TO: Committee Members
FROM: Richard Heath and Kevin Jensen
DATE: September 30, 2013
RE: Issues with the Department's 8/29/13 Draft Gainful Employment Regulations

There are several key problems with the U.S. Department of Education's draft gainful employment regulations that will impose significant costs and regulatory burden that do not ultimately produce enhanced outcomes for students or targeted examination of troubled programs. These problems include:

- Debt-to-earnings measures are applied to colleges where the vast majority of students do not borrow and are not experiencing any significant debt burden.
- Exemptions applied to debt measures do not extend to reporting and disclosure requirements.
- Privacy and data integrity concerns for small programs.

Unfortunately, the burdens placed upon institutions to report and disclose this information will increase program costs and may lead to the closure of smaller programs with lower tuition and fees. If these programs are forced to close, it will reduce the ability of students to attend low-cost gainful employment programs. Solutions to these problems are straightforward and consistent with the overall intent of the gainful employment regulations to protect students from enrolling in programs of low-quality as evidenced by high levels of indebtedness.

<u>Proposal 1</u>: Reinstate provisions from the 2011 final rule that specify gainful employment programs in which median loan debts are zero shall be automatically exempted from any further eligibility determinations or DTE calculations. Institutions could certify to the Department that the majority of their gainful employment program completers have not borrowed any federal loans. The statement would be certified by audit.

> <u>§668.404 Calculating D/E rates:</u>
>
> <u>(f) Rates not calculated. The Secretary does not calculate D/E rates for a GE program if--</u>
> *<u>(4) The federal median loan debt of the program is zero.</u>*

<u>Comments:</u> Debt measures under the 2013 draft rules are calculated for programs in which only a minority of students borrow, so long as those institutions have the requisite number of completers and data matches from SSA to make such calculations. These calculations are unnecessary for some programs. The central objective of the gainful employment metrics is to ensure that students do not incur loan obligations they cannot repay after completing their programs. At community colleges, where program costs remain highly affordable, the majority of participants (and completers) do not borrow any federal loans.[1] Programs in which fewer than half of completers do not borrow will, by definition, have a median federal loan debt of zero. Because the current draft regulations only make debt-to-earnings

[1] The federal borrowing rate at two-year public institutions is 16.7%. Radwin, D., Wine, J., Siegel, P., and Bryan, M. (2013). *2011–12 National Postsecondary Student Aid Study (NPSAS:12): Student Financial Aid Estimates for 2011–12 (NCES 2013-165).* Institute of Education Sciences, U.S. Department of Education. Washington, DC: National Center for Education Statistics.

(DTE) calculations for Title IV recipients, the metrics ignore the majority of students who do not borrow or receive other Title IV assistance.

The final 2011 gainful employment rule stated that programs with a median loan debt of zero would automatically satisfy the DTE metrics based on the sound policy that federal policies should encourage institutions to keep borrowing to a minimum. The provision was identified by the Department as a “logical extension” of the debt-to-earnings metrics. There are other provisions within the previous draft rules that cite concern with high levels of student indebtedness:

- **July 2010 Draft Rule Preamble:** The proposed standards for institutions participating in the Title IV, HEA programs are necessary to protect taxpayers against wasteful spending on educational programs of little or no value that also lead to *high indebtedness for students.* The proposed standards will also protect students who often lack the necessary information to evaluate their postsecondary education options and may be misled by skillful marketing, resulting in significant student loan debts without meaningful career opportunities.

  …The proposed regulations are intended to address growing concerns about *unaffordable levels of loan debt* for students attending postsecondary programs that presumptively provide training that leads to gainful employment in a recognized occupation…. The Department would consider that a program prepares students for gainful employment if the loan debt incurred by the *typical student* attending that program is reasonable.

- **June 2011 Final Rule Preamble:** The legislative history of the gainful employment requirement bears directly on the issues now emerging in the data. Congress was concerned that the availability of federal student aid, particularly in the form of loans for some types of programs and institutions might lead to *students taking on more debt* than is reasonable given the earnings that could be expected. … Finally, we are revising the regulations to provide that programs with a median loan debt of zero are meeting the measures. *This clarification is a logical extension of the debt measures* since programs with a median loan debt of zero are not placing any debt burden on the majority of their students.

Furthermore, in the case *Ass'n of Private Sector Colls. & Univs. v. Duncan* (2012), Judge Rudolph Contreras of the U.S. District Court for the District of Columbia supported the Department’s overall application of the debt metrics as constructed in the June 2011 final rule based on the targeting of programs that have high levels of borrowing and default among all students:

> The Department’s determination that the debt measures *appropriately measured* whether a program prepared its students for gainful employment in a recognized occupation rather than a program’s demographics was therefore not arbitrary. Nor was its decision to promulgate tests affected by students’ professional choices arbitrary: the D.C. Circuit has already rejected that argument in an analogous context. See *Ass'n of*

> *Accredited Cosmetology Schools v. Alexander,* (1992) holding that it was "clearly rational" for Congress and the Department to "solve the problem of increasing …defaults by eliminating schools evidencing a *disproportionately large share of the defaults*" even though such an action would "punish schools for their students' rates of default."

This "appropriate measurement" in the 2011 rules included a provision exempting programs with a medial loan debt of zero. It appropriately applied debt measures to assess student outcomes – not just Title IV or borrower outcomes – by directly addressing the eligibility of programs consisting primarily of non-borrowers. The current draft regulations do not do so.

Proposal 2: Eliminate the calculation of "attendance dates and enrollment status during the award year" under §668.409(1)(v) – Reporting requirements for GE programs – for programs that are either passing under the debt measures (§668.403) or exempt from DTE calculations altogether (§668.404(f)).

Comments: All institutions, regardless of size or status, must report data elements to ED that are difficult, if not impossible, to provide, and they come at great institutional expense While it is reasonable to require that some of these data be reported, in part because they are in standard reporting elements, others present complications in both their definition and the staff time required to collect it. For each student in a program, an institution must report:

- Student identifiers linked to institution
- Name, CIP code, credential level, and normal time of program
- Date of completion or withdrawal
- Private and institutional loan amounts
- Date of initial attendance
- Attendance dates and enrollment status during the award year
- Explanation for any missing data

Many students attend certificate programs part-time due economic, work, or family responsibilities. Some of these part-time students often "drop-back" on their enrollment by reducing their course load or stopping out completely before resuming their studies. This produces irregular attendance patterns. Determining attendance dates is particularly difficult when a student does not initiate a formal withdrawal process and at institutions where attendance is not calculated. To assemble the individual information about such interim statuses of each Title IV student in a program would present significant administrative burden and would provide relatively little useful data about program quality to ED. The date of initial attendance, completion, or withdrawal should be sufficient to identify a students' current or former participation in a given program. Limiting disclosures from passing or exempt programs also provides regulatory relief for high-quality programs.

Proposal 3: Modify §668.409(2)(ii) regarding "the total amount the student received from private education loans for attendance in the program." Instead, an institution should be

able to provide a statement for gainful employment reporting that attests "no private or institutional loans are certified, offered, or provided for ANY program at this institution." Under a new §668.409(3):

> *Whether an institution certifies or offers private education loans or provides institutional financing plans for attendance in the program; and*
> *(i) if the private education loans or institutional financing plans are provided and the information is available: the total amount the student received from private educational loans for attendance in the program and the total amount of debt arising from institutional financing plans the student owes the institution upon completing or withdrawing from the program*

Comments: "Private and institutional loan amounts" are often unavailable or inapplicable to students in gainful employment programs. Most community colleges, for example, do not certify private educational loans and are thus unaware of students' use of such loans, which only occur in very rare circumstances. Pursuant to Section 155 of the Higher Education Act (HEA) of 1965, as amended, and to satisfy the requirements of Section 128(e)(3) of the Truth in Lending Act, a lender must only obtain a self-certification signed by the student applicant before disbursing a private education loan. But the institution of higher education need not review this form and has no way of requiring students to present it. Most institutions discourage private loan borrowing when federal loans are otherwise available. Furthermore, the overwhelming majority of community colleges offer no institutional loans – only tuition and fee installment plans which are repaid by the end of the semester or term. Thus, no debt is incurred upon completion or withdrawal of the program

Proposal 4: **For all schools and programs, if the number of students who completed a gainful employment program was less than ten (10) in a two-year period, for privacy reasons, the school should have a separate disclosure template. The separate disclosure template would exempt these small programs from disclosing the following items that reflect an individual's personal financial status and private information:**

- Median earnings (disaggregated)
- Median loan debt (disaggregated)
- Loan repayment rates (disaggregated)

Comments: Disclosure requirements include small programs, pose substantial privacy risk, and are ultimately unhelpful as consumer information tools. The 2013 draft rules include several new disclosure elements for all programs, as well as other provisions included in the 2011 final rule. While some of these elements are standard, others present a significant departure from established privacy thresholds and, in the cases of small programs, are not statistically valid tools of consumer information.

- Occupation that program prepares students to enter
- Cost of tuition, fees, books, supplies within normal time
- Completion rates (100% & 150% of program time)
- Job placement rate, if data is already gathered by the institution
- Median loan debts, disaggregated by completers and non-completers

- Loan repayment rates, disaggregated
- Median earnings, as calculated by SSA
- Whether program meets requirements for licensure (if applicable)

The debt measures create clear thresholds for small programs, with those having less than 10 Title IV completers over two years being exempt from the metrics. The same policy should be applied to disclosure requirements. The Social Security Administration (SSA) has already stipulated that it will not provide earnings match information for groups of less than 10 individuals, and the Department should abide by the same standard for disclosure requirements. Furthermore, guidance provided by the Department in 2011 stated that institutions should not disclose the median loan debt for programs with less than ten (10) completers.[2] This is especially important given the required disaggregation of such information by attendees, completers, and withdrawing students, which further reduces the size of data disclosures and elevates privacy risks.

Consider as an example at a community college, where an individual completer's median loan debt is individually identifiable (because they are the only borrower) to the public. This is a significant violation of individual privacy. Disclosures for small programs must be different in nature and format than for large programs. Ten individuals is a minimum level at which privacy could be violated in the disclosure.

Finally, the disclosure requirements are an area that is ripe for providing passing programs some regulatory relief as a reward for producing high-quality outcomes for participants.

Proposal 5: Institutions that have more than 10 Title IV completers but less than 10 borrowers should be able to include a standard statement regarding privacy for both *median loan debt* and *repayment rates* that reflects their limited ability to disclose such information without violating student privacy, such as "this data is not available in order to protect privacy of student borrowers."

Comments: See privacy concerns under Proposal 4. A minimum of 10 individuals for any subgroup should be required for reporting.

Proposal 6: Instead of calculating and disclosing 100% and 150% completion rates for disclosure under §668.410(2), institutions should provide the number of credits and courses required to complete a program at full time attendance.

Comments: At community colleges, approximately 60% of all students are enrolled part-time. The "normal time" to graduation does not reflect student intentions and is an extraordinarily difficult to calculate. It is also interpreted differently by each campus and system. In addition, research has shown that students who attend community college both full-time and part-time

[2] "For all schools, if the number of students who completed a GE Program during the award year was less than ten (10), for privacy reasons, the school should not disclose to the public…Median debt amounts (Title IV debt, private educational loan debt, and debt from institutional financing)." Gainful Employment, Frequently Asked Questions. June 8, 2011. http://ifap.ed.gov/GainfulEmploymentInfo/2011GEFAQ.html#G-Q7

have higher completion rates even than those who attend solely full-time, and many of these students will fall outside of the 100% and even 150% windows. Consequently, the proposed completion rates for disclosure are not applicable to large numbers of students and should be eliminated. However, institutions can easily disclose the normal credit load required for students attending a program full time.

Proposal 7: The Department should establish a new program approval process that would apply only in the following cases:

1. *If an institution has a failing program within the award year, it would have to submit to ED any new programs.*
2. *If an institution has two zone programs within the award year, it would have to submit to ED any new programs.*
3. *If an institution voluntarily closed a failing program or lost program eligibility, the institution would have to submit for approval any new programs with the same CIP code for up to five (5) years after the closure or loss of eligibility.*

Comments: New program approval is a key area where the ED could provide regulatory relief to institutions and programs that are meeting the DTE measurement. By targeting program approval to failing or zone programs, ED can concentrate limited resources for regulatory review to institutions and programs that pose the greatest risk to students.