INFORMATION QUALITY GUIDELINES CORRECTION REQUEST

February 1, 2011

Association of Proprietary Colleges

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Cont'd)

Page

INFORMATION QUALITY GUIDELINES
CORRECTION REQUEST

The Association of Propriety Colleges ("APC"), through counsel, hereby submits the following correction request pursuant to the Data Quality Act ("DQA") and the Information Quality Guidelines ("Quality Guidelines") that the United States Department of Education ("Department") promulgated implementing the DQA.

OVERVIEW

1. The Quality Guidelines impose minimum standards regarding the reliability and objectivity of information that the Department relies upon or disseminates for rulemaking and for other purposes. As demonstrated below, a careful review of the Department's notice of proposed rulemaking relating to determining if certain educational programs lead to gainful employment ("NPRM"),[1] the proposed regulation contained therein ("Proposed Regulation"), and certain comments filed in connection with the NPRM (including those of multiple well-respected economists) conclusively establish that the division within the Department that authored the NPRM ("Division") grossly violated the Quality Guidelines in numerous respects.

2. These violations deprived the Secretary, other Department decision-makers, and the public of the ability to make informed judgments regarding the Proposed Regulation, a regulation that will have a sweeping impact on the ability of thousands of educational programs to remain eligible to participate in federal student financial assistance authorized under Title IV ("Title IV Programs") of the Higher Education Act of 1965, as amended ("HEA").

[1] 75 Fed. Reg. 43616 (July 26, 2010) ("NPRM").

3. Among other things, in gross violation of the Quality Guidelines, the Division employed improper methodologies, relied upon unrepresentative and misleading data, failed to acknowledge the very substantial shortcomings in the information and data the Division relied upon and disseminated, and failed to have the information and methodologies peer reviewed. Incredibly, the Department's response to a July 27, 2010 FOIA request establishes that the Division conducted *no peer review whatsoever*, although the Quality Guidelines require such peer review.

4. The reason the Division attempted to shield its work from peer review is obvious: *no respectable economist would have sanctioned the Division's work.* Indeed, the entire framework of the Proposed Regulation is facially non-sensical: the tests it adopts for determining whether a program remains eligible rely upon income and repayment data from three to four years after graduation, when graduates' incomes are at their lowest. The Department itself has concluded that the Harvard Medical School would fail the repayment rate test applying the truncated measurement periods used in the Department's proposed methodology.[2]

5. Even more astounding, the NPRM wholly fails to address the enormous societal costs that the Proposed Regulation would impose, particularly upon minority and disadvantaged citizens. Simply put, *if the Proposed Regulation is not withdrawn, it poses the grave risk of a mammoth public policy disaster.* Based upon government census data and the reports submitted by numerous expert economists, the Proposed Regulation poses, under the most conservative estimates, the grave risk of:

[2] The Department's own data shows that the Harvard Medical School's estimated repayment rate is 24%. *Cumulative Four-Year Repayment Rate by Institution*, posted on the Department's website, available at http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.

- **causing from 1.775 to 2.6 million students to discontinue or not receive additional education over the next 10 years;[3]**
- **depriving students of the additional income they would have earned from this additional education, which according to Census Bureau statistics for associate degree graduates is approximately $400,000 per student;[4]**
- **costing students (principally those with low income) who would have attended an institution of higher education in the next ten years but for the proposed regulation between $198 billion and $291 billion in lost income;[5]**
- **costing the United States and state governments between $45 billion and $67 billion in lost taxes;[6]**
- **costing states billions of dollars in additional subsidies to community colleges;**
- **while saving less than $10 billion in defaults on student loans over the next 10 years.[7]**

6. The Division's wholesale refusal to address or to provide any meaningful data on these societal costs is a blatant violation of the Quality Guidelines, and deprived the Secretary, other Department decision-makers, and the public of the ability to perform a critical review of the Division's work in promulgating the Proposed Regulation. These flaws, both individually and collectively, are so severe that the Department should withdraw the NPRM and start afresh with the advice of experts who can analyze the data regarding the economic and societal impacts of the Proposed Regulation in conformance

---

[3] Jonathan Guryan & Matthew Thompson, *Comment on the Proposed Rule*, at 29 (Sept. 9, 2010) (submitted herewith as Exhibit 1) ("CRA Report") The curriculum vitae of Professor Guryan is submitted herewith as Exhibit 2. The curriculum vitae of Dr. Thompson is submitted herewith as Exhibit 3.

[4] Data from the U.S. Census Bureau establishes that students with associate degrees earn $1.6 million over their lifetimes, whereas students with high school diplomas make $1.2 million. Jennifer Cheeseman Day & Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, at 3-4 (2002) (submitted herewith as Exhibit 4).

[5] This figure is derived from multiplying Professor Guryan and Dr. Thompson's estimates of the number of students discontinuing their education times the Census Bureau's differential income figure of $400,000 times an approximate 28% graduation rate (based on APC members' graduation rate for students in associate degree programs).

[6] Based on an estimated modest 22.9% combined federal and state tax rate on the lost income.

with the Quality Guidelines. The methodological flaws alone are so significant that the Proposed Regulation simply must be withdrawn in its entirety.[8]

APPLICABLE FACTS

A. Background Of APC

7. Founded in 1978, the Association of Proprietary Colleges ("APC") represents 27 degree-granting institutions on 41 campuses throughout New York State.[9] Many of the APC member colleges have been family-operated and owned for three or more generations. The APC colleges serve more than 50,000 students per year, offering students the opportunity to choose from more than 350 associate, bachelor, master, and doctoral degree programs in both traditional and emerging fields. APC and its members strive to improve access to education for those who aspire to obtain a college degree, including minority students and adults returning to college. APC member institutions enroll the highest percentage of Black and Hispanic students in New York, and the APC colleges graduate these students at a higher percentage than all other sectors.[10]

8. All of the APC colleges are accredited by the New York Board of Regents, Middle States Commission on Higher Education, or other approved accreditors. APC informs state and federal decision makers and advocates in favor of legislation and policy that support the goals of higher education. From the hands-on education by

---

[7] Based on the net present value of defaults on federal student loans as reported in the NPRM (page 43646).

[8] APC reserves the right to file a supplemental correction request with respect to any changes in the gainful employment Proposed Regulation or accompanying materials.

[9] A listing of the APC member colleges is submitted herewith as Exhibit 5.

[10] Based on data published by the New York State Education Department, 26% of Black and Hispanic students enrolled in associate degree programs at APC colleges in 2006 graduated within three years, compared to 9% of such students enrolled in the City University of New York, 15% of such students in the State University of New York, and 22% of such students in other independent colleges in New York.

experienced faculty, to the small class sizes and generous grant programs, to the extensive career counseling and placement services, APC colleges provide students with a clear path to career opportunities and offer the business community employable, highly educated graduates.

9. APC member colleges provide significant economic benefits to New York. Its colleges are taxpaying institutions that receive no direct state financial assistance, invest millions of dollars annually in capital improvements, employ thousands, and account for millions of dollars in economic impact in their communities. APC colleges also provide their students with millions of dollars in annual scholarships.

10. The information and methodologies challenged in this Correction Request have very important potential impacts on APC members. As detailed below, among other things, the information and methodologies improperly penalize APC institutions for educating disadvantaged students, rely on flawed metrics that will improperly render ineligible valuable programs offered by APC members, and significantly understate the number of programs at APC institutions that will be harmed by the Proposed Regulation.

B. <u>The DQA And The Department's Information Guidelines</u>.

11. To ensure that information the federal government uses is accurate and reliable, in 2000 Congress passed the Data Quality Act ("DQA").[11] The DQA directed the Office of Management and Budget ("OMB") to require that each applicable Federal agency "issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) . . . ."[12] In early 2002, OMB

---

[11] Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554).

[12] *Id.*

issued final guidelines implementing the DQA and requiring agencies to publish their own guidelines no later than October 1, 2002.[13]

12. Subsequently, in October 2002, the Department published its Information Quality Guidelines on the Department website.[14] The Quality Guidelines state that "[t]o make sound decisions, the Department intends to accept and use only information that is accurate and reliable."[15]

13. The Quality Guidelines seek to ensure the objectivity of information upon which the Department relies:

> *Objectivity refers to the accuracy, reliability, and unbiased nature of information. It is achieved by using reliable information sources and appropriate techniques to prepare information products.*[16]

14. In furtherance of this goal, the Quality Guidelines impose a number of specific "minimum" requirements, such as utilizing state of the art methodologies, confirming and documenting the reliability of data, acknowledging any shortcomings or explicit errors in any data that is included, selecting and implementing analyses to ensure that data is correctly analyzed using modern statistical techniques suitable for hypothesis testing, and subjecting information products to peer review.[17]

15. The Quality Guidelines impose especially rigorous requirements with respect to "influential information," defined as information "reasonably likely to have a

---

[13] 67 Fed. Reg. 8452-60 (Feb. 22, 2002).

[14] 67 Fed. Reg. 62043-44 (Oct. 3, 2002).

[15] Quality Guidelines at 2.

[16] Quality Guidelines at 5 (emphasis in original).

[17] Quality Guidelines at 5-9.

clear and substantial impact on public policies or private sector decisions if disseminated."[18]

16. The information the Department has relied upon in the NPRM falls squarely within the definition of "influential information." Indeed, the Department has conceded that the proposed rulemaking constitutes a "significant regulatory action" under Executive Order 12866 because it will have an annual effect on the economy of more than $100 million.[19] Among other things, information in the NPRM will have a clear and substantial impact on the anticipated future of hundreds of thousands of students enrolled in the affected educational programs and the disbursement of billions of dollars of Title IV program funds. Indeed, even though not final, the Proposed Regulation already is having a "substantial impact" on the planning and decision-making of the APC colleges and thousands of other institutions.

VIOLATIONS OF THE QUALITY GUIDELINES

17. A review of the NPRM, the Proposed Regulation, and relevant comments of multiple expert economists filed in connection with the NPRM conclusively establishes that the Division grossly violated the Quality Guidelines in numerous respects.

18. Among other things, the Division employed improper methodologies, relied upon unrepresentative and misleading data, failed to acknowledge the very substantial shortcomings in the information and data, and failed to have the information and methodologies peer reviewed. Indeed, as noted above, the Department's response to

---

[18] Quality Guidelines at 9.

[19] NPRM at 43629.

a July 27, 2010 FOIA request establishes that the Division conducted *no peer review or consultation with outside experts whatsoever*:

> You requested copies of all information in the possession, custody or control of the Department of Education or the employees, etc in reference to contracts or agreements that the DoEd entered into in the preparation of the Notice of Proposed Rulemaking (NPRM) regarding Program Integrity Gainful Employment as published in the Federal Register on July 26, 2010, etc. [sic]
>
> *Staff in [Federal Student Aid] informed the FOIA Requester Services Center that after a search of their files, they were unable to locate any documents that were responsive to your request.*[20]

As demonstrated below, the Division attempted to shield its work from peer review because no respectable economist would have sanctioned the Division's work.

19. The Division's violation of the Quality Guidelines deprived the Secretary, other Department decision-makers, and the public of the ability to make an informed, critical review of the standards employed in and the effect of the Division's proposal. The Division's failure to follow the Quality Guidelines is particularly troublesome because no Congressional mandate required the Department to issue gainful employment regulations at all and there certainly was no time pressure to do so. The Department had ample time to follow proper procedures and thoroughly examine these issues and the underlying data, but the Division chose not to do so in a biased, rushed, and misguided effort to penalize proprietary institutions.

---

[20] Letter from the United States Department of Education to Jonathon Glass, dated Dec. 7, 2010 (submitted herewith as Exhibit 6) (emphasis added). While the office of Federal Student Aid ("FSA") was unable to locate any responsive documents at all, the Office of Postsecondary Education ("OPE") located only two contracts – one for facilitating the Negotiated Rulemaking sessions and the other to obtain data from the Missouri Department of Higher Education. Thus, the Department made no contracts or agreements for peer-review of the data or consultation with outside experts.

A. Methodological Improprieties In The Development Of The Debt To Income And The Repayment Rate Tests.

1. The Division's Insupportable Use Of 3 And 4 Year Periods Violates Well-Established Economic Theory.

20. The Quality Guidelines mandate that the Department use a "state of the art methodology" or a "modern statistical technique",[21] in this case for the purpose of evaluating the benefits of an investment in education. The Division's selection of truncated 3 and 4 year time periods, despite the well-documented increases (as recited in the NPRM itself) in student income that continue for decades after graduation, is contrary to universally accepted economic methodology and, according to a leading economist, simply "economically irrational."[22]

21. With respect to measuring an acceptable level of debt compared to the benefits of the education, the Division proposed two statistical tests. The first test is the "Loan Repayment Rate Test," which purports to measure what percentage of students enrolled in the educational program (regardless of whether they completed or withdrew) in the previous 4 years have repaid some portion of their loan principal in the most recent federal fiscal year. Under the Division's Proposed Regulation, a repayment rate of 45 percent or higher is passing, while a rate of 35 percent or less may lead the program to lose eligibility for continued Title IV funding.

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

---

[21] Quality Guidelines at 6-8.

[22] Brad Cornell, *Expert Report Regarding Proposed Gainful Employment Regulation,* ¶ 18 (Sept. 9, 2010) (hereinafter "Cornell Report") (submitted herewith as Exhibit 7). The NPRM's possible allowance for institutions to use earnings for certain students graduating four to six years earlier (under the "Prior Three Year Period" method) under certain undefined circumstances does not begin to address the deficiencies in this method.

based on the proposition that students should not devote more than 8% of their average annual earnings towards repaying their student loans (including Title IV, other governmental, private and in some cases institutional loans), with the loan amount set as the median loan amount of all students who graduated from the program in the relevant 3-year period. Further, a debt to income ratio of 12% or higher may lead the program to lose eligibility for continued Title IV funding. Alternatively, the Department proposes that the debt repayment cannot exceed 30% of the discretionary income of the graduates, defined as the amount of total income above 150% of the poverty level for the applicable year, and even a debt repayment rate greater than 20% of discretionary income can lead to restrictions on a school. These ratios are calculated based on the average annual earnings, in the most recent year for which post-completion data are available, for the program's graduates from the previous 3 years, based on the assumption that all of the applicable loans have a 10-year repayment term and carry an interest rate that is tied to the rate for unsubsidized Title IV loans (currently 6.8%).

23. These 3 and 4 year periods are economically irrational and violate well-accepted economic theories for calculating the benefit of making an investment, including an investment of education. In a report by Professor Bradford Cornell, a leading economist[23] ("Cornell Report"), Professor Cornell explains that economic theory dictates that the decision "to undertake higher education should be evaluated (and the related decision to provide financial assistance for higher education) . . . by considering

---

[23] Professor Cornell is currently a Visiting Professor of Financial Economics at the California Institute of Technology. Among other things, he earned a master's degree in Statistics from Stanford University in 1974 and earned his doctorate in Financial Economics from Stanford in 1975. He has served as an editor of numerous journals relating to business and finance and has written more than 70 articles and two books on finance and securities. His curriculum vitae is submitted herewith as Exhibit 8. The Cornell Report was submitted to the Department in response to the NPRM in support of the comments of Career Education Corporation.

education to be a capital project undertaking, similar to a firm deciding to build a factory or a University deciding to fund the construction of new classrooms."[24]

24. Professor Cornell further explains "that education can be thought of as a special type of capital investment project, aimed at building human capital, which requires substantial expenditures (tuition, opportunity cost of attending school, etc.) in a fairly short period (one to four years) at the start of the project." Under these circumstances, the "benefits from education typically accrue over a lengthy period following the conclusion of the formal coursework. The direct benefits to education are the increased earnings potential of the student throughout his career, a period that could span decades, but there are also other intangible benefits to the student and society."[25]

25. Rather than the ad hoc and unsupported methodology the Division employed, capital budgeting theory has developed a concept for evaluating such decisions based on an analysis of net present value ("NPV"), which has guided capital investment decisions for decades. As Professor Cornell explains:

> The NPV of a project is the sum of the present values of all incremental cash flows (current and future) related to that project (where cash outflows are treated as negative and cash inflows are treated as positive). To arrive at the NPV, these cash flows are discounted to their present values using the appropriate discount rate. In the example of a firm deciding to build a new factory, NPV would equal the sum of the initial capital outlay, future cash inflows from the factory production, future maintenance costs, etc., all expressed in terms of their present values.[26]

26. If the NPV is positive, capital budgeting theory dictates that the project should be undertaken. As expressed in a leading finance text book:

---

[24] Cornell Report ¶ 10.

[25] Cornell Report ¶ 11.

[26] Cornell Report ¶ 12.

Firms can best help their shareholders by accepting all projects with positive net present values and rejecting projects with negative net present values. The net present value of a project measures the wealth created by the project.[27]

27. Professor Cornell then analyzes the Division's proposed Debt to Income Test and Loan Repayment Rate Test in light of these standard economic principles:

> Neither the Debt to Income Ratio Test nor the Loan Repayment Rate Test is based on the NPV methodology. *Consequently, both tests are economically irrational and will lead to sub-optimal decisions and outcomes* whereby students who would benefit from educational programs will be denied access to funds that would help them enroll in such programs.[28]

This is because "[n]either of the Department's two tests takes into consideration the increase in the lifetime earning capacity of a student who is deciding whether to enroll in a program."[29]

28. Rather, the Division should have used the NPV approach:

> The correct approach according to finance theory would be an NPV based approach that considers the present value of ***all incremental lifetime earnings*** due to the educational program and compares this to the present value of the total costs of the program. If the present value of the benefits is higher than the present value of the costs, it makes economic sense for the student to enroll in the program and for the federal government to provide access to title IV funding ***even if in the first three years the debt repayments might exceed 12 percent of the student's annual income or during the first four years the student might not be able to make a repayment on the principal amount of the loan***.[30]

29. Numerous other well-respected economists echo this approach. For example, Professor Jonathan Guryan and Dr. Matthew Thompson, in their *Comment on the Proposed Rule Regarding Gainful Employment* (Sept. 9, 2010), conclude:

---

[27] Richard A. Brealy, Stewart C. Myers & Franklin Allen, *Principles of Corporate Finance,* at 29 (9th ed.) (emphasis added).

[28] Cornell Report ¶ 18 (emphasis added).

[29] Cornell Report ¶ 19.

> The standard economic analysis of education implies that the decision of whether to continue schooling beyond high school should be based on a comparison of the lifetime benefits and the lifetime costs of that schooling. . . . . Even when the benefits only slightly exceed the costs, when properly measured, it benefits the student to continue to pursue additional education.[31]

30. In his report, Professor Cornell calculated that the NPV, based on mid-range assumptions, of a typical associate degree program is over $100,000, even though under the examples he postulates the program may not comply with the Division's flawed tests.[32]

31. Astoundingly, the Division did not have its arbitrary, unsupported, and ad hoc methodology peer reviewed, despite the enormous implications for thousands of schools and millions of students. The systematic bias in the Division's actions, as established below, leads to the obvious conclusion that this failure was the result of the Division's efforts to shield its work product because the Division recognized that it was inconceivable that any mainstream economist would embrace its methodology, which so severely departs from standard economic principles.

32. For these reasons, the Division's use of the truncated 3 and 4 year periods, as opposed to the NPV methodology, is "economically irrational," and blatantly violates the Department's Quality Guidelines.[33]

---

[30] Cornell Report ¶ 21 (emphasis added).

[31] CRA Report at 6; *see also* CRA Report at 4, 13-18; Charles Diamond and Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 11-13 (Sept. 9, 2010) (submitted herewith as Exhibit 9) ("The proposed debt-to-earnings measure is vastly different from the common sense, economic measure of the returns to an investment in postsecondary education"). The curriculum vitae of Dr. Diamond is submitted herewith as Exhibit 10. The curriculum vitae of Dr. Millimet is submitted herewith as Exhibit 11.

[32] Cornell Report ¶¶ 22-25.

[33] Cornell Report ¶ 18.

2. The Division's Use Of The Truncated 3 And 4 Year Periods Is Economically Irrational Even Under The Division's Own Flawed Methodology.

33. Even if the Division's non-NPV flawed methodology reflected in the Debt to Income Test and the Loan Repayment Rate Test somehow were deemed to be a "state of the art methodology" or a "modern statistical technique",[34] which they are not, those measures still violate the Quality Guidelines because they embrace arbitrary 3 and 4 year periods, respectively, that are wholly unreflective of the value of the education.

34. As Professor Cornell explains:

> The data contained in the NPRM itself demonstrates that the Department's arbitrary selection of a three to four year period in which to measure the Debt to Income Ratio Test and Loan Repayment Test is economically irrational even under the Department's flawed methodology. In this regard, Chart F demonstrates a substantial increase "by as much as 43 percent between the first few years out of post secondary education and the sixth to tenth years out." NPRM at 43666. Thus, it makes little sense to artificially limit the period to the first three or four years.[35]

35. This conclusion is reflected in the substantial economic literature that has been developed in this field, which is extensively described in the CRA Report submitted to the Department by Professor Jonathan Guryan and Dr. Matthew Thompson. In the course of describing the results of three significant studies, they state:

> Economic studies typically find that each additional year of schooling on average raises a student's annual earning by between 8 and 15 percent.[36]

36. In a transparently flawed attempt to justify the artificially short 3 and 4 year time periods, the Division states in the NPRM that: "Some would argue that a more appropriate income measure would occur a few years after completion of the degree or

[34] Quality Guidelines at 6-8.

[35] Cornell Report ¶¶ 27-28.

[36] CRA Report at 13.

certificate, since incomes increase with age and experience."[37] But the Division claims that "this increase is true for high school diplomas as well as postsecondary education; in other words, the income gaps measured in the early years generally serve as good indicators of the income gaps in the later years."[38]

37. The Division's attempt to justify these very short time periods on the basis of the relative constancy of the income gap between high school graduates and those students who receive postsecondary education is nonsensical. Obviously, under either the Debt to Income Test or the Loan Repayment Rate Test, the increased incomes resulting from the additional education mean that the individual has more money available to pay his or her student loans, regardless of the fact that the income gap remains the same. As Professor Cornell explains:

> [B]oth of [the Division's] tests take a snapshot of certain metrics during a specific short term period. The fact that salaries rise for high-school graduates over time does not mean that students who have obtained post-secondary education at for-profit schools should be assessed solely on the basis of their lower salaries over the period immediately following completion of their programs of study.[39]

38. Professor Cornell provides the following hypothetical to "demonstrate the fallacy in the Department's reasoning":

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

---

[37] NPRM at 43666.

[38] *Id.*

[39] Cornell Report ¶ 30.

However, if the student obtains the associate degree, assume that his income reaches $42,000 by his tenth year from completing the program (consistent with data presented in NPRM's Chart F), at which point his loan repayments would constitute 8 percent of his annual income (assuming no principal repayment in the years 1 to 10 after the completion of the program). Similarly, under the Department's alternative Debt to Income Test, the ratio of debt payments to discretionary income by the tenth year is only 13%, far below the proposed threshold of 30%. This is true despite the fact that the income differential between high school graduates and associate degree students remains constant. Thus, the Department's proposed rationale for selecting the truncated three year period on the basis that it does not make any difference to the application of the Debt to Income Ratio Test because the income gap remains relatively constant is demonstrably false.[40]

3. <u>The Division's Methodology Does Not Penalize Institutions For Poor Program Quality, But Rather For Educating Disadvantaged Students.</u>

39. The Quality Guidelines mandate that the Department should "present conclusions that are strongly supported by the data" and "acknowledge any shortcomings or explicit errors in any data that is included."[41] In violation of these requirements, the Division wholly failed to recognize that the measures it adopted regarding program eligibility penalize institutions not for poor program quality, but for educating disadvantaged students. One of Mark Kantrowitz's studies found that "colleges that serve more at-risk students have lower loan repayment rates."[42] The study compared the draft Loan Repayment Rate data that the Department published in August 2010 with other Department data regarding the number of students receiving Pell Grants, which are awarded to low-income students, and found that among all types of colleges, there is a strong inverse correlation between the percentage enrollment of Pell Grant recipients and

---

[40] Cornell Report ¶ 30-32.

[41] Quality Guidelines at 6.

[42] Mark Kantrowitz, *The Impact of Loan Repayment Rates on Pell Grant Recipients*, at 1 (2010).

the loan repayment rate.[43] For example:

> [T]he average loan 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...[I]nstitutions with 40% or more Pell Grant recipients are unlikely to satisfy the 45% loan repayment rate threshold.[44]

40. This strong inverse correlation demonstrates that the Division's proposed measures would penalize programs that enroll financially needier students rather than achieve the purported purpose of the Proposed Regulation to discourage low-quality programs that do not prepare their students for gainful employment. Remarkably, the Division's data fails to address this correlation.

41. Indeed, the Proposed Regulation will treat two private sector schools that are otherwise identical – i.e., where student cost is the same at both schools and the schools generate the same job prospects for students – differently if one school enrolls students from lower-income families who have to borrow to support their educational aspirations while the other school enrolls students capable of self-financing their education.

42. Numerous other studies by well-respected economists likewise establish that repayment rates "depend on personal attributes and post-graduation life-style choices that have little to do with the economic value of the educational investment."[45] For example, Volkwein and Szelest (1995) concluded:

> Loan repayment and default behavior can be substantially predicted by the precollege, college, and postcollege characteristics of individual borrowers .... In both populations (all borrowers and proprietary), we find virtually

[43] *Id.*

[44] *Id.* at 1-2.

[45] Charles Diamond and Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 17 (Sept. 9, 2010).

> no evidence of a direct link between default behavior and type of institution or higher degree offered.[46]

43. Since income is also associated with race and ethnicity, the Division's Proposed Regulation will lead to the loss of eligibility of (or restriction on) a disproportionate number of programs in which minority students form the principal enrollees. Another Kantrowitz study found that there is a strong inverse correlation at all types of colleges between the percentage of minority students enrolled and the loan repayment rate.[47]

> [T]he average loan repayment rate is 30% at colleges with more than two-thirds minority enrollment, compared with 62% at colleges where less than a tenth of the students are minorities...The results are similar even when the analysis is restricted to public, non-profit or for-profit colleges...suggesting that a low loan repayment rate may be caused, at least in part, by the demographics of the students enrolled in a college and not just due to differences in educational quality...colleges that do not enroll minority students will generally have loan repayment rates in the fully eligible range while colleges that enroll mostly minority students will generally have loan repayment rates in the ineligible range. Colleges that enroll a mix of minority and non-minority students will tend to have loan repayment rates in the restricted zone.[48]

Indeed, 91 of the 98 historically black colleges and universities would fail to meet the 35% repayment threshold.[49]

44. Not only does the Proposed Regulation not measure program quality, but it does not empower private sector educational institutions to address the alleged problem

---

[46] J.F. Volkwein & B.P. Szelest, *Individual and Campus Characteristics Associated with Student Loan Default*, Research in Higher Education, at 36, 41-72 (quoted in Charles Diamond & Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 20 (Sept. 9, 2010).

[47] Mark Kantrowitz, *The Impact of Loan Repayment Rates on Minority Students*, at 1 (2010).

[48] *Id* at 1, 4. Indeed, the Division offered no statistical basis to establish a linkage between the repayment rate thresholds and program quality. To the contrary, "the mean repayment rate for all schools is 48%, with a standard deviation of 24 percentage points. . . . The relatively large standard deviation indicates that differences in performance are unlikely to be attributed to a single cause; e.g., program quality." *Comments of DeVry, Inc. re NPRM*, at 7 (Sept. 9, 2010).

[49] *Comments of Monroe College re NPRM*, at 3 (Sept. 9, 2010).

of excessive debt. The Department's regulations essentially prevent an institution from refusing to certify the full amount of a student loan unless that decision is made on a case-by-case basis and documented in a particular manner.[50] Moreover, the Department's guidance has been even more stringent. The Division's failure to address this issue as relevant to the NPRM and the Proposed Regulation likewise violates the Quality Guidelines.

4. The Division's Flawed Measure Of The Quality Of Student Programs Fails To Take Into Account Macroeconomic Factors Such As Recessions.

45. The impact of a recession on the tests proposed by the Department is obvious. As the nationwide employment rate hovers around 10 percent, numerous graduates of all types of institutions are having great difficulty finding a job, not because of the quality of the programs in which they enrolled, but because of macroeconomic conditions. As Professor Cornell explains, the use of 3 and 4 year measurement periods does not allow time to "smooth out" the effect of such macroeconomic events, so that the Division's use of the 3 and 4 year periods is inherently flawed:

> Moreover, the period is too short to smooth out externalities such as recessions and periods of high unemployment including the current downturn. While the cost of enrolling in a particular education program and the assumed 10-year loan repayment costs are relatively constant, the employment opportunities available to students and their earnings levels are adversely impacted in the short term by recessions and labor markets with high unemployment. Furthermore, it is during periods of slow economic growth, when opportunity costs are less that many students contemplate getting further education to expand their skill set and gain access to more employment opportunities.[51]

46. Professor Guryan and Dr. Thompson echo this point in the CRA Report:

---

[50] *See* 35 C.F.R. § 685.301(a)(8).

[51] Cornell Report ¶ 33.

> When evaluating a particular program it should be the quality of the program that should be measured, not the cost or short-term post-completion earnings. As we initially stated, the costs of a program for an individual is only "too" high when the costs exceed the lifetime benefits for the individual. The department's attempt to measure quality based on repayment rates and debt-to-income ratios is too highly correlated with the broader economy for which no institution can predict or control. Simply based on changes in macroeconomic conditions a program can move from eligible to ineligible, with no change in the quality of service being provided.[52]

47. Thus, "[b]ecause the proposed rules ignore external factors such as the state of the economy, wage growth and the rate of unemployment, they could in effect be counter-productive in that programs would be denied access to title IV funding during periods of slow economic growth – exactly the time when society should be encouraging education and re-training of the workforce."[53]

5. **The Proposed Regulation Is Based On The False Premise That Private Sector Schools Are More Expensive Than Public Sector Schools.**

48. A fundamental premise for the Proposed Regulation is the Division's insistence, purportedly based on a recent Florida study, "that for profit institutions were more expensive for taxpayers on a per-student basis due to their high prices and large subsidies."[54] In fact, the study found just the opposite: "some public programs are more expensive when the state's contribution is considered."[55] Indeed, the Florida legislature has found "that strong, viable independent for-profit colleges and universities reduce the tax burden on the residents of the state."[56]

---

[52] CRA Report at 39.

[53] Cornell Report ¶ 34.

[54] NPRM at 43618.

[55] Florida's Office of Program Policy Analysis & Government Accountability, Report No. 10-18, at 9.

[56] Fla. Stat. § 1009.891.

49. State and local subsidies to community colleges and public universities amount to approximately $7,000 per year per full-time equivalent student at public, postsecondary educational institutions. Once these subsidies are considered, private sector schools are less expensive than their public counterparts.[57]

6. The Division's Methodology Fails To Take Into Account The Proposed Regulation's Erratic Effect On Small Programs.

50. Although the Division was required to use a "state of the art methodology" or a "modern statistical technique,"[58] the Division instead adopted a methodology that does not account for the small sample size associated with smaller programs. As a result, educational programs that enroll relatively few students may be irrationally penalized not because they provide lower educational quality, but simply as a result of the exaggerated results that statistically arise when a smaller sample size is used.

51. The CRA Report vividly portrays the problem with the dramatic differences in the status of programs based on their sheer size. In explaining the relationship between sample size and the Loan Repayment Rate, the CRA Report provides the following table:

Table 8
Percent of Programs with High or Low Repayment Rates

	Less than 10% Repayment Rate	Greater than 90% Repayment Rate
Programs with 10 students or less	47.1%	21.9%
Programs with more than 10 students	1.2%	0.1%

[57] Charles Diamond & Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 3-5 (Sept. 9, 2010).

[58] Quality Guidelines at 6-8.

52. As the CRA Report concludes: "This pattern is what would be expected when calculating averages from smaller samples; it suggests that a good deal of the variation in repayment rates is due to measurement error rather than true differences across programs."[59]

7. The Specific Metrics The Division Adopted Are Irrational And Not Properly Supported

53. The Division adopted a number of specific metrics with respect to the Proposed Regulation that are both irrational and inconsistent with well-established standards.

54. **10 Year Repayment Term.** The Division did not present any relevant data to establish that the 10-year repayment term used in the Debt to Income Test is currently an appropriate length, considering borrowers' available options. Rather, it cited to a National Center on Education Statistics ("NCES") report that tracked borrowers who received their bachelor's degrees in 1992-93, almost 20 years ago.[60] This data does not reflect current practices. The majority of borrowers now choose a repayment terms of 15 years or more.[61]

55. **Median Earnings.** The Division inconsistently elected to use a median to measure debt but an average to measure earnings in the Debt to Income Test. The Division did so in a systematic effort to disadvantage proprietary institutions, thereby violating the requirement that its choices be unbiased.[62]

[59] CRA Report at 34.

[60] NPRM at 43644.

[61] CRA Report at 7 (referencing calculations reported to Drs. Guryan and Thompson by Mark Kantrowitz, publisher of FinAid.org).

[62] NPRM at 43667.

56. The NPRM disingenuously claims that the use of a median to measure debt "excludes extreme values that could otherwise skew the results." But the Division does not present any data whatsoever on this subject. As one analyst has pointed out, "It is unclear why the U.S. Department of Education is using median debt levels, because by definition half a college's students will have debt above the threshold. Cutoffs on the affordability of debt should be based on a determination of excessive debt, not typical debt. Debt at the 90^{th} percentile is a reasonable approximation of excessive debt."[63]

57. Further, the Department's use of the median does not consider whether the results could be skewed at institutions where fewer students borrow since this approach would not accurately assess the performance of the students enrolled at those institutions who do in fact borrow. Moreover, the Division presents no explanation and no data on the question of why the same reasoning allegedly supporting the use of a median to measure debt should not apply equally to measure earnings, where there can also be extreme results.[64]

58. **<u>8% And 12% Debt To Earnings Standards.</u>** The Division, in its reliance on 8% and 12% debt to earnings standards, blatantly miscites sources that do not in fact support its selection of these percentages, including the following:

59. First, the Division relies on research conducted by Dr. Sandy Baum and Mr. Mark Kantrowitz for these measures, but they are actually critical of the 8% metric, reciting a number of distinct weaknesses in the use of an 8% measurement. In a 2006

---

[63] Mark Kantrowitz, *What is Gainful Employment, What is Affordable Debt*, at 6 n.8 (rev. 2010).

[64] It is notable that the primary NCES study cited in the NPRM (B&B:93/03 Baccalaureate and Beyond Longitudinal Study) consistently uses average figures and does not appear to use median figures in its analysis.

College Board report prepared by Dr. Sandy Baum and Dr. Saul Schwartz, [65] they state the 8% metric arose from mortgage underwriting standards, and is thus based on lenders' mortgage default experiences, not on any analysis of what may be "affordable" debt levels for students.[66] They conclude that using an 8% debt to earnings ratio misguidedly adopts empirical analyses from an entirely different field (defaults of homeowners on their mortgages, rather than defaults of students on their Title IV loans). Thus, it fails to account for the fact that student borrowers are likely to have much higher incomes over time and that "[t]he percentage of income that borrowers can reasonably be expected to devote to student debt repayment increases with income."[67]

60. Even if the mortgage underwriting standard of 8%, based on the difference between the so-called "front-end" ratio (of mortgage payments to current gross income) and the "back-end" ratio (of total credit commitments to gross income), were a reasonable benchmark, underwriting guidelines currently allow a much greater range based on credit scores than the traditional spread between front-end and back-end ratios.[68] An 8% standard implies that a single percentage is applicable to all students, even though students with higher incomes are generally able to use higher proportions of their incomes to pay down debt.[69] Drs. Baum and Schwartz summarize their findings by stating that "we believe that using the difference between the front-end and back-end

---

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

[66] *Id.* at 3.

[67] *Id.*

[68] *Id.*

[69] *Id.*

ratios historically used for mortgage qualification as a benchmark for manageable student loan borrowing *has no particular merit or justification.*"[70]

61. Second, Mr. Kantrowitz writes in opposition to the 8% debt-to-income threshold in his article "*What is Gainful Employment? What is Affordable Debt?,*" asserting that the 8% threshold is "arbitrary and only weakly justified."[71] Kantrowitz states that the 8% threshold is too strict and would be particularly onerous for bachelor degree programs at for-profit colleges.[72] To the extent that the 8% threshold is based on mortgage underwriting standards, Kantrowitz asserts that transferring mortgage underwriting standards to the student loan context is based on the faulty assumption that "home ownership is a measure of the affordability of student debt."[73] He emphasizes that mortgage underwriting standards are extreme and "not reflective of typical or average borrowing patterns."[74] Instead, as Kantrowitz explains, the most common standards promoted by personal finance experts for student loan debt are 10% and 15% of income.[75] Further, Kantrowitz suggests that the Department extend the 10-year repayment term to a 20-year repayment term, which would radically modify the Department's ratio.[76]

---

[70] *Id.* (emphasis added).

[71] Mark Kantrowitz, *What is Gainful Employment? What is Affordable Debt?*, at 11 (rev. 2010).

[72] *Id.* at 14.

[73] *Id.* at 11 n.30.

[74] *Id.* at 11.

[75] *Id.* Kantrowitz's own public service financial aid website (FinAid.org), which has won awards from the College Board, the National Association of Student Financial Aid Administrators, the National Association of Graduate and Professional Students and the American Institute of Public Service, uses a loan payment calculator with both the 10% and 15% standards, and has done so for over a decade.

[76] *Id.* at 18-20.

62. Third, a sister federal agency, the General Accounting Office ("GAO"), has stated that ED itself considers the correct debt payment metric to be up to approximately 10% of income. In their report entitled "Monitoring Aid Greater Than Federally Defined Need Could Help Address Student Loan Indebtedness" (GAO-03-508), published just seven years ago, the GAO concludes that the Department has established that 10% is the appropriate "performance indicator" for borrower indebtedness. The GAO Report (page 7) states that the Department:

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

63. The Department nowhere references its own "performance indicator" in the NPRM, even though it would seem to be directly relevant to the subject, and certainly more relevant than unrelated mortgage underwriting data. For the Division to cite to Baum and Schwartz and Kantrowitz to support the proposed Debt to Income Test turns the Quality Guidelines on their head since each of these sources in fact criticizes the benchmarks the Division has chosen for that test.

64. The Division also offered essentially no support for the selection of the 12% metric. Indeed, a White House Senior Education Advisor, MaryEllen McGuire, essentially conceded that the selection of the 12% metric violated the Quality Guidelines: "the 12%, quite honestly, is just 50% more than the 8%. That was just a number that the Department felt made some bit of sense."[77]

---

[77] Transcript of comments of MaryEllen McGuire, former White House Domestic Policy Advisor and Senior Education Advisory, in call with Morgan Stanley, dated August 12, 2010.

65. The Division's misuse of these sources, the absence of any rational basis for adopting the 8% and 12% metrics, and its omission of any reference to the Department's own prior position as referenced in the GAO report, demonstrates the fatal unreliability of the Division's data and rationale for the Proposed Regulation and the need for an independent review of these issues by outside experts.

66. **Repayment Rate Metric.** The NPRM offers even less support for the 35% and 45% standards the Division adopted with respect to the repayment rate. Indeed, Ms. McGuire confirmed the lack of any rationale support for these standards and the corresponding violation of the Quality Guidelines:

> Quite honestly—we [did] something called runs where we . . . run percentages [and] look at where they land. We see, sort of, what the percentages may be in terms of who falls into the category and we think about what we believe the market can bear.[78]

67. **Inconsistent Treatment Of Debt.** The Division's inconsistent treatment of prior debt also demonstrates its flawed methodology. The Debt to Income Test recognized the unfairness of including prior debt in that calculation, and therefore excluded it. However, the Proposed Regulation inexplicably does not exclude such prior debt for an unrelated program from the Loan Repayment Rate test. The inclusion of such prior debt is completely irrational, because this unrelated debt could have no probative value in determining the merits of the program under consideration.

68. **Improper Penalties for Approved Conduct.** The Division's Proposed Regulation violates the Quality Guidelines and federal policy because it provides that students who are in federally approved loan programs and who have timely made all the

[78] Transcript of comments of MaryEllen McGuire, former White House Domestic Policy Advisor and Senior Education Advisory, in call with Morgan Stanley, dated August 12, 2010.

required payments are nonetheless counted against the school for purposes of the repayment test if they have not paid down any principal in the year under measurement. Thus, it penalizes institutions whose students take advantage of flexible loan repayment options that Congress approved and the Department elsewhere seeks to encourage.

69. The Division's rationale for this illogical position is unsupported by any data. The Division claims that the Federal Government's encouragement of deferment and repayment options "should not mean that institutions should increase the level of risk to the individual student or the taxpayer."[79] However, to the contrary, the analysis by numerous economists and others, including the GAO, presented above demonstrates that the risk of default is correlated not with the quality of the program, but with the socio-economic characteristics of the individual student.

70. **Flawed Inclusion Of Those Not Completing Program.** The metrics in the Loan Repayment Test are based on all borrowers entering repayment, not just those who completed the program. This is inconsistent with the Proposed Regulation's alleged purpose to measure program quality. It makes no sense to include a student who never completes a program in the cohort of students whose repayment record is considered in determining whether the program prepares the student for gainful employment.

B. Statistical Improprieties In The Division's Analysis Of The Effect Of The Proposed Regulation.

1. The Missouri Data Is Not Representative Of The Country.

71. The Quality Guidelines require that the Department use only information that is "accurate and reliable," and that it employ proper sampling techniques. The

[79] NPRM at 43622.

Quality Guidelines also emphasize that "influential information ... needs to meet higher quality standards."[80] As demonstrated below, the Department violated these requirements by relying upon fragmentary and unrepresentative data.

72. In evaluating the potential impact of the Proposed Regulation, the Division relied on a data set of select institutions and programs from the state of Missouri, and particularly data regarding the earnings of students (both graduates and drops) in Missouri ("Missouri Data").

73. The NPRM asserts that Missouri provides an appropriate baseline to measure the effect of the Debt to Income Test across the nation because its data, with certain exceptions, is "broadly representative" of the nation.[81] On this basis, the NPRM relies on the Missouri Data to evaluate the effect of the Proposed Regulation on the affected institutions and programs across the entire country.[82] The result is systematically to under-estimate the effect of the Proposed Regulation on proprietary institutions such as the APC colleges.

74. The NPRM's assurances blithely ignore systemic problems and gaps in the Missouri Data that demonstrate that such data is not "reliable" as the Quality Guidelines require, making the Missouri Data completely unacceptable and unreliable as a basis for projecting the effect of the regulation. The shortcomings of the Missouri Data are numerous, and include the following.[83]

[80] Quality Guidelines at 2, 5, 8.

[81] NPRM at 43669.

[82] NPRM at 43670-74.

[83] These shortcomings, and numerous others, are summarized in *Assessment of Missouri Estimate of Impact*, by Dr. Roger Brinner, Chief Economist of The Parthenon Group ("Brinner Report") (submitted herewith as Exhibit 12), which was submitted to the Department as a public comment dated September 9, 2010. The curriculum vitae of Dr. Brinner is submitted herewith as Exhibit 13. Dr. Brinner has been an

75. First, by the Department's own admission, the Missouri Data is not representative "rac[ially] or ethnic[ally]" of the national population of students that will be affected by the Proposed Regulation.[84] Missouri for-profit institutions have a 27.5% minority student population, compared to a 41% minority student population at for-profit institutions nationally. Indeed, contrary to the Division's claim that the Missouri Data is broadly representative, the Missouri Methodological Notes concede that the data presented in the study does "not completely reflect either postsecondary institutions in that state or, more generally, institutions nation-wide."[85]

76. This disparity between the Missouri Data and the national figures is very significant. As noted above, minority populations default on their student loans at a much higher rate:

> "[M]inority students contribute to lower loan repayment rates at all colleges, with loan repayment rates for minority students that are less than half the loan repayment rates of non-minority students. A college that enrolls primarily minority students is extremely unlikely to have a loan repayment rate in the eligible or restricted zones."[86]

Thus, the Department's use of the Missouri Data necessarily results in a significant understatement of the effect of the Proposed Regulation, evidencing once again the bias inherent in the Division's work.

---

economics professor at Harvard University and the Massachusetts Institute of Technology, and for more than 20 years, led the preeminent economic research group Standard & Poors/Data Resources. Dr. Brinner served as a Senior Economist with the President's Council of Economic Advisors and a Visiting Fellow with the Federal Reserve. He received a Ph.D. in Economics from Harvard University. Other shortcomings of the Missouri Data are described in *Impact of Gainful Employment on Public and For-Profit Colleges according to the Missouri data Set*, by Mark Kantrowitz (2010) (submitted herewith as Exhibit 14).

[84] NPRM at 43669.

[85] *Gainful Employment Analysis Missouri Methodological Notes,* prepared by the Department's Office of Postsecondary Education with the assistance of the Missouri Department of Higher Education (2010) ("Methodological Notes"), at 4, and available at http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.

77. Second, the Missouri sample that the Division used has many shortcomings with respect to debt levels, including the following:

- The Missouri Data includes only federal debt, even though the Proposed Regulation requires the inclusion of all debt (including private debt) in the Debt to Earnings Test. This oversight results in a significant understatement of the number of programs that would be rendered ineligible. The Department's own data establishes that private loans constitute 6 percent to 25 percent of total student debt, depending on the type of institution and degree type.[87] The inclusion of these additional loans would necessarily increase the debt to earnings ratio, thereby leading to increased ineligibility.

- The Missouri Data omitted students with zero federal loans. The Brinner Report found that "[i]nterviews with loan officers indicate that ~10% of students have no federal loans but do have private loan debt."[88]

- The Missouri Data reflects 2008 debt levels, and fails to account for the increased debt levels that have risen at an annual rate of 8.2 percent.[89]

78. Third, the Missouri sample that the Division used has many shortcomings with respect to income, including the following:

- The Missouri Data did not account for students who were unemployed for the full year. The Bureau of Labor Statistics ("BLS") estimates that 1.7 percent of the workforce is unemployed and seeking a job for a period greater than one year.[90]

- The Missouri Data did not account for students who had left the workforce. BLS estimates that 17 percent of 25-34 year olds are not part of the labor force.[91]

- The income levels reflected in the Missouri Data are not representative of national averages.[92]

---

[86] Mark Kantrowitz, *The Impact of Loan Repayment Rates on Minority Students*, at 4 (2010).

[87] *See* National Post-Secondary Aid Study, United States Department of Education (2008); Brinner Report at 4.

[88] Brinner Report at 4.

[89] *Id.*

[90] *Id.* at 5.

[91] *Id.*

[92] *Id.*

➢ The income levels reflected in the Missouri Data are for 2008, and thus do not reflect the increase in the unemployment rate.[93]

79. Fourth, the Missouri Data did not capture students enrolled in cosmetology programs even though such students make up a significant portion of the national student body in vocational-oriented programs that the Proposed Regulation affects and a particularly large portion of students enrolled at institutions that offer a single program or cluster of closely related programs. By the Department's own estimation, cosmetology schools make up 38% of Missouri's for-profit institutions,[94] a remarkably large fraction to omit from the base data. Thus, the Department's use of the Missouri Data again necessarily results in a significant understatement of the effect of the Proposed Regulation.

80. Fifth, the Missouri Data did not include any non-degree seeking students,[95] so it is entirely unclear how this data can support projections of the impact of the Proposed Regulation on certificate programs.

81. Sixth, the Missouri Data included drop-outs and stop-outs,[96] even though the Debt to Income Test will be based on the performance of graduates only, so the student populations are not congruent.

82. Seventh, the Missouri Data did not include data regarding any students who were enrolled in educational programs in which five or fewer students exited the

---

[93] *Id.*

[94] Methodological Notes at 3.

[95] Methodological Notes at 2. This exclusion is particularly problematic since it would suggest that the Division had no information from Missouri regarding certificate and diploma students, but the NPRM includes projections of the Proposed Regulation's effect on such programs.

[96] *Id.*

program, which could be a significant fraction of the relevant student population.[97] Two researchers reported that 55.3% of all programs at career colleges had five or fewer students who graduated or withdrew (i.e, "exited") in the relevant period.[98] The Missouri Data would not capture any of these programs or student borrowers.

83. Eighth, although the Division recognized in the NPRM that the effect of the Proposed Regulation would fall primarily on for-profit schools, it incomprehensibly did not base its projections on a sample of such institutions. Rather, "more than half of the programs analyzed by the Department of Education are not for-profit programs."[99]

84. Ninth, the Department has released back-up information for the Missouri Data indicating that the state's records would provide information with respect to approximately 80,000 students who graduated or withdrew.[100] However, companion information released by the Department indicated that Missouri only produced data with respect to 48,803 exiters[101] or 61.6 percent of the expected population. This suggests that fully 38.4% of the relevant student population was excluded from the data that the Division relied on in preparing the NPRM and projecting the results of the Proposed Regulation.

---

[97] *Id.* at 3.

[98] CRA Report at 34. To assess the possible impact of the proposed gainful employment rule, Professor Guryan and Dr. Thompson collected data from for-profit colleges, receiving responses from 308 schools, representing approximately 450 campuses, including information on approximately 10,000 programs and more than 600,000 students. The sample accounts for more than one-fifth of all students in for-profit colleges. In contrast, the Division conducted no such survey and collected no such representative data upon which to base its analysis.

[99] *Id.* at 25.

[100] NPRM Data Analysis Contract, Number ED-OPE-10-P-0025, provided to Dow Lohnes by the U.S. Department of Education on December 7, 2010 in response to FOIA request (submitted herewith as Exhibit 15).

[101] *See* spreadsheet titled "Data Used to Model the Effects of the Program Integrity (Gainful Employment) NPRM," available at http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.

2. The Division's Flawed Methodology Leads To An Enormous Understatement Of The Number Of Programs Rendered Ineligible.

85. Despite these substantial problems, which significantly skewed the results to minimize the effect of the Proposed Regulation, the Division elected to use the Missouri Data to project the effect of the Proposed Regulation on program eligibility. Using the flawed Missouri Data, the Division found that 6.2% of programs in Missouri would be rendered ineligible and 9% of programs in Missouri would be subject to enrollment restrictions under the Proposed Regulation.[102]

86. Based on these flawed and understated projections regarding Missouri, the Division estimated that, on a national basis across all sectors, approximately 5% of affected educational programs (representing 8% of student enrollments) would lose eligibility and 7% of such programs (representing 8% of student enrollments) would be subject to enrollment restrictions, figures even lower than the understated Missouri projections.[103]

87. The Division's projections of the effect of the Proposed Regulation is based on two other leaps that are not supported by reliable data. The Department acknowledges that it does not have a firm figure for the number of educational programs covered by the Proposed Regulation, but is using 52,980 as a rough estimate.[104] In addition, the Department acknowledges that it has not calculated Loan Repayment Rates at the level of the individual educational programs to conform to the way in which the Proposed Regulation will be implemented, but instead is working with draft rates

[102] Mark Kantrowitz, *Impact of Gainful Employment on Public and For-Profit Colleges According to the Missouri Data Set*, at 1 (2010).

[103] NPRM at 43671.

calculated at the level of the entire institution.[105] Clearly, the Division's projections are based on data that is woefully incomplete, in violation of the requirements of the Quality Guidelines, especially the requirement that "influential information" must meet "higher standards" of reliability.

88. Numerous knowledgeable analysts have found the Division's figures to be greatly underestimated, especially for programs at for-profit institutions, because of the flaws in the Missouri Data upon which the Division relied. For example:

- In evaluating the affected student population on a national basis, Dr. Brinner estimated that 30% of all students in for-profit institutions would find their programs are ineligible and 26% of all such students would find their programs are subject to enrollment restrictions.[106]

- The CRA Report found that "if one calculates the failure rate using the data on Missouri programs that the Department made public, 26 percent of for-profit programs fail the test, and an additional 30 percent of programs would be restricted," numbers far in excess of the Division's estimates.[107]

- After making adjustments for the flaws in the Missouri data, Mr. Kantrowitz estimated that 26.1% of programs at for-profit institutions would lose eligibility and 30.1% of programs at for-profit institutions would be subject to enrollment restrictions.[108]

89. The Quality Guidelines were issued in furtherance of the sound public policy to enable Department decision-makers to evaluate accurately the data (and the impact of their regulations based on that data) before them. In this case, the Missouri Data is so unreliable and the NPRM's projections of the results of the Proposed

---

[104] NPRM at 43675.

[105] NPRM at 43668.

[106] Brinner Report at 6.

[107] CRA Report at 25-26.

[108] Mark Kantrowitz, *Impact of Gainful Employment on Public and For-Profit Colleges According to the Missouri Data Set*, at 1 (2010).

Regulation are so far off base that Department decision-makers are unable to evaluate the effect of the Proposed Regulation.

3. Additional Improprieties In The Division's Calculation Of The Effect Of The Proposed Regulation.

90. There are a number of other glaringly questionable and unsupported assumptions in the Division's projections regarding the effect of the Proposed Regulation.

91. First, as the lynchpin of its assumption that the Proposed Regulation would ameliorate the debt that students incur, the Division suggests that institutions would "adjust their pricing as a result of the regulation."[109] However, institutions cannot control the amount of debt students incur, and students typically borrow amounts in excess of tuition to cover, among other things, living costs.

92. Second, the Division's estimates wholly fail to account for the effect that students transferring from an ineligible program to an eligible program may have on the continued eligibility of the program to which the student transfers. As noted above, the students in putatively ineligible programs are predominately disadvantaged students who do not have the family resources to fall back on to make repayments. If a large number of low-income students are forced to transfer from ineligible to eligible programs, the loan repayment rates in the programs receiving those transferees are likely to drop significantly, potentially subjecting those programs to restrictions or jeopardizing their eligibility under the repayment rate metrics.

93. Third, the Division assumes (with no empirical basis) that only around 10 percent of the students in ineligible or restricted programs will discontinue their

[109] NPRM at 43668.

education. As the CRA Report establishes, this estimate is unreasonable because it assumes: (a) that 90 percent of the students will be able to find a comparable program in the same field at either the same institution or a different institution; (b) that these other programs (if they exist) will be equally convenient; (c) that the student will be accepted into the transfer program; and (d) if a comparable transfer program is not available, the student will change his or her entire field of study.[110]

94. Fourth, the Division assumes that roughly 50 percent of students in ineligible 4-year programs will transfer to eligible two year programs and vice-versa. Common sense suggests that it is unreasonable to assume that students would change the length of the program they wish to attend, either lengthening or shortening their education by a full 2 years, in this manner.

C. The Division's Methodology For Implementing The Proposed Regulation Violates The Quality Guidelines.

1. The Division's Methodology Improperly And Unnecessarily Relies Upon Secret Data.

95. The Quality Guidelines provide that the Department "will assure" the reproducibility of "influential" information or data.[111] This provision is intended to ensure that the public and more particularly regulated parties have an opportunity to test the accuracy of data and methodologies that the Department uses. Data must be accessible in order for calculations or analyses based on it to be reproducible. The Quality Guidelines further provide that where the public cannot access the data due to privacy concerns, "the Department will apply especially rigorous robustness checks to

---

[110] CRA Report at 27.

[111] Quality Guidelines at 10.

analytic results and document what checks were undertaken."[112]

96. Remarkably, instead of complying with the Quality Guidelines, the Division instead elected to rely upon secret data that is unavailable to the affected institutions to calculate compliance with both the Debt to Income Test and the Loan Repayment Rate Test, in effect mandating that the institution accept the data as correct. The use of such secret data prevents the regulated parties from testing the Department's data. Use of such secret data therefore violates the Quality Guidelines, particularly in light of the fact that use of such secret data is not necessary.[113]

97. With respect to the data necessary to compute compliance with the Debt to Income Test, the Division reversed its earlier plan to use Bureau of Labor Statistics ("BLS") data, even though the BLS data would have provided several advantages. First, BLS data is publicly available and thus has none of the concerns attributable to the use of secret individual earnings data that the Proposed Regulation envisions. Second, the BLS data is derived from a broader population. Therefore, it is subject to less variation due to sample size and macro-economic forces than individual earnings data. Third, the earnings data the Proposed Regulation contemplates would not be obtainable until some time in the future (if at all) after students have incurred their debt, whereas the BLS data is available now. Accordingly, use of the BLS data would enable institutions to plan intelligently for compliance with the Proposed Regulation.

---

[112] *Id.*

[113] The use of such secret data also constitutes a due process violation. *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 60-63 (D.C. Cir. 1999) ("It is well-established that a party is entitled to know the issues on which the decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation") (internal citation omitted).

98. Similarly, the information necessary to calculate the Loan Repayment Rate Test, which turns on payments that reduce the loan principal in the relevant fiscal year, is not available to regulated institutions. There is no valid reason why that information could not be made available through the National Student Loan Data System ("NSLDS"), the Department's national database for Title IV student loan information. Institutions may access NSLDS to generate many types of reports to track how the institution and its students are performing under their Title IV loan obligations, including their cohort default rates ("CDRs"). However, the Division failed to provide any mechanism for institutions to access the data used to calculate the Loan Repayment Rates to test those calculations or monitor their own performance. Indeed, the Division advised schools that they would not be able to access all the parts of the NSLDS database necessary to replicate the "complex" queries that the Division used to calculate estimated repayment rates.

99. The Division's approach is particularly troubling because the Proposed Regulation veers from the longstanding regulations for calculating Cohort Default Rates ("CDRs") to change the way in which certain categories of loans are counted for purposes of the Loan Repayment Rates without providing any back-up data on the subject. Loans that are in deferment, forbearance, consolidation or on income-contingent repayment status, which have been counted favorably for CDRs, would be counted against an institution in the Loan Repayment Rates. The Department undoubtedly has considerable data regarding the number of borrowers that have loans in deferment, forbearance, consolidation or income-contingent repayment status. However, the Division has proposed a major change in the treatment of such loans for the Loan

Repayment Rates without presenting any data on the number of loans that might be affected or the expected impact of the change.

100. Indeed, based upon information and belief, we understand that the Division actually directed its contractors that provide loan servicing and NSLDS maintenance services to reject institutional requests for information necessary to calculate their Loan Repayment Rates. This is directly contrary to both the letter and spirit of the DQA and the Quality Guidelines.

2. **Social Security Or IRS Earnings Data Are An Inappropriate Measure Of Gainful Employment.**

101. SSA and IRS data, which the Department suggests it may use for earnings, are an inappropriate measure of gainful employment for multiple reasons, including the following:

102. First, SSA and IRS data do not provide information regarding the number of hours or weeks worked by the individual in question. Thus, it is impossible to determine whether the income reported reflects a job obtained at the beginning of the relevant year, or at the end, or somewhere in the middle. The use of such data would systematically understate the actual yearly income of many individuals because the great majority of graduates do not commence their employment on January 1.

103. Second, earnings data is not directly correlated to the value of the education for a variety of other common sense reasons. For example, people make employment decisions based on a variety of factors, including familial obligations, location, and scheduling issues. These say nothing about the value of the education. As the National Association of Student Financial Aid Administrators commented:

> Zero incomes are ambiguous, as they may indicate unemployment due to poor training, or a personal choice by a program graduate to stay home to raise a family rather than working, or a host of other situations including death or disability. Low income might reflect part-time employment, which could be underemployment due to underpreparation, or, again, a personal choice. Low income across a set of program graduates might be indicative of an economic downturn in just one geographic area or a temporary reversal of need for a particular career field due to general economic conditions.[114]

In addition, as noted previously, macro-economic conditions have a huge impact on whether individuals can obtain employment, regardless of the quality of the education.

104. Third, self-employed workers may understate their actual income, or set up corporations which distribute only part of the income in any given year.

105. Fourth, SSA earnings data excludes individuals' deductions for costs such as medical care, child care, and other elective deductions. Moreover, data for self-employed individuals is the net income reflected on Schedule C of their federal income tax returns, and thus will not reflect income spent on deductible items like insurance and business travel.[115]

D. The Division Failed To Consider The Enormous Costs That The Proposed Regulation Would Impose On States And Community Colleges.

106. The Proposed Regulation would impose enormous costs on the already overburdened states and community colleges in several respects. First, community colleges that already face ballooning enrollments and flat or declining budgets will have to expand in order to enroll the large number of students who cannot pursue their studies at for-profit institutions that have closed or reduced their program mix due to the

---

[114] *Comments of National Association of Student Financial Aid Administrators*, at 2 (Sept. 9, 2010).

[115] Charles Diamond & Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 38 (Sept. 9, 2010).

Proposed Regulation. Second, "[g]iven capacity limits in community colleges and a downward trend in per-capita state support of higher education, a significant shift in enrollment from for-profit colleges to community colleges would likely lead to significant increases in tuition rates and student debt at community colleges, perhaps by as much as 40% and 75%, respectively."[116]

E. <u>The Division Failed To Consider The Enormous Societal Costs Of The Proposed Regulation.</u>

107. The Quality Guidelines require that the Department "acknowledge any shortcomings" in the information upon which it relies.[117] As established below, the Division wholly failed to comply with this requirement because it failed to conduct an appropriate cost/benefit analysis, neglecting even to address the mammoth amount of lost income and taxes the Proposed Regulation would likely cause.

108. Even though the Division failed to address the loss of income the Proposed Regulation would cause, publicly available U.S. Census Bureau data combined with the expert reports previously examined permit an approximate estimate to be made. As demonstrated below, these studies establish that the Proposed Regulation, under the most conservative estimates, poses the grave risk of:

- **causing from 1.775 to 2.6 million students to discontinue or not receive additional education over the next 10 years;**
- **depriving students of the additional income they would have earned from this additional education, which according to Census Bureau statistics for associate degree graduates is approximately $400,000 per student;**

---

[116] Mark Kantrowitz, *The Impact of Loan Repayment Rates on Minority Students*, at 6 (2010). *See* Robert J. Shapiro & Nam D. Pham, *Taxpayers Costs to Support Higher Education: A Comparison of Public, Private Not-for-Profit, and Private For-Profit Institutions*, (2010).

[117] Quality Guidelines at 5.

- **costing students (principally those with low income) who would have attended an institution of higher education in the next ten years but for the Proposed Regulation between $198 billion and $291 billion in lost income;**
- **costing the United States and state governments between $45 billion and $67 billion in lost taxes;**
- **costing states billions of dollars in additional subsidies to community colleges;**
- **while saving less than $10 billion in defaults on student loans over the next 10 years.**

109. The Division's wholesale refusal to address these issues is a blatant violation of the Quality Guidelines, and deprived not only the public, but also Department decision-makers, of the ability to make an informed judgment. It is all the more troubling since the NPRM discusses other social impacts such as the costs of loan subsidies and consequences of default,[118] but makes no mention of these broader social and financial issues that reflect the severe impact of the Proposed Regulation.

110. As described below, the lost income figures are easily derived by multiplying the number of students who are projected not to proceed with their postsecondary education times the graduation rate times the income that would have been derived from such education.

1. The Proposed Regulation Will Result In At Least 1.775 Million Students Not Continuing Their Education In The Next Ten Years.

111. As established above, employing more realistic and granular assumptions than the Division, the CRA Report made a mid-range estimate of the number of students who would discontinue or not receive additional education as a result of the Proposed Regulation over the next 10 years: approximately 1.775 million students.[119] This figure

[118] NPRM at 43621-22.

[119] CRA Report at 29.

includes 1.1 million female students, approximately 315,000 Non-Hispanic Black students, and more than 290,000 Hispanic students.

112. Consistent with these figures, according to another study, more than half of minority students (57%) enrolled at for-profit colleges are enrolled at colleges with programs that could lose eligibility, based on projected draft Loan Repayment Rates of less than 35%.[120] Almost a third of minority students (30%) enrolled at for-profit colleges are enrolled at colleges with programs that could be subject to enrollment restrictions, based on projected draft Loan Repayment Rates between 35% and 45%.[121]

113. In another study, after adjusting the Missouri Data to reflect some of the shortcomings identified above, Dr. Brinner estimated that over 1 million students nationwide would be enrolled in ineligible programs each year.[122] He further concluded, after examining driving times, absence of community college alternatives, and other factors, that approximately 40 percent, or 400,000, of these students would discontinue their education each year.[123]

114. In light of these studies, the Division's seat-of-the pants, unsupported assumption that students in 95 percent of the programs displaced by the Proposed Regulation would continue their education grossly underestimates the effect of the Proposed Regulation and violates the Information Quality Guidelines. Indeed, among other things, it defies common sense to assume that other schools would welcome these students with debt profiles that rendered their first school subject to sanctions. And many

[120] Mark Kantrowitz, *The Impact of Loan Repayment Rates on Minority Students*, at 5 (2010).

[121] *Id.*

[122] Brinner Report at 8.

[123] *Id.*

public schools are trying to reduce enrollment, not increase it, because of a shortage of funds: "Across the nation, cash-strapped public universities have limited, capped or even reduced enrollment to cut costs."[124]

2. The Value Of Additional Income That Will Be Lost.

115. Census figures show that that students with associate degrees earn $1.6 million over their lifetimes, whereas students with high school diplomas make $1.2 million,[125] a difference of $400,000 in lifetime earnings. Based on these census figures, Professor Cornell provided an estimate of the NPV of a 2 year education, calculated as follows:

> Consider a hypothetical average student who is considering enrollment in a 2-year associate degree program that will have a total present value cost equal to $30,000.[126] This program will enhance the earnings capacity of the student throughout his working life, and assume that the present value of the ***entire stream of incremental earnings*** is equal to $150,000.[127] After deducting tuition costs of the education of approximately $30,000, and allowing for additional opportunity costs (assumed to be approximately $20,000), the degree still represents a net present value in excess of $100,000.[128] Thus, financing the education is clearly an easy investment decision to make under the NPV rule – the student should go

[124] Eric Ferrarri, *State May Cap UNC's Growth*, News Observer (2010), available at http://www.newsobserver.com/2010/05/29/505976/state-may-cap-uncs-growth.html.

[125] Data from the U.S. Census Bureau establishes that students with associate degrees earn $1.6 million over their lifetimes, whereas students with high school diplomas make $1.2 million. *See* Jennifer Cheeseman Day & Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, at 3-4 (2002).

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

[127] The present value of the $400,000 of incremental earnings is approximately $150,000, assuming a 40-year earnings period and 6% discount rate. The discount rate accounts for the interest costs attributable to loans used to finance the education.

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

ahead with the enrollment and the associated costs and the government should provide access to funding through loans if the student requires it.[129]

3. The Enormous Societal Costs The Proposed Regulation Imposes.

116. The societal impact of the Division's Proposed Regulation is daunting. If one multiplies the CRA Report's mid-range estimate of 1.775 million students that the Proposed Regulation deprives of further education over the next ten years, times the graduation rate of approximately 28% for students enrolled at two-year for-profit institutions,[130] times the $400,000 of income per student that would be lost, the result is $198,800,000,000 ($198.8 billion).

117. And these are the mid-range conservative estimates. Under the CRA Report's calculations, if "placing the 'restricted' label on programs were to cause them to shut down," and "assuming that 50 percent of potentially affected students would attend college, more than 2.6 million fewer students would attend college over the next decade as a result of the rule."[131] Assuming $400,000 of lost income per student, the total loss of income resulting from the Proposed Regulation for students who would have attended an institution of higher education in the next ten years could be over $291 billion. Under the above methodology, employing Dr. Brinner's estimate of 400,000 students per year who would discontinue their education yields even starker results: $448 billion.

118. The effect on tax revenues is likewise enormous. Assuming a modest 22.9 percent combined average state and local tax rate,[132] and employing the CRA Report's

[129] Cornell Report ¶ 22 (emphasis and footnotes in original).

[130] Graduation rate for students enrolled in associate degree programs at APC member colleges.

[131] CRA Report at 30.

[132] Dr. Brinner assumes a federal tax rate of 15.2 percent and state/local tax rate of 7.6 percent, for a combine rate of 22.9 percent, based on data from the Congressional Budget Office, total income and total

midrange conservative estimate of 1.775 million students not furthering their education in the next ten years, the lost tax revenue the Proposed Regulation would cause exceeds $45 billion for this group of students, while using the 2.6 million estimate results in a tax loss of $67 billion.[133] If one adopts Dr. Brinner's analysis, then the loss in tax revenue for students who fail to further their education in the next ten years as a result of the Proposed Regulation is even larger, over $102 billion.

119. While these figures use associate degree earnings as a proxy for earnings of all students who would have obtained post-secondary education but for the Proposed Regulation (including those who would have attended only some college and those who would have attended four year or more programs), these figures likely greatly underestimate the effect of the Proposed Regulation. The difference between the average lifetime earnings of a high school graduate and a student obtaining a four year degree, according to U.S. Census Bureau figures, is $900,000, over twice the difference between the average lifetime earnings of a high school graduate and a student obtaining an associate degree. By comparison, the lifetime earnings of those only having some college, according to U.S. Census Bureau figures, is $1.5 million, only slightly less than the $1.6 million for an associate degree.[134] Moreover, according to the NPRM, there are far more students enrolled in private for-profit four-year degree granting institutions than in private for-profit less than two year institutions.[135] Finally, the income figures do not

federal tax liabilities for all households, by household income category, 1979-2005. Brinner Report at 9 n.25.

[133] Under a NPV analysis, at $100,000 lost income per student and assuming a modest 22.9 percent combined average state and local tax rate, the lost taxes exceed $24,000,000,000 ($24 billion).

[134] *See* Jennifer Cheeseman Day & Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, at 4 (2002).

[135] NPRM at 43669.

account for fringe benefits (which comprise between 30 and 35 percent of a worker's total compensation). "[E]conomists have long recognized that individuals investing in higher education earn greater fringe benefits" and have "greater employment stability" than those who did not obtain such education.[136]

120. In any event, the incredible magnitude of the losses predicated on the lifetime earnings of a student with an associate degree, and the Division's failure to examine these issues demonstrates the Division's total failure to "acknowledge the shortcomings" in its approach.[137]

121. The Division's failure to consider the dramatic societal effects of its Proposed Regulation is even more egregious when the lost income and tax revenue is compared to the cost of defaulted loans that the Proposed Regulation is designed to ameliorate. The Division misleadingly claims that it loses $1 billion per year (on an NPV basis) for all the loans defaulting in a given year:

> While the Government covers the costs of defaults on Federal student loans ($9.2 billion in fiscal year 2009), ultimately the cost of defaults is mitigated by the Department's success in collection using such tools as wage garnishment, Federal and State tax refund seizure, seizure of any other Federal payment, and Federal court actions. As a result, the projected taxpayer cost of defaults is less than one percent of the total annual amount of loans. Nonetheless, these costs can be significant. Based on historical collections, the net present value cost of the $9.2 billion of loans that defaulted in fiscal year 2009 is estimated at less than $1 billion.[138]

122. In fact, to the contrary, the Office of Management and Budget ("OMB") budget tables for recent years demonstrate that the government recovers more than 100

[136] Charles Diamond & Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 14 (Sept. 9, 2010).

[137] Quality Guidelines at 5.

[138] NPRM at 43646.

cents on the dollar (including interest and penalties) on defaulted loans. Indeed, the proposed budget for fiscal year 2011 projects a 122 percent recovery rate for federally guaranteed higher education loans.[139]

123. Even assuming the Division's $1 billion NPV loss figure is correct (which is inconsistent with the OMB data), and even assuming that the Proposed Regulation would eliminate 100% of defaults (a clearly unreasonable assumption), and even multiplying that $1 billion number by ten to reflect ten years of results, this $10 billion is still a pittance compared to the lost income (under conservative estimates) of $198 billion to $291 billion for students who would have graduated in those same ten years but for the Proposed Regulation.

124. Thus, even a rudimentary cost/benefit analysis establishes that in promulgating the Proposed Regulation, the Division disseminated shockingly incomplete information, depriving Department decision makers of an appreciation of the enormous costs the Proposed Regulation would impose.

125. The pernicious effects of the Proposed Regulation do not stop there, however. Among other things, it "will result in many quality education programs no longer being eligible for Title IV funding." And the Proposed Regulation "will have dire consequences for the racial and gender composition of students enrolled in postsecondary programs."[140]

---

[139] Office of Management and Budget, *U.S. Government Budget FY 2011, Federal Credit Supplement,* Tbl.4, *available at* http://www.gpoaccess.gov/usbudget/fy11/cr_supp.html.

[140] Charles Diamond & Daniel Millimet, *Report In Response To DOE Proposed Regulatory Changes*, at 22 (Sept. 9, 2010).

CONCLUSION

126. The Division violated its own Quality Guidelines, and the underlying principals and purpose of the DQA, in numerous respects, departing significantly from standard and well-accepted economic and statistical principles.

WHEREFORE, APC respectfully requests that the Department:

A. Withdraw the gainful employment Proposed Regulation pending further study in conformance with the Quality Guidelines;

B. Convene a group of outside experts, including economists and statisticians as well as representatives of institutions, to study the possible effects of the Proposed Regulation; and

C. Convene a group of outside experts to examine alternatives to the Proposed Regulation (including the comparative benefits of expanded disclosures rather than increased eligibility standards) to accomplish the Department's stated goal to improve postsecondary education.

Respectively submitted,

Michael Hays

Michael D. Hays

Jonathon C. Glass

Jonathon C. Glass

Counsel to the Association of Proprietary Colleges

Date: February 1, 2011