wages in the occupation or occupations for which the program trains students because the data are broken down by specific occupation on both a national and regional level and, as a result, provide a cleaner, more accurate picture of what persons in the relevant field are earning. The BLS earnings data thus are more consistent with the intended purpose of the debt-to-income tests, namely to measure whether a particular program prepares students for gainful employment in the recognized occupation for which it purported to prepare students. Under EDMC's proposed approach, institutions also would have the opportunity to submit to ED actual earnings data that they collect about students in a relevant occupational field. Consistent with ED's proposal during negotiated rulemaking, institutions would have the burden to demonstrate that the supplied data are representative of the program completers' earnings in occupations related to the training provided by the program.

During negotiated rulemaking, ED proposed to use BLS earnings data at the 25th percentile for all programs because "BLS earnings data are for *all* workers in an occupation, while students face their debts when they *enter* the occupation." *See* ED, Issue Paper No. 6 at 4 (Jan. 2010), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/ integrity-session3-issues.pdf. In our view, ED's approach at negotiated rulemaking did not appropriately take into account that students in degree programs have substantially more debt than students in diploma or certificate programs. This inherently higher debt burden is not offset by initial earnings immediately after students graduate because degree students are making a lifetime investment in their future. BLS earnings data at the 50th percentile properly reflects this lifetime investment decision by using the average expected income level for the relevant occupation. Therefore, while EDMC's proposal adopts ED's approach of using BLS earnings data at the 25th percentile for diploma/certificate programs, it accounts appropriately for practical realities of degree programs by using BLS earnings data at the 50th percentile for degree programs. EDMC's proposed approach is also consistent with the federal student financial aid statutory and regulatory scheme, which generally encourages four-year programs.

A simple analysis of projected debt payments for one-year, non-degree programs and four-year bachelor's degree programs demonstrates the need to use higher income assumptions for degree programs. A student who borrows $8,000 per year for her program of study will have an annual loan repayment amount of $1,105 per year assuming an interest rate of 6.8%, the current rate on unsubsidized federal student loans. Accordingly, the student would be required to have an annual salary of $13,812, *or less than the federal minimum wage assuming the student works 2,000 hours per year*, in order to meet the 8% debt-to-income test if she attended a one-year certificate program. However, the same student would be required to have an annual salary of $55,237 to meet the 8% debt-to-income test if she attended a four-year bachelor's degree program due to the three additional years of indebtedness. The higher debt amounts are reflective of the lifetime investment decision made by the student and should not be penalized by a regulation that ignores the long-term benefits associated with degree programs. Decisions by students to invest in their future earnings are supported by data from BLS, which found that in 2009 the median weekly earnings for individuals aged 25 years and older with a bachelor's degree was more than one-and-a-half times higher than for high school graduates of the same age with no college experience, and the average unemployment rate in 2009 for persons aged 25 years and older with a bachelor's degree was nearly half that of those without college experience. *See* BLS, *Education Pays*, http://www.bls.gov/emp/ep_chart_001.htm.

EDMC also is very concerned that the proposed debt-to-income tests based on SSA or other federal agency data raise fundamental due process concerns because institutions will have no opportunity to review and rebut the earnings data that ED will use for the calculation.[7] ED's proposed approach is fundamentally unfair and will deprive institutions of essential due process rights.

EDMC's proposal would ameliorate to some extent the due process concerns associated with the debt-to-income tests. With the actual earnings approach, institutions receive no information other than the average earnings figure that the SSA or other federal agency releases; they will have no access to the data, methodology, or assumptions that resulted in that figure. With the BLS data approach, institutions would have access to detailed tables, charts, and explanations of the methodology for calculating the wage estimates on BLS's website. *See generally* BLS, Occupational Employment Statistics, http://www.bls.gov/oes/current/oes_nat.htm#(1). Similarly, due process concerns are alleviated if as an alternative to BLS earnings data an institution may supply to ED earnings data that the institution collects and is consequently able to review and validate.

EDMC also submits that ED's proposed approach is administratively cumbersome and—given the better quality of BLS earnings data for purposes of determining earnings in fields for which a program prepared its students—imposes needless burdens on the federal government. Under the proposed regulations institutions will be required to submit to ED a list of program completers and ED in turn will submit such list to SSA or another relevant federal agency. SSA or the other federal agency will be required to calculate an average actual earnings figure for that list of program completers and to supply such figure to ED, so that ED can perform the debt-to-income calculation. SSA or the other federal agency will be performing activities that it currently does not perform and will presumably need additional human and other resources to perform such activities. In contrast, BLS already collects and reports the relevant BLS earnings data and such data are readily available to institutions and the public. Thus, an approach that uses BLS earnings data would be easier to administer and would impose no new and questionable burdens on the federal government.

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[7] CCA describes in detail the due process infirmities associated with debt-to-income tests that are based on actual earnings data from a federal agency. As CCA explains, the fundamental requirements of due process are notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (internal quotation marks and citation omitted)). Furthermore, it is an "immutable" principle of due process that agencies may not injure a party based on information that the entity does not have an opportunity to review and rebut. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 289 n. 4 (U.S. 1974) ("A party is entitled, of course, to know the issues on which [sic] decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.") (citing *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292 (1937)). Yet, as ED concedes, the debt-to-income calculation will be based on earnings data that ED will not—indeed cannot under federal law—make available to institutions. In fact, even ED itself and a hearing officer in an action to terminate a program's eligibility under the proposed rule will not have access to the underlying earnings data. *See* 75 Fed. Reg. 43,616, 43,629 (July 26, 2010) ("neither the Department nor the institution will be able to review the wage information for specific program graduates."); 34 C.F.R. § 668.90.

B. Use a 15-year repayment schedule to calculate debt-to-income tests for degree programs – 34 C.F.R. § 668.7(c)(2).

The proposed rule would use "an annual loan payment based on a ten-year repayment schedule" to calculate the annual loan payment for the debt-to-income test. Because this approach conflates all types of programs and does not reflect actual practice, EDMC respectfully requests that ED modify the rule to use a 15-year repayment schedule for degree programs and a ten-year repayment schedule for non-degree programs.

EDMC respectfully disagrees with ED's basis for the blanket ten-year repayment standard. ED's rationale appears to be an unsupported statement that the "standard repayment plan chosen by most borrowers remains 10 years" and an assertion that "prior generations" paid off their loans in ten years. 75 Fed. Reg. at 43,621. As to the first basis, to the extent data exist regarding the regularity of students electing a ten-year repayment plan, such data actually suggest that many students elect longer repayment schedules. According to a study by Mark Kantrowitz, for example, "[a]bout half of borrowers who consolidated their loans in 2007 chose extended repayment with terms of 25 to 30 years, based on data reported in the prospectuses of FFELP securitizations for the largest education lenders." Mark Kantrowitz, *What is Gainful employment? What is Affordable Debt?* at 16 n. 3 (rev. Mar. 11, 2010), available at http://www.finaid.org/educators/20100301gainfulemployment.pdf. As to the second basis, EDMC submits that much has changed in postsecondary education and student borrowing over the past several generations, making reliance on the supposed conduct of "prior generations" improper. Today's recent graduates confront a weak economy that may require them to extend their repayment periods longer than prior generations. The Advisory Committee on Student Financial Assistance ("ACSFA") recently recognized this reality in recommending to both Congress and ED a national loan experiment to modify loan repayment parameters to address increasing loan burdens, especially among low- and moderate-income students:

> Today low- and moderate-income families can easily face a prospective cumulative loan burden at a 4-year public college between $30,000 and $60,000, respectively . . . . Despite best efforts to increase grant aid from all sources, loan burden is very likely to increase in the future. In response, income contingency and forgiveness are policy tools that might be used to lessen the financial concerns families have about accumulating debt.

The Rising Price of Inequality: How Inadequate Grant Aid Limits College Access and Persistence, ACSFA Report to Congress and the Secretary of Education (June 2010) at 35. Further, the present reality is that people of all demographic and socioeconomic categories need a higher education to compete in the workplace, a fact recognized by President Obama's goal that America will once again have the highest proportion of college graduates in the world by 2020. Unlike prior generations, obtaining a college degree is now a baseline requirement for positions at all wage levels.[8] Thus, the behavior of "prior generations" may not reflect the behavior of today's graduates.

[8] As explained above, BLS data illustrate the importance of college training to present and future earnings potential. For example, the 2009 median weekly earnings for a bachelor's degree is more than one-and-a-half times greater

Recognizing that a ten-year repayment period is not always sufficient, Congress has allowed flexible loan repayment options that ED itself endorses and encourages on its website. *See, e.g.*, 20 U.S.C. § 1087e(d); Repayment Plans and Calculators, http://studentaid.ed.gov/PORTALSWebApp/students/english/OtherFormsOfRepay.jsp ("Generally, you'll have from 10 to 25 years to repay your loan, depending on which repayment plan you choose."). ED's website even explains to students that a 25-year repayment is a "good plan if you will need to make smaller monthly payments." *Id.* Indeed, a variety of personal circumstances unrelated to a person's earnings may make smaller monthly payments a desired approach. ED's adoption of a ten-year repayment plan for all programs is inconsistent with the advice it provides to students and thus it would be unfair to calculate programs' debt-to-income ratios based solely on a ten-year repayment period. ED in effect proposes to penalize institutions for the independent choices of students, guided by ED's advice, that institutions ultimately cannot control.

The proposed ten-year payment schedule treats degree and non-degree programs uniformly. Yet degree and non-degree programs are not similar with respect to factors that are core to the debt-to-income test. Students in non-degree programs accrue less debt, hence, a ten-year repayment schedule may be a reasonable expectation, while students in degree programs accrue more debt for which a longer repayment period is certainly justified. Thus, EDMC's proposed approach reflects an appropriate distinction between degree and non-degree programs with respect to reasonable expectations regarding repayment periods, and, as described above, is consistent with our understanding regarding actual practice.

C. Count all loan payments in the principal repayment test – 34 C.F.R. § 668.7(b)(2)-(3).

The proposed principal repayment rate test compares the original outstanding principal balance of federal loans that have entered repayment in the prior four years and are being repaid (the "numerator") to the original outstanding principal balance of all loans in repayment (the "denominator"). ED proposes to include in the numerator only the original outstanding principal balance of any loan for which a student "reduced the outstanding principal balance of that loan from the beginning of the FFY." 34 C.F.R. § 668.7(b)(3)(i). In addition, "a consolidation loan is not counted [in the numerator] as paid in full." *Id.* § 668.7(b)(2). EDMC respectfully disagrees with this approach and proposes that the numerator should include payments under *any* government-authorized loan repayment program, including payments on interest-only loans, income-based and contingent programs, consolidation loans, and others.

As a threshold matter, the "loan repayment rate" cannot be construed as having a rational relationship to whether or not a program leads to "gainful employment." First, the test is applied to all students, whether or not they graduate and seek employment. Second, the test does not even begin to measure appropriately "gainful employment" for graduates, but rather focuses on debt repayment. For example, a student who graduates from a program in computer technology

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than those with a high school diploma. *See* BLS, *Education Pays*, http://www.bls.gov/emp/ep_chart_001.htm. Similarly, the 2009 unemployment rate for a bachelor's degree is 5.2% compared to 9.7% for high school graduates. *Id. See* Bureau of Labor Statistics – Current Population Survey, ep_chart_001.htm (5/27/10).

who cannot get work in the field, but who becomes successful in an unrelated field, such as selling real estate, would be deemed "gainfully employed" under this test if the student is able to pay $1 towards principal during the prior year.

Even as a measure of debt payment the "loan repayment rate" as proposed fails in its essential purpose. In actuality the "loan repayment rate" has nothing to do with true loan repayment. It is an artificial construct that measures repayment of principal—not repayment of debt—in the current fiscal year and the outstanding balance of loans in the first four years after graduation. The "loan repayment rate" definition excludes from the numerator, but not the denominator, all loans that are current but for which principal is not being reduced because of interest-only repayment and other acceptable and legal terms of student debt. Thus, the test, which is more accurately referred to as the "principal repayment rate," does not reflect the reality of loan repayment: Over 90% of student borrowers who entered repayment in the 2007-2008 cohort default period were meeting their repayment obligations through 2009. *See* William J. Taggart, Federal Student Aid, *FY 2008 Draft Student Loan Cohort Default Rates* (May 2010), *available at* http://www.ifap.ed.gov/eannouncements/043010FY08DraftStuLoanCDR.html (stating that the draft FY 2008 national student loan cohort default rate is 7.2 percent).

The test also penalizes programs, and thereby restricts continued student access, for personal decisions made by students that have nothing to do with the quality of the program or the outcomes of its graduates. For example, if a student elects to consolidate her loans while in in-school deferment status, the student will accrue interest that must be paid down before the student can start making principal payments. However, the student's payments, to the extent they are equal to or less than the accrued interest, would not be included in the numerator of the principal repayment test because, under ED's current regulations, the payments would be applied to interest and not principal. *See* 34 C.F.R. § 685.211(a) (payments generally applied "first to any accrued charges and collection costs, then to any outstanding interest, and then to outstanding principal"); 34 C.F.R. § 682.209(b)(1) (same). Similarly, some students with sufficient earnings to make principal payments nevertheless will pay only the minimum amount on their loans due to personal decisions, which in many cases will be equal to or less than the amount of interest owed on the loan. Again, such payments will be applied to interest, not principal. In addition, other students may be unable to make full payments on their loan obligations not because they make insufficient income, but rather because they have additional debt burdens—such as burdens associated with borrowing for living expenses and other expenditures financed by the student while attending college (whether or not those expenditures were necessary or reasonable)—that impede their ability to pay down principal on their loans but allow them to pay interest. None of these payments will be included in the numerator of repayment test, despite the fact that institutions cannot control these private choices.

It is equally questionable to exclude from the numerator payments made consistent with income-based or income-contingent repayment program. Congress has expressly given students the option of repaying their loans in a variety of various ways. For example, under the Direct Loan program, students can repay their loans according to a standard repayment plan, a graduated repayment plan, an extended repayment plan, an income-contingent repayment plan, and an income-based repayment plan. *See* 20 U.S.C. § 1087e(d). As is clear from the multitude of options available to students, Congress has made a policy judgment that students need many repayment avenues because a variety of different circumstances may affect a student's approach

to debt management. The proposed rule should recognize this judgment and not punish programs if students, by their own choice, elect income-based or income-contingent repayment pursuant to programs encouraged by ED.

Finally, with respect to proposed 34 C.F.R. § 668.7(b)(2), which provides that "a consolidation loan is not counted [in the numerator] as paid in full," EDMC notes that it is unclear whether ED's repayment rate calculations would properly segregate consolidation loans according to source institutions. If ED's calculation fails to segregate consolidation loans according to source institutions, for any borrower who consolidates during a given fiscal year, that borrower's principal balance at the end of the fiscal year would be greater than his principal balance at the beginning of that fiscal year. Under these circumstances, ED would fail to count properly in the numerator of an institution's repayment rate those borrowers who consolidated their loans but also made payments to principal prior to consolidation. Such failure would have the greatest effect on institutions with high transfer-in rates because transfer students typically have loans from other institutions. In order to create a more rational test—particularly given the large number of consolidation loans—EDMC urges ED to develop an acceptable and transparent method for determining the amount of a consolidation loan that is attributable to a particular program.

For these reasons, EDMC respectfully requests that ED modify the "loan repayment rate" calculation to give full credit for borrowers making payments consistent with their loan terms, including interest-only payments, or any government-authorized loan repayment program.

D. Phase-in the regulations so that students are not improvidently harmed and institutions have an opportunity to conform their programs – 34 C.F.R. § 668.7

According to the NPRM, the proposed rule will be phased in beginning July 1, 2011; existing programs will be subject to the principal repayment and debt-to-income tests beginning July 1, 2012. *See* 75 Fed. Reg. at 43,626-27. However, institutions will have no opportunity to prepare their programs and students to comply fully with the new standards until at least 2015, because until that time both the principal repayment test and the debt-to-income ratios will be based on data that pre-date the effective date of the rule. In the interests of fairness, EDMC respectfully requests that ED implement the proposed rule no earlier than July 1, 2014, with existing programs subject to the principal repayment and debt-to-income tests beginning July 1, 2015. In the intervening period, ED should provide certain program-level data to institutions to facilitate preparation for regulatory implementation.

As ED has recognized, "[f]or-profit postsecondary education . . . has long played an important role in the nation's system of postsecondary education and training. . . . The President's goal [of leading the world in the percentage of college graduates by 2020] cannot be achieved without a healthy and productive higher education for-profit sector." *Id.* at 43,617. It is therefore important that ED implement any gainful employment regulations in a way that addresses its concerns while at the same time allowing the proprietary sector to continue to play its essential role in this country's higher education system. A key factor that affects proprietary institutions' successful response to the new debt-to-income and principal repayment rate tests will be the phase-in period for the proposed regulations. If the transition period is too short,

institutions will be forced to improvidently discontinue high-quality and important programs, such as nursing, teaching, and computer technology, simply because they have insufficient time to adjust the programs to meet the new requirements. Giving institutions adequate time to use adjustment mechanisms at their disposal will help preserve high-quality programs that provide invaluable services to students and are critical to this country's economic recovery and the attainment of the President's postsecondary education goals.

As the U.S. Supreme Court has explained, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Contrary to such considerations, under the proposed regulations institutions will face the prospect of losing program eligibility until at least July 1, 2015 based on data that were collected at a time when institutions did not know that program eligibility was conditioned upon compliance with certain principal repayment thresholds and debt-to-income ratios. Given the draconian consequences of the proposed regulations—including displacement of students from educational programs that are declared ineligible—use of data that reflect conduct that pre-dates the proposed regulations is unfair and inconsistent with Congress's and ED's prior practice when applying major new eligibility requirements.

Application of the gainful employment tests to conduct that pre-dates the rule's effective date inappropriately requires institutions to comply with standards that were not in effect at the time the conduct occurred and unfairly penalizes institutions for conduct that the law encouraged during those time periods. For example, HEA and ED regulations currently require institutions to focus their efforts on student loan default reduction. This focus, in turn, has led institutions to counsel students at-risk of default to elect loan forbearance, deferment, and consolidation options—measures that the ED encourages as well. *See, e.g.*, ED, *Postponing Repayment*, http://studentaid.ed.gov/PORTALSWebApp/students/english/difficulty. jsp ("If you have trouble making your education loan payments, contact immediately the organization that services your loan. You might qualify for a deferment, forbearance, or other form of payment relief. It's important to take action before you are charged late fees."). Under the proposed tests, however, institutions will be penalized for borrower's lawful and government-encouraged conduct. *See* 34 C.F.R. § 668.7(b). Loans in forbearance or deferment will be counted against institutions by being included in the denominator of the principal repayment test, and loans that are consolidated may not be counted as being repaid if the consolidation loan requires interest-only payments or the principal on the consolidation loan is higher than the principal on the underlying loans.

Congress and ED have recognized previously that delayed application of a new rule is appropriate to enable institutions time to come into compliance with a new requirement that has major consequences for noncompliance. For example, Congress explicitly acknowledged fairness concerns when it intervened in ED's rulemaking process and legislatively delayed implementation of the 85/15 rule, which was the precursor to the 90/10 rule. Congress first passed the 85/15 rule as part of the Higher Education Amendments of 1992, with directions to the Secretary to promulgate regulations to interpret the meaning of "revenue." Higher Education Act of 1965, as amended, Pub. L. No. 102-325, § 481(b)(6), 106 Stat. 448 (1992). As a practical matter, Congress's direction delayed implementation of the 85/15 rule because "revenue" was otherwise undefined and various interpretations existed. After ED promulgated a rule, effective

July 1, 1994, that would have used data from a time period that pre-dated the rule, Congress further delayed the effective date of the rule until July 1, 1995. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-333, § 510, 108 Stat. 2539 (1994). As Representative Goodling explained, the delay responded in part to reservations about the consequences of applying the rule to past conduct:

> Many Members on both sides of the aisle have expressed serious reservations about the Department of Education's intent to apply the [85/15] regulation implementing this section of the 1992 amendments to a period of time prior to the effective date of the regulation. The Appropriations Committee's delay in the effective date of this regulation will allow institutions sufficient time to comply with its intent. As a result, quality training institutions will not be forced out of the program for failing to comply with confusing and unforeseen accounting rules.

140 Cong. Rec. H5252 (daily ed. June 28, 1994).

Likewise, when implementing cohort default rate requirements or making changes to the maximum rate thresholds, ED has acknowledged the importance of a "multi-tiered approach" or phase-in period. *See, e.g.*, 56 Fed. Reg. 33,332, 33,332 (July 19, 1991) ("The legislation does not phase in the 30 percent cohort default rate threshold until fiscal year 1993, to give institutions an opportunity to adjust their programs to the new standards, if necessary."); 54 Fed. Reg. 24,114, 24,122 (June 5, 1989) ("The Secretary believes that using a fiscal year default rate is more equitable than using a cumulative rate because it does not penalize a school for a high default rate incurred before it took steps to reduce defaults."). Similarly, in 2008 when Congress extended the period for which the cohort default rate is calculated from two to three years, it provided that penalties based on three-year cohort default rates would not be implemented fully until 2014. Higher Education Opportunity Act, Pub. L. No. 110-315, § 436(e)(2), 122 Stat. 3257 (2008).

Congress's and ED's past practice should serve as a model for implementation of the proposed gainful employment rule. The draconian consequences that will result from using data that pre-date the rule—declaring ineligible numerous programs, including many that are successful and beneficial to students—are unreasonable in light of ED's apparent goal to reduce student debt through tests that prompt institutions to change practices. *See* 74 Fed. Reg. at 43,619 ("The proposed regulations are intended to address growing concerns about unaffordable levels of loan debt for students attending postsecondary programs."). Institutions should be given an opportunity to modify their programs to meet ED's new requirements. This delay would avert unnecessary disruption to students' education programs and would allow many high-quality programs to continue operation in the interim period. It would also avoid the deleterious short-term effects that the rule will have on the economy—from laying off staff to dis-enrolling students and in effect reducing the number of qualified graduates who enter the workforce. ED's current proposal to cap at 5% for one year the number of programs at each program or degree level that can be found ineligible under the rule is insufficient to address these concerns, as it is of limited duration and would still penalize institutions for conduct that occurred when they were unaware of the new tests.

EDMC therefore urges ED to adopt an approach where ED, educational institutions, and students can work together to address the student debt concerns that the proposed regulations identify. Delaying the effective date of the proposed rule until at least July 1, 2014, with determinations about the eligibility of existing programs not being made until at least July 1, 2015, will accomplish this collective goal. Institutions will have time to change their current practices in a manner consistent with the gainful employment tests, and they will have an incentive to do so because eligibility determinations in 2015 will be based on data collected from 2011 forward. Students, in turn, will benefit from such changes in practice and will not have to suffer from potential disruption to their education programs due to loss of eligibility. And institutions that do not conform their conduct to the proposed regulations by July 1, 2015 will be on notice that their programs may be declared ineligible. In sum, EDMC's proposed phase-in of the regulations provides a fair and reasonable approach—and one that is consistent with ED's and Congress's past practice—to implementation of a major new compliance obligation that entails severe consequences for noncompliance.

E. Exempt graduate programs from gainful employment tests – 34 C.F.R. § 668.7.

The proposed regulation would cover all programs, including graduate-level programs. *See generally* 34 C.F.R. § 668.7. EDMC urges ED to exempt graduate level programs because the proposed gainful employment tests are an unreliable indicator of whether graduate programs prepare their students for gainful employment. Students in graduate programs—which by definition are students who hold credentials from one or more other programs—often have outstanding student loan debt from prior programs. The principal repayment test, however, would take into account all Federal Family of Education Loan Program ("FFELP") or Direct Loan Program loans owed by students who attended the program, including such loans from prior programs. *See* 34 C.F.R. § 668.7(b)(1)(i). In a similar vein, the debt-to-income test would take into account debt incurred by students who attend undergraduate and graduate programs at institutions under common ownership or control or institutions that qualify as related entities. *See id.* § 668.7(c)(2). Both the principal repayment test and debt-to-income tests thus would inappropriately penalize graduate programs for the debt that their students incurred at other institutions and in other programs.

ED's own data show that prestigious graduate programs failed to satisfy the lower 35% threshold for the principal repayment test, including Harvard Medical School (24%) and Johns Hopkins University School of Medicine (31%). *See* ED, *Cumulative Four-Year Repayment Rate By Institution*, http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html. Many other graduate programs appear to have fared poorly as well: Charleston School of Law (23%), Golden Gate University School of Law (32%), John Marshall Law School (28%), Boston Graduate School of Psychoanalysis (23%), and the Houston Graduate School of Theology (31%). *Id.* Such data demonstrate that the principal repayment test is incompatible with graduate education programs, which often require substantial loan obligations with substantial increases in income many years after graduation.

Furthermore, a student who has a bachelor's or higher degree is fully capable of determining how much debt to incur, and EDMC respectfully submits that ED should not be regulating such choices through the gainful employment rule.

In the event that ED does not exempt graduate programs from the gainful employment tests, EDMC alternatively suggests that the amount of debt counted in the principal repayment test and debt-to-income tests for these students should be limited to the tuition and fees charged by a program. Students enrolled in programs higher than a bachelor-level can borrow up to $20,500 per academic year under the Stafford program. Students enrolled in certain graduate-level health professions can receive an additional $12,500 per academic year. As such, graduate students have the ability to borrow amounts under federal loan programs well in excess of the limits established for undergraduate programs and frequently borrow more than the tuition and fees charged by proprietary institutions. ED expressly has limited institutional ability to control the amount of federal student financial aid that students may elect to incur. *See* ED, 2009-10 Federal Student Aid Handbook at 3-94 ("[N]ote that your school cannot engage in the practice of certifying Stafford loans only in the amount needed to cover the school charges, or to limit unsubsidized Stafford borrowing by independent students.") Additionally, institutions have no control over a student's decision to incur private loan debt that exceeds program costs. Limiting the amount of debt incurred by graduate students to the tuition and fees charged by their program of study in the event that ED does not exclude graduate programs entirely from the gainful employment regulation would ensure that institutions are not improperly penalized for decisions made by students over which they have no control and therefore are unable to offer important programs of study at the graduate degree level.

F. Eliminate growth restrictions and employer verifications – 34 C.F.R. § 668.7(d) and (e).

The NPRM requires "restricted"[9] programs to: (a) limit the enrollment of federal student financial aid recipients in the program "to the average number enrolled during the prior three award years" (hereinafter "growth restrictions"), *see* 34 C.F.R. § 668.7(e)(3); and (b) provide "[d]ocumentation from employers not affiliated with the institution affirming the curriculum of the additional program aligns with recognized occupations at those employers' businesses, and that there are projected job vacancies at those businesses." (hereinafter "employer verifications"), *see id.* § 668.7(e)(1). The proposed regulations also require new programs to receive approval from the Secretary before federal student financial aid may be awarded in connection with the program. To obtain approval, an institution must submit an application providing certain information, including employer verifications. *See id.* § 668.7(g)(1). EDMC respectfully requests that ED eliminate completely the proposed use of growth restrictions and employer verifications because such measures would require ED to perform a function beyond its expertise and raise substantial fairness concerns.

Under the proposed rule, both growth restrictions and employer verifications contemplate that ED, and not the market, should control how many students are trained for a particular profession. Growth restrictions effectively will limit the number of students who can be trained for a particular profession and therefore the number of students prepared to enter a certain profession. Likewise, new or restricted programs that do not receive what ED determines to be

[9] ED proposes to place a program on "restricted status" if the program meets the minimum threshold on at least one of the tests but "has an annual loan repayment rate of less than 45 percent," and "an annual loan payment that is more than 20 percent of discretionary income and more than 8 percent of average annual income." 34 C.F.R. § 668.7(a)(2).

adequate employer verifications will not be allowed to operate, therefore limiting the number of programs available to students. ED proposes to assume this power over the job market even though it is not equipped to perform the primary function contemplated by the employer verifications and growth restrictions, namely, need assessment of job markets. Analysis of whether a job market is growing, contracting, or otherwise changing requires consideration of many complex and interrelated factors. ED's expertise is in the educational sector, and it does not have sufficient experience and knowledge with issues related to job markets to assume this function.

More fundamentally, EDMC questions whether ED has the authority under the gainful employment provision to regulate general economic conditions, as contemplated by the growth restrictions and employer verifications. Both of these requirements would regulate job markets, not debt levels or whether a program prepares its students to make money. For example, if a short-term oversupply of computer technicians exists that prevents an institution from obtaining sufficient employer verifications, under the proposed regulations ED would not approve a new computer technician program and/or may limit a restricted computer technician program's eligibility,[10] regardless of whether or not the program adequately trains its students to make money as computer technicians. Congress has not indicated an intent to permit federal student financial aid to be used only for programs preparing students for occupations that are in demand, as determined by ED, at the time the student enters the program. Indeed, such a standard would limit federal student financial aid in certain job fields any time the economy goes into a recession. The proposed growth restrictions are particularly troubling in light of the August 13 Data, which, as discussed in Part I.A above, demonstrate that proprietary, public, and non-profit institutions fared similarly on the principal repayment test after adjusting for socioeconomic factors.

Growth restrictions and employer verifications raise a number of other more specific concerns, as well. With respect to the use of growth restrictions and employer verifications for restricted programs, EDMC believes that such penalties are an extreme approach with unjustified harsh consequences, particularly given the problems that this letter has identified with respect to the proposed tests. For example, programs that fall within the restricted zone will likely have significant populations of Pell Grant students—the students that institutions need to educate to meet President Obama's 2020 goal. Yet the restrictions will limit the number of students who can attend restricted programs, thus impeding the Administration's objectives. To avoid these unintended consequences, ED should eliminate the growth restriction and employer verification requirements for restricted programs and require only that such programs make debt disclosure warnings to students and in their promotional materials. Not only is this approach fairer, but it also is consistent with the approach that Congress has taken to address concerns about education costs and debt loads under the HEA. *See* 20 U.S.C. § 1015 (providing for provisions related to "market information and public accountability in higher education.")

Further, with respect specifically to the process by which ED will administer the employer verifications, the proposed regulations as written lack a standard of application and thus raise substantial due process and fairness concerns. Among other matters, the proposed

[10] EDMC notes that under the proposed regulations restricted programs merely must "provide annually to the Secretary" the employer verifications, and that the consequences to a program if verifications are not submitted or are deemed inadequate by ED is unclear. *See* 34 C.F.R. § 668.7(e)(1).

employer verification regulations do not: (a) specify what must be included in the documentation that institutions must submit, such as the number of employer verifications needed or what those verifications must say; (b) put institutions on notice regarding what it means for a program to "align[] with recognized occupations at those employers' businesses" or what data are required to show that "vacancies or expected demand for those occupations at businesses" exists; or (c) indicate who will review the verifications or what standards will be applied in evaluating the verifications and ensuring consistent evaluation. *Id.* The proposed requirement also does not explain the circumstances under which ED will treat an employer as "affiliated" with the institution. Based on the information provided in the proposed rule, it appears that certain ED officials will make ad hoc determinations about whether the employer verifications are appropriate to demonstrate job vacancies in a relevant market. This standardless review is unfair and supports eliminating the employer verifications requirements.

In sum, EDMC urges ED to eliminate completely the use of growth restrictions and employer verifications because both of these punitive measures require ED to perform a function, namely need assessment in the job market, beyond its expertise and raise substantial due process and fairness concerns.

G. Additional modifications

In addition to the six principal changes proposed above, EDMC notes the following additional modifications that would improve the gainful employment regulations if ED determines to adopt a version of the proposed rule at this time.

1. Exclude loans in forbearance or deferment from denominator of principal repayment test – 34 C.F.R. § 668.7(b).

Although ED has excluded certain types of loans from the denominator of the principal repayment rate, *see* 34 C.F.R. § 668.7(b)(4), the proposed regulations include loans in forbearance or deferment in the denominator. At the same time, because the principal on loans in forbearance or deferment is not being reduced, such loans are not counted in the numerator of the principal repayment test. *See id.* § 668.7(b)(3). For many of the reasons explained in Part II.C with respect to counting all loan payments in the numerator of the repayment test, EDMC urges ED to take a more neutral approach such that loans in forbearance or deferment neither hurt nor help an institution's principal repayment rate. Specifically, EDMC respectfully requests that ED modify the proposed regulations to exclude loans in forbearance or deferment from the denominator of the repayment test (*i.e.*, such loans should be excluded from both the numerator and the denominator of the calculation). Such approach is appropriate because ED itself encourages students to elect forbearance and deferment options if necessary, and it is unfair to punish institutions for conduct that ED expressly recommends. *See* ED, *Postponing Repayment*, http://studentaid.ed.gov/PORTALSWebApp/students/english/difficulty.jsp ("If you have trouble making your education loan payments, contact immediately the organization that services your loan. You might qualify for a deferment, forbearance, or other form of payment relief. It's important to take action before you are charged late fees.").

2. For additional programs, calculate the principal repayment test and debt-to-income ratio based on data from the program at issue and a

sufficient cohort of borrowers/program completers – 34 C.F.R. § 668.7(g)(3).

ED proposes to calculate the principal repayment test and debt-to-income ratios for approved additional programs that do not constitute a substantive change using data from "all other programs currently or previously offered by the institution that are in the same job family as the additional program." *See* 34 C.F.R. § 668.7(g)(3)(i)-(ii). ED proposes to use the data from other programs in the same family until the additional program has existed long enough to generate sufficient data for ED to evaluate the program on its own merits, *i.e.*, four years of loan data under the principal repayment test and three years of earnings data under the debt-to-income measures. *Id.* Because such an approach will hinder compliance with the proposed rule's other requirements, EDMC urges ED to modify its approach and to evaluate additional programs that do not constitute a substantive change based only on data from the program itself.

By tying an additional program's compliance with the gainful employment rule to previous and current programs in the same job family, ED is frustrating compliance with the rule itself. Institutions will be unable to add programs that aim to comply with the gainful employment tests. For example, an institution may decide that students would benefit from a one-year certificate program in addition to or in place of a two-year associate's degree program in the same area. The certificate program, however, would be subject to the principal repayment rates and debt-to-income ratios of the longer, and thus more costly, associates degree program, which will increase the likelihood that the additional program will not comply with the gainful employment tests. The proposed rule therefore places institutions in a catch-22: It commands that they make education effective and affordable for students but penalizes them for programmatic changes that serve those ends. This cannot be ED's desired result.

EDMC therefore urges ED to evaluate additional programs that do not constitute a substantive change based only on data from the program at issue. This proposal is consistent with the approach that ED will use to evaluate additional programs that constitute a substantive change. *See* 34 C.F.R. § 668.7(g)(3) ("If the additional program constitutes a substantive change based solely on program content as provided in 34 CFR 602.22(a)(2)(iii), the Secretary calculates the loan repayment rate and the debt measures for that program *as soon as data are available*.") (emphasis added). There is no rational reason for ED to distinguish between programs that do and do not qualify as a substantive change. If ED approves a program, it should not tie that program's eligibility to other programs that may or may not satisfy the gainful employment tests.

Furthermore, ED should base its evaluation of all additional programs on a sufficient cohort of program completers/borrowers. As proposed, neither the debt-to-income test nor the principal repayment test accurately or fairly assesses whether a program with a small number of program completers and/or a small number of borrowers whose loans have entered repayment—as will often be the case with additional programs—prepares students for gainful employment.

Under either gainful employment test, the behavior of a few program completers or a few borrowers could have a disproportionate effect on the tests' results for small programs. For example, a small, additional program that effectively prepares its students for gainful employment could fail the debt-to-income test if a few of its completers had very low annual

earnings or very high debt. This could easily be the case if those few completers chose to start a family, travel, or delay joining the workforce for some other personal reason, or opted to incur excessive private loan debt—decisions that are well outside an institution's control. Without a sufficient number of other completers with high- or mid-level earnings and/or low- or mid-level debt, the program would not be able to compensate for these few outliers.

Likewise, when an additional program has only a few borrowers whose loans have entered repayment, the failure of a handful of borrowers to make a payment toward principal could have a disproportionate effect on the program's principal repayment rate. This problem is amplified by ED's proposal to weight the principal repayment rate according to the size of each borrower's debt. An effective additional program could fail the principal repayment rate test because one or two of its borrowers with high debt—which would not be unusual given that the principal repayment test includes debt incurred at prior and subsequent institutions—opted not to make a payment toward principal in a given year. When a test's results turn on the behavior of a couple students, that test is not an accurate assessment of whether a program prepares its students for gainful employment. ED, itself, acknowledged as much in the release of its repayment rate data on August 13, 2010, by stating (in bold print): "Extreme caution should be exercised in instances where small numbers of borrowers entering repayment are observed." *See* Cumulative Four-Year Repayment Rate by Institution, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.

EDMC respectfully requests that ED modify the proposed gainful employment tests to ensure that decisions about a program's continued eligibility for federal student financial aid are based on a sufficient cohort of program completers/borrowers. In the context of its cohort default rate regulations, ED has declined to impose penalties upon an institution based on the behavior of fewer than 30 borrowers. *See, e.g.*, 34 C.F.R. § 668.16(m)(2)(iv) (an institution will not be placed on provisional certification based solely on its cohort default rate if the institution had 30 or fewer borrowers in its three most recent cohorts); 34 C.F.R. § 668.216 (an institution may appeal a notice that it has lost eligibility due to its cohort default rate if 30 or fewer borrowers were included in the three most recent cohorts used to calculate the rate). ED should develop similar accommodations in its gainful employment regulations.

3. Allow students who are attending programs that are deemed ineligible to continue to be eligible for federal student financial aid through program completion – 34 C.F.R. § 668.7(f)(1).

Under the proposed regulations, an institution with an ineligible program "may disburse title IV, HEA program funds to students who began attending the program before it became ineligible for the remainder of the award year and for the award year following the date of the Secretary's notice." 34 C.F.R. § 668.7(f)(1). Because this provision will disrupt the educational experience of many associate's and bachelor's degree students, EDMC respectfully requests that ED modify the proposed regulation to enable students to continue to receive federal student financial aid after a program has been deemed ineligible until the students graduate or withdraw so long as the student completes the program within one and one half times the program length and continues to comply with applicable Satisfactory Academic Progress standards.

Proposed Section 668.7(f)(1) apparently would allow students in a program deemed ineligible approximately two years to complete a program. For example, if an institution received a notice of program ineligibility on August 1, 2012 that was effective September 1, the students in the relevant program would be otherwise eligible for federal student financial aid during award year 2012/13 and award year 2013/14. Many associate's degree programs, however, are more than two academic years long if a student is not taking the maximum credit hour load. Such a student who started the associate's degree program in award year 2012/13, then, would be unable to receive federal student financial aid for all years in the program. The proposed rule would affect bachelor's and graduate degree students more significantly. In most of EDMC's programs, bachelor's degree students taking 12 credits per quarter need 15 quarters (three years and nine months) to finish. The proposed rule would leave many students who rely on federal aid unable to finish their program at their chosen institution. Although students may transfer to other institutions, even in the best case scenario transfer entails substantial burdens, such as disruption to the student's academic progress, adjustment to a new learning environment, and potential difficulties in the job market, including, but not limited to, students having to explain to employers the reason why they changed colleges mid-stream. EDMC fails to see how it serves ED's underlying policy goals to have the gainful employment tests force students to decide between three unappealing choices: Remain in the program without federal student financial aid (but with a continued ability to obtain private educational loans at higher interest rates), transfer (with the accompanying negative consequences), or leave the program without a credential but with student loan debt.

H. Requested clarifications

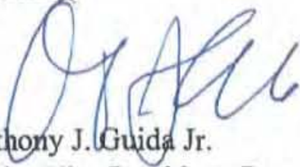
EDMC requests that ED provide clarification on the following points:

- The NPRM currently proposes to include in the principal repayment test all FFELP and Direct Loan Program loans "owed by students who attended the program." 34 C.F.R. § 668.7(b)(1). As drafted, this provision could be interpreted to include in the principal repayment test loan debt from all programs attended by students, including programs at other institutions. EDMC respectfully requests clarification that the principal repayment test counts only loans that the relevant students incurred in connection with the program at issue.

- The debt-to-income ratio "does not include any debt obligations arising from student attendance at prior or subsequent institutions unless the other and current institutions are under common ownership and control, or are otherwise related entities." 34 C.F.R. § 668.7(c)(2). As drafted, this provision appears to include in a program's debt-to-income ratios loan debt incurred at other programs at the same or affiliated institution. EDMC does not understand the rationale for including in the ratios debt incurred for other programs at the same or a related institution, and respectfully seeks clarification that 34 C.F.R. § 668.7(c)(2) excludes from the debt-to-income ratio all loan debt incurred for other programs.

As explained above and in more detail in CCA's comments, EDMC urges ED to abandon the proposed regulations because ED lacks statutory authority and the proposed regulations conflict with the HEA. If ED does not abandon the proposed regulations, EDMC respectfully requests that ED postpone issuance of the proposed regulations pending collection and analysis of data that are representative of the regulated institutions, the student populations they serve, and the likely effects of the rule on both institutions and students. If ED proceeds with the proposed regulations, EDMC respectfully requests that ED adopt EDMC's proposed modifications, as detailed above. Thank you for your consideration of these comments.

Sincerely,



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