September 13, 2018

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400 Maryland Ave., SW
Mail Stop 294-20
Washington, D.C. 20202

RE: ED-2018-OPE-0042-0001

To Whom It May Concern:

Thank you for the opportunity to comment on this proposed rule, ED-2018-OPE-0042-0001. I write to express my concern that the Department has, throughout this rulemaking process, placed the interests of colleges and universities above the students and taxpayers whose time and money are being wasted on poorly-performing programs.

Nearly 190,000 students in 2015-16 were enrolled in programs that left them with levels of debt that far outstripped the earnings they make after graduating. Yet the Department doesn't appear to care that the government is wasting tens of billions of dollars in taxpayer money each year on low-value programs that are putting students into harm's way, loading them down with unmanageable debt they may never be able to repay.

By failing to enforce the Gainful Employment regulations over the last 18 months, the Department's current leadership has shown that it is not interested in holding even the worst-performing college programs accountable. The Department, in other words, has made clear to unscrupulous institutions that they can continue to bilk students and taxpayers alike without fear that they will be held accountable for their actions.

The Department has revealed throughout the rulemaking process where its sympathies lie. It stacked the negotiating committee with institutional representatives, especially from for-profit colleges, ensuring their voices outweighed those of students and consumer representatives. The Department refused to provide any of the data necessary to conduct productive negotiating sessions, and hasn't even provided in this proposed rule relevant analyses to justify its decision to eliminate the Gainful Employment regulation. By relying only on a vague rationale around institutional burden, the Department has failed to adequately justify the rescission.

Below, I outline a number of flaws in the Department's reasoning as described in this proposed rule, which collectively argue for maintaining the current gainful employment rule, perhaps with small alterations to address the Department's stated concerns. It is my earnest hope that you will give these comments careful consideration and make the requisite changes prior to publishing a final rule.

I am available to discuss these comments in greater detail if you have questions or concerns at mccann@newamerica.org. I look forward to continuing to engage the Department on ways to ensure career-education programs are held accountable when they fail to provide real opportunity to their graduates.

Sincerely,

Clare McCann
Deputy Director for Federal Policy
Higher Education Initiative, New America

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The author would like to thank Ben Barrett, Jared Bass, and Sophie Tran Nguyen for their generous assistance with these comments.

Gainful Employment Programs

The history of the gainful employment law explains its application to specific programs.
Throughout its notice of proposed rulemaking (NPRM), the Department wrongly suggests that the gainful employment rules are "unfair," that they suggest gainful employment programs are "less valuable to students," and that they reflect an "inaccurate" belief that GE programs "should be held to a higher degree of accountability." These views are far from the legislative realities; the requirements that certain programs demonstrate they provide students with "gainful employment in a recognized occupation" are long-standing and driven by statute. Given the Department's apparent concern about the development of the gainful employment standard established by Congress, a history lesson may be instructive.

Prior to 1972, for-profit institutions had no eligibility for federal financial aid under the Higher Education Act. When Congress acted to remove that restriction in the 1972 HEA Amendments, it rightly raised concerns with the potential implications of doing so. A House report on the legislation stated that "[w]e are concerned what will happen when, as provided for in the bill, hundreds of proprietary schools begin to participate in such a loosely controlled program."[1] To limit the scope of programs that could receive federal dollars, Congress defined eligible proprietary institutions as those that provide "not less than a six-month program of training to prepare students for gainful employment in a recognized occupation."[2]

The initial concerns turned out to be well-founded, since Congress, the Education Department, the Department of Veterans Affairs, and other federal agencies spent much of the next several decades fighting waves of abuse from proprietary-school programs. Media reports found for-profit colleges that preyed on students but churned them out without a degree of value, where "about seven...of ten students who enroll...drop out and only half of those who graduate are placed in jobs."[3] It wasn't the first time these abuses of students and taxpayer dollars had been seen; a massive expansion of GI Bill benefits to veterans returning home after World War II yielded a similarly massive increase in enrollment at fly-by-night for-profit correspondence schools with terrible outcomes that deceived students into signing up for their programs and cheated veterans out of their education benefits.[4]

Concerns about for-profit programs continued to grow in the years to come. During the 1980s and 1990s, the Inspector General found egregious acts of fraud and abuse in proprietary-school programs.[5] A CRS study of federal aid from 1983 to 1993 found that default rates at for-profits peaked at fully 41

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[1] House Education and Labor, Committee Report 92-554
[2] http://na-production.s3.amazonaws.com/documents/STATUTE-86-Pg235.pdf
[3] https://tcf.org/content/report/profit-college-story-scandal-regulate-forget-repeat/ re ITT, via the Boston Globe 1974. The complete Spotlight Team series from the Boston Globe, which ran from March 25–April 1, 1974, was reprinted in the *Congressional Record*, Senate, April 4, 1974, S5235-S5249, https://drive.google.com/file/d/0B7aqIo3eYEUtZWlvNzVzZjZjX1U/view?usp=sharing
[4] https://tcf.org/content/report/vietnam-vets-new-student-loan-program-bring-new-college-scams/
[5] https://www2.ed.gov/about/offices/list/oig/misc/oig25years.pdf

percent on 1990, nearly twice the overall default rate.[6] In 1992, Congress added new limitations on higher education institutions, including requiring states to assess whether "the stated objectives of the courses or programs of the institution are to prepare students for employment, [and] the relationship of the tuition and fees to the remuneration that can be reasonably expected by students who complete the course or program…"[7] Congress also stated that "[t]he Committee [on Education and Labor] agrees with the findings of the GAO that the Department of Education is the ultimate gatekeeper of Federal Student Aid Programs. As such, it needs to pay a more active role in screening schools to reduce the exposure to financial risk to the government and students."[8]

In every Congressional action related to higher education since then, including six comprehensive reauthorizations and multiple other education bills since 1972, Congress has opted to maintain the existing language on gainful employment programs.[9] As the Department itself has acknowledged, "[t]he legislative history of the statute preceding the HEA that first permitted students to obtain federally financed loans to enroll in programs that prepared them for gainful employment in recognized occupations demonstrates the conviction that the training offered by these programs should equip students to earn enough to repay their loans."[10] To that end, the Department launched a lengthy rulemaking process, including two rounds of negotiations and the input of tens of thousands of stakeholders, that has ultimately survived multiple court challenges.

The Secretary may believe these requirements are unfairly targeted or inappropriately specific. But the lengthy legislative history speaks to the legislative intent behind these requirements and reflects a strong concern that if vocational college programs weren't regulated closely enough, they would wind up abusing students' and taxpayers' dollars and offering educational programs of little to no value. It is clear that the Department has the authority--and the obligation--to promulgate regulations like those outlined in the 2014 regulations.

"Gainful employment for all" does not fit the statute.

The Department suggests that it believes these data must be available for all programs and institutions in order to be considered valid. Specifically, it notes that "the Department does not believe it is appropriate to attach punitive actions to program-level outcomes published by some programs but not others."[11] However, the Department actually does differentiate by sector in a number of cases. For instance, only private colleges--and not public--are subject to the financial responsibility rules the Department holds, including the ones it proposed to re-write through the borrower defense rulemaking. Gainful employment programs that are short-term--including both for-profit programs and certificate programs at public or nonprofit institutions--must meet an annual threshold for completion and job

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[6] https://www.everycrsreport.com/files/20050119_RL32182_9de7b131340b3992e224199c3609a02dd5789639.html

[7] http://na-production.s3.amazonaws.com/documents/STATUTE-106-Pg448.pdf, Sec. 494C

[8] House Report 102-447

[9] https://www.newamerica.org/education-policy/reports/higher-education-act-1965/introduction

[10] 79 FR 64893

[11] 83 FR 40174

placement rates of at least 70 percent in order to maintain eligibility for federal aid.[12] Graduate loans are excluded from the cohort default rate measure, meaning those accountability metrics are applied only to institutions awarding undergraduate degrees or certificates.[13] In other words, both Congress and the Department have historically taken a risk-based approach to accountability, applying certain requirements only to certain sectors or types of programs based on the risk they pose given past behavior. And applying the gainful employment rules to the sectors and program types identified by Congress simply continues that approach, pursuant to the statutory intent of the language.

The Department has repeatedly indicated that it wishes to apply gainful employment to all programs at all institutions. However, as noted above, this is outside the scope of the Department's authority. Congress established, and has repeatedly reaffirmed, that the requirement that programs prepare students for gainful employment in a recognized occupation applies solely to for-profit and certificate programs. The Department says that, "[w]hile bad actors do exist in the proprietary sector, the Department believes that there are good and bad actors in all sectors and that the Department, States, and accreditors have distinct roles and responsibilities in holding all bad actors accountable."[14] That is true--and one way lawmakers have required the Department to hold bad actors accountable is by establishing a gainful employment requirement for certain types of programs. While the Department may (and perhaps should) propose changes to that structure, only Congress can change the law. And until it does so, the Department has an obligation to uphold the laws as they are written. This proposed rule would not serve to uphold existing laws, nor has it adequately justified withdrawing existing regulation.

Moreover, this notice of proposed rulemaking suggests those statements, that the Department believed GE should apply to all educational programs, were not made in good faith. The Department has not, as it said during negotiations it intended to include, drafted any regulatory language that would require disclosures or that would require the Department to follow through on its single sentence promising to update the College Scorecard with program-level data. It has not made any firm commitments in terms of the timeline for improving disclosures, or required any additional reporting from institutions that could shorten that timeline. This NPRM makes clear that, in contrast to its statements that the Department was interested in gainful employment for all--at least on disclosures--it actually meant it was interested in gainful employment for none.

There are continued and persistent problems in the for-profit sector.
In 2014, the Department identified a series of concerning problems in the for-profit sector, particularly. Those problems include:

- "Students at for-profit institutions are more likely to receive Federal student financial aid and have higher average student debt...even taking into account the socioeconomic background of the students enrolled within each sector."[15]

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[12] 20 USC §1088(b)(2) and 34 CFR 668.8(e)
[13] https://ifap.ed.gov/DefaultManagement/guide/attachments/CDRGuideCh2Pt1CDRCalculation.pdf
[14] 83 FR 40174
[15] 79 FR 64905

- "[Student loan default rates] are highest among students attending for-profit institutions."[16]
- "There is evidence that many programs at for-profit institutions may not be preparing students as well as comparable programs at public institutions."[17]
- "Many for-profit institutions devote greater resources to recruiting and marketing than they do to instruction or to student support services."[18]
- "Lower rates of completion at many for-profit institutions are a cause for concern."[19]
- "[S]tudents who attend for-profit institutions are more likely to be idle--neither working nor still in school--six years after starting their programs of study in comparison to students who attend other types of institutions."[20]
- "[A] growing number of State and Federal law enforcement authorities have launched investigations into whether for-profit institutions are using aggressive or even deceptive marketing and recruiting practices that will likely result in the same high debt burdens."[21]
- "Of the minority of programs that [the Department] expect[s] will not pass the D/E rates measure, a disproportionate percentage may be operated by for-profit institutions."[22]

Unfortunately, more recent research indicates that these problems are still prevalent, particularly in the for-profit sector. For instance, representative data tracking students' outcomes for over a decade after entering college finds disturbing trends. For-profit borrowers default at twice the rate of community college borrowers; and for-profit entrants (including non-borrowers) default at four times the rate of community college entrants, largely because public two-year entrants are substantially less likely to borrow.[23] For Black borrowers, the outcomes are even more severe; 75 percent of those who attend a for-profit college and don't complete default on their loans, compared with 54 percent at public two-year institutions.[24] Borrowers from for-profit colleges are also much less likely to have repaid at least one dollar of principal on their loans three years after leaving college -- just 26 percent of for-profit borrowers who left school in AY 2010-11 or AY 2011-12 had, compared with 44 percent of students overall.[25] New data looking at default rates and delinquency after five years finds 44 percent of borrowers from for-profit institutions in financial distress on their student loans, including a quarter of borrowers in default. That's nearly twice the default rate of borrowers from public institutions and three times the rate at private nonprofit institutions.[26]

Data on college completion rates also demonstrate significant, continued concerns with the sector. While for-profit less-than-four-year colleges have high completion rates (likely due in large part to the

[16] Ibid
[17] 79 FR 64906
[18] Ibid
[19] Ibid
[20] 79 FR 64907
[21] Ibid
[22] Ibid
[23] https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/
[24] https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/
[25] https://trends.collegeboard.org/student-aid/figures-tables/federal-student-loan-three-year-repayment
[26] https://www.nytimes.com/interactive/2018/08/25/opinion/sunday/student-debt-loan-default-college.html

number of very-short, albeit often low-value, programs they tend to offer), completion rates at four-year for-profit institutions are disturbingly low. New data that include all students, regardless of whether they are enrolling for the first time or attending part-time, reveal that fewer than one in three students at a for-profit four-year college graduates within eight years of enrolling. That's substantially lower than at either a public or private nonprofit four-year college (54 and 63 percent, respectively).[27]

The first year of gainful employment implementation is also instructive, highlighting similar concerns with employment outcomes. The Department's own analysis found that certificate programs at public institutions had average earnings of graduates nearly $9,000 higher than graduates at for-profit certificate programs. In fields of study offered by both for-profit and public institutions, "average earnings are higher in the public sector at 80 percent of programs, which graduated 75 percent of students."[28] Within the same field of study, earnings were about 13 percent higher for public college programs than in for-profit college programs.[29] Of programs that failed to meet both the annual and discretionary debt-to-earnings tests in that first year of data, 98 percent were at for-profit colleges.[30]

Other researchers have concluded similar findings. A causal study conducted using administrative data on earnings found that "despite the much higher costs of attending a for-profit institution, the average for-profit certificate student experiences lower earnings effects relative to public sector students." Specifically, for-profit certificate students were 1.5 percentage points less likely to be employed--and had 11 percent lower earnings--than their counterparts from public institutions.[31] The study also reported that "institution-level regressions reveal that the weak performance of the for-profit sector is not limited to a few poor-performing institutions, rather the majority of schools appear to have negligible average earnings effects,"[32] indicating the problem greatly exceeds a couple of 'bad apples.' A piece from the Federal Reserve Bank of New York indicated that, while public and nonprofit colleges help close the gap in earnings among the highest- and lowest-income students, for-profit colleges actually widen that gap compared with nonprofit colleges.[33] Several researchers have also experimented with employers' perceptions of for-profit higher education, tested by sending resumes of recent graduates to employers in response to job postings. Those studies have found no preference for for-profit colleges and--in the case of a study that tested business and health degrees from for-profit colleges, particularly--far fewer responses from employers.[34]

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[27] https://nces.ed.gov/pubs2017/2017150rev.pdf Table 6
[28] https://www2.ed.gov/documents/press-releases/ge-fact-sheet-online.pdf
[29] Ibid
[30] https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs
[31] Ibid
[32] http://www.nber.org/papers/w22287.pdf
[33] http://libertystreeteconomics.newyorkfed.org/2018/09/educations-role-in-earnings-employment-and-economic-mobility.html
[34] https://onlinelibrary.wiley.com/doi/pdf/10.1002/pam.21863 and https://www.aeaweb.org/articles?id=10.1257/aer.20141757

Enforcement work may have slowed at the Education Department,[35] but state and federal agencies continue to pursue investigations and/or actions against numerous institutions of higher education--overwhelmingly for-profit--accused of scamming students and taxpayers.[36] For instance, the California Attorney General has filed a lawsuit against Ashford University and owner Bridgepoint Education for making "false promises and… faulty information to students to persuade them to enroll," as well as "illegal debt collection practices."[37] American Military University reached a recent settlement with the Massachusetts Attorney General over "predatory enrollment tactics."[38] Career Education Corporation is being pursued by a group of 18 attorneys general from across the country, as well as four other individual states, over possible noncompliance with "certain state consumer protection laws,"[39] and has been engaged by the Federal Trade Commission in an investigation into possible "deceptive or unfair acts or practices."[40] CEC also recently settled a False Claims Act lawsuit for violations of the incentive compensation ban and lying to American InterContinental University's accreditor in order to maintain accreditation.[41] DeVry Education Group recently reached a sizeable settlement with the attorney general of New York for "ads that exaggerated graduates' success in finding employment at graduation and contained inadequately substantiated claims about graduates' salary success,"[42] and a settlement with the Federal Trade Commission over deceptive advertising.[43] Florida Technical College (a for-profit institution) recently faced False Claims Act charges for falsifying students' documentation to make them appear eligible for federal aid, and settled for $600,000.[44] In short, it is clear that the depth and scope of problems within the for-profit sector has not slowed, nor has the removal of some of the worst actors--such as Corinthian Colleges and ITT Tech--stemmed the flow of illegal and misleading practices by proprietary institutions.

Moreover, students in the for-profit sectors are still much more likely to receive federal student aid than students in other sectors -- three out of four for-profit students in 2016 did, for instance, compared with

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[35] https://www.nytimes.com/2018/05/13/business/education-department-for-profit-colleges.html

[36] https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/

[37] https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-sues-profit-ashford-university-defrauding-and

[38] https://www.mass.gov/news/american-military-university-pays-270000-for-alleged-failure-to-disclose-job-prospects-high

[39] https://www.sec.gov/Archives/edgar/data/1046568/000156459017021193/ceco-10q_20170930.htm

[40] https://www.sec.gov/Archives/edgar/data/1046568/000156459017021193/ceco-10q_20170930.htm; and https://www.sec.gov/Archives/edgar/data/1046568/000156459018018464/ceco-10q_20180630.htm

[41] https://www.sec.gov/Archives/edgar/data/1046568/000119312517050424/d347448d8k.htm; https://www.leagle.com/decision/infdco20160921877; and https://www.leagle.com/decision/infdco20140930b70

[42] https://ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-devry-university-providing-225-million-restitution

[43] https://www.consumer.ftc.gov/blog/2016/12/devry-settles-claims-deceptive-advertising-100-million

[44] https://www.justice.gov/usao-sdfl/pr/florida-based-school-chain-pay-united-states-government-600000-submitting-false-claims

39 percent in public two-year institutions.[45] That suggests a need for the Department to focus especially on abuses of the federal aid programs in that sector, where poor outcomes tend to be more concentrated and careful regulation is perhaps even more needed.

Nor is there reason to believe that potential abuses in gainful employment programs--both for-profit and not-for-profit--is likely to slow. Proposed changes letting institutions off the hook for potential misrepresentations by limiting relief to harmed borrowers under the borrower defense to repayment rule mean, more than ever, that the Department needs to be vigilant in holding institutions accountable for failing to provide good outcomes for students.[46] With declining enrollment, data indicate that institutions of higher education are investing in trendy--but very possibly low-value--certificate programs like casino management[47] and beer fermentation[48] to attract new students.[49] These cash-cow certificate programs may not be a good use of federal dollars, let alone students' own dollars. But without the gainful employment rule requiring them to demonstrate value and show that they meet the statutory requirement to lead to employment in a recognized occupation, the Department is granting institutions permission to abuse the federal financial aid system.

The Department itself acknowledges the potential for abuse, in its regulatory impact analysis for this proposed rule. The Department estimates the costs of rescinding the gainful employment rule at $5.3 billion over the next decade, mostly in increases in taxpayer-financed federal aid dollars going to poor-performing programs at which students' educational experiences will not pay off. While transparency for all programs is an improvement for programs where there is currently no accountability or transparency, it cannot offer the same impact as a rule that eliminates unfettered access to federal dollars where educational programs fail to meet a very minimal baseline.

Some certificate programs have poor-quality outcomes.

Gainful employment programs are defined in the statute as not just for-profit programs, but also certificate programs across all sectors. Here, too, there is evidence of a problem in which some programs charge students too much and provide too little value in the marketplace. For instance, there is significant variation in the returns on certificate programs--even those offered in the same field of study. The *Washington Monthly* recently compiled a ranking of vocational programs using the gainful employment data from the Department and found huge disparities--ones that can't be explained solely by labor market variations or other technicalities--among programs in the same space. For instance, it highlighted medical insurance coding programs at Columbus State Community College (median earnings: $35,250) and Bryan University in Springfield, MO (median earnings: $9,796). Columbus State grads had less than half the amount of debt of those at Bryan University, on top of earning four times more. As a *Washington Monthly* article put it, "the performance of the schools at the bottom of the certificates

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[45] U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16). Accessed through PowerStats on August 19, 2018.

[46] https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-borrower-defense-proposed-rule/

[47] https://encoura.org/caution-niche-market-enter-at-your-own-risk/

[48] https://www.cmich.edu/news/article/Pages/the-science-behind-the-beer.aspx

[49] https://hechingerreport.org/panicked-universities-in-search-of-students-are-adding-thousands-of-new-majors/

ranking is not just *relatively* bad--it is absolutely, screamingly, catastrophically bad."[50] This problem crossed sectors: some of the lowest-ranked certificate programs were at community colleges.

The Department found similar results in its analysis of the first-year earnings data.[51] Thirty-two percent of for-profit graduates and 14 percent of public college graduates in certificate programs reported in the gainful employment earnings data went to programs in which the typical borrower earned less than a full-time minimum-wage worker ($14,500). Relative to for-profit students attending higher credential levels, certificate students were much more likely to earn less than a minimum-wage worker; the Department found that just five percent of for-profit students who graduated with an associate degree left programs with average earnings below a full-time, minimum-wage worker. At higher credential levels, that share shrank to less than one percent.

Other research confirms those figures. One rigorous study of Kentucky State found that students with associate degrees saw their quarterly incomes increase by more than $2,300 for women and nearly $1,500 for men; while those with short-term certificates saw returns of only around $300 per quarter.[52] Another study, using data on students from Washington State, found sizeable increases in quarterly wages for both long-term certificates and associate degrees, but found "that short-term certificates have no overall labor market value in terms of increasing wages."[53] A study from the Community College Research Center found that, using a nationally representative survey, certificates and associate degrees did not increase earnings as compared with students with some college but no credential; and there were "no clear earnings gains" from any combination of stacked credentials considered.[54]

The Department claims in its proposed rule to be concerned with how wage discrimination against women and students of color interacts with the existing regulations.[55] However, the proposed rule neglects to account for the fact that poor-performing certificate programs may actually be exacerbating the gender and race wage gaps, and fails to provide evidence that wage discrimination is driving those changes. A recent report from the Center on Education and Skills at New America (CESNA) examines data from the National Center for Education Statistics 2016 Adult Training and Education Survey, for instance, and finds that certificate programs and other non-degree credentials reflect wage inequality in male- versus female-dominated occupations, particularly for adults with less than a bachelor's degree; and that they often have very poor labor market returns, especially for women.[56] Among certificate holders, workers in female-dominated occupations (such as healthcare and education) earned significantly less than did workers in male-dominated occupations (such as computers). Moreover,

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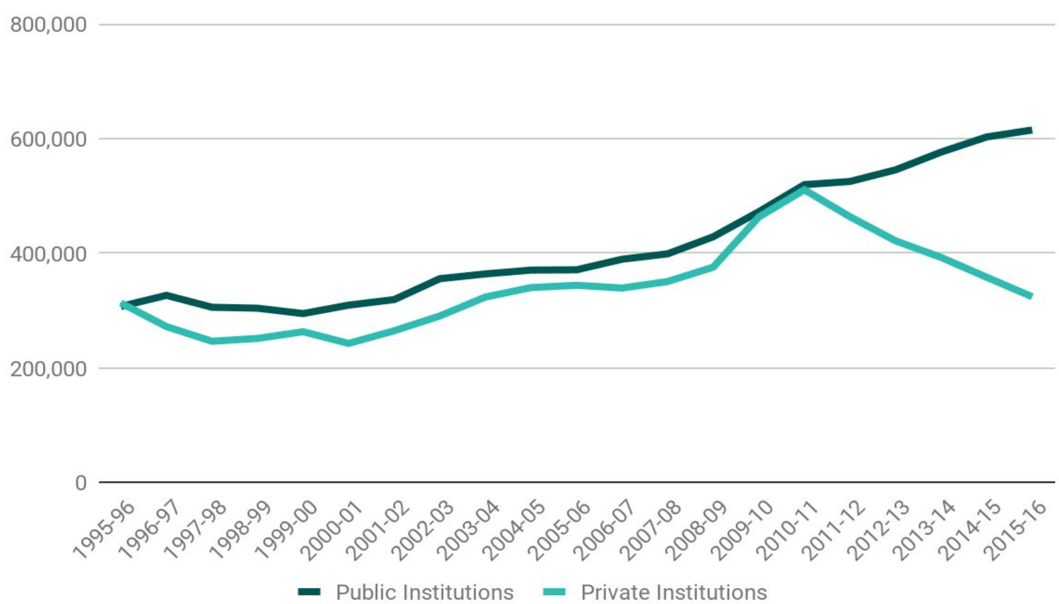
[50] https://washingtonmonthly.com/magazine/september-october-2018/americas-best-and-worst-colleges-for-vocational-certificates/
[51] https://www2.ed.gov/documents/press-releases/ge-fact-sheet-online.pdf
[52] http://ftp.iza.org/dp6902.pdf
[53] https://files.eric.ed.gov/fulltext/ED533520.pdf
[54] https://ccrc.tc.columbia.edu/publications/stackable-credentials-do-they-have-labor-market-value.html
[55] 83 FR 40171
[56] https://www.newamerica.org/education-policy/reports/paying-more-and-getting-less/paying-more-and-getting-less

among certificate-holders, fully one-third of men earned more than $50,000 per year, compared with 10 percent of women. Institutions offering certificate programs in low-earning, female-dominated occupations may simply be reifying existing inequities, rather than offering students legitimate opportunities to boost their earnings and access socioeconomic mobility.

Despite these questionable returns for certain types of certificates, though, institutions have continued to offer more and more credentials--especially the short-term certificates that research has found have the lowest labor-market payoffs (see figure below).[57]

Figure 1: Certificates Awarded, 1995-96 through 2015-16



Students are particularly concerned with the metrics used in gainful employment.

The Department seems to indicate skepticism that costs and earnings are reliable measures of success. It states in the proposed rule that “[s]tudents select institutions and college majors for a wide variety of reasons, with cost and future earnings serving as only two data points within a more complex decision-making process.”[58] However, those measures are rooted in the legislative history of career-college programs and are consistent with students’ own interests. Moreover, they should be of great relevance to the Department, which is financing some or all of these students’ education through taxpayer-financed financial aid programs. And while it is reasonable to believe that students might have many non-pecuniary factors driving their choice of program, it strains credulity to believe that they should not or would not be concerned with serious risk of financial distress like that identified in the 2014 gainful employment rule.

[57] https://www.brookings.edu/blog/brown-center-chalkboard/2016/03/28/do-students-benefit-from-obtaining-vocational-certificates-from-community-colleges/

[58] 83 FR 40174

To begin, as stated by a judge who upheld the validity of the 2014 gainful employment rule, the Department "reached the sensible conclusion that [to assess whether programs lead to gainful employment] it should test the profitability of students' employment by asking whether students earn enough to pay their bills."[59] As upheld by the courts, this is a valid and logical interpretation of the "gainful employment" language used in the statute. As the Department wrote, "[t]his definition supports the idea embodied in the regulations that 'gainful employment in a recognized occupation' is not just any job that pays a nominal amount but a job that pays enough to cover one's major expenses, including student loans."[60]

These data are also consistent with the concerns that are top of mind for students. According to a national, online survey of U.S. residents aged 16-40 who were prospective or very recent college enrollees, their top three reasons for deciding to go to college were: to improve employment opportunities (91 percent); to make more money (90 percent); and to get a good job (89 percent). In deciding which college to attend, students were most concerned about the programs offered (93 percent identified this as important or very important), as well as financial aid availability and the cost of the college (88 percent).[61]

While the Department notes that it is opting against the debt-to-earnings rate in part because it "believes that it is more useful to students and parents to publish actual median earnings and debt data rather than to utilize a complicated equation to calculate D/E rates that students and parents may not understand,"[62] it is important to note that under the 2014 rule, students were also meant to use heuristics to help them understand the implications of debt loads too high for the earnings graduates could expect. To that end, the Department ensured that schools with poor-performing programs that failed the debt-to-earnings rate measure would provide prominent, easily comprehensible warnings alongside a disclosure template that lists the separate median earnings and debt.

The Impact of the Gainful Employment Rule

The GE rule has been extremely effective.

The gainful employment rule has been highly effective. As New America's Kevin Carey wrote in *The New York Times* in 2017, "a close analysis of the more than 500 failing programs that haven't appealed their status reveals something interesting: A substantial majority of them, 300 or so, have already been shut down…"[63] Specifically, New America analyzed the websites of those institutions with failing GE programs that hadn't appealed their earnings and found that the majority of them had already been shut down, roughly six months after the first debt-to-earnings rates had been published. As he wrote at the time, one such school "cited a 'challenging regulatory environment' and 'the gainful employment

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[59] *APSCU v. Duncan*, Civil Action No. 14-1870. June 23, 2015.

[60] 79 FR 64894

[61] https://www.newamerica.org/education-policy/edcentral/collegedecisions/

[62] 83 FR 40174

[63] https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html

regulations issued last year'" in opting to shut down its chain of for-profit schools--or, "[i]n other words, rather than invest the time and money necessary to offer affordable programs that lead to well-paying jobs, they simply closed up shop." This analysis gave one of the first quantitative glimpses into the effect that the first gainful employment rules had on the vocational postsecondary education landscape.

To adequately respond to the Department's proposed rescission of the gainful employment rule, New America repeated and expanded this analysis, more than a year later[64] and found that despite the Department's claims to the contrary, the 2014 gainful employment regulations have already had an impact on the higher education landscape. We believe it has had a positive and discerning effect on the value of higher education options available to students. In particular, the new data collected by New America suggest that the threat of sanctions on Title IV eligibility may have influenced colleges' decisions to close underperforming programs. Under the Department's proposed changes, which include an elimination of all sanctions, colleges would have less incentive to heed data about the economic returns to students and make any necessary adjustments to program offerings.

Methodology:

Using the GE data file posted on the Federal Student Aid Data Center website , New America tracked whether GE programs are still open in their original iteration by assessing institutional websites to determine whether the institution is still operating; whether it operates the program at the same CIP code and credential level as is reported in the GE data; and whether it continues to operate the same program but has suspended enrollment of new students in the program. This tracking occurred in July and August 2018. Specifically, New America examined gainful employment programs that failed the first year of debt-to-earnings rates. The data reported here cannot distinguish between programs that have been closed and those that have been restructured with different CIP codes, program names, or credential levels.

Results:

The gainful employment data published in 2017 for the first year of the Department's implementation of the rule identify 767 failing programs that fail both the annual and discretionary debt-to-earnings measures and that have not successfully appealed their failing status. It includes those with pending or abandoned appeals.

Table 1: Debt-to-Earnings Designation of Programs (After Appeal Decisions)

Designation	Number of Programs (After Appeals)	Percent of Programs
Fail	767	9%
Pass	6,639	77%
Zone	1,231	14%

[64] Data on GE programs' statuses were updated by New America staff in July-August 2018 and based on the program listing on institutions' websites.

Total	**8,637**	**100%**

In the years following the release of these data, 500 programs designated as failing, offered by 136 colleges, have been closed or altered because they do not provide adequate post-graduation value to students relative to the amount of debt required to attain the credential. Under threat of losing federal financial aid eligibility for these programs if they failed to improve, the data collected by New America suggest that colleges have been responsive to the gainful employment rule in taking preemptive action to discontinue or change those programs.

Table 2 demonstrates the degree to which colleges have preemptively closed or altered failing programs. Of the 767 programs that failed both debt-to-earnings measures in the first year of implementation and did not win an alternate earnings appeal, nearly two-thirds, enrolling over 70 percent of students in failed programs, have been shuttered or reformed by institutions in the past two years. To be sure, more than half (55 percent) of those failed and since-closed programs were at institutions that closed entirely, but several hundred others were at institutions that remain open and selectively closed these failing programs.

Table 2: Failing Programs' Current Status by Rates of Program Closure/Reform

Program Status (August 2018)	Number of Failing Programs	Percent of Failing Programs
Closed	500	65%
Open	267	35%
Total	**767**	**100%**

Since colleges with a failing program would not face loss of Title IV aid based on a single year of failed rates, their aggressive response and reaction to the 2014 regulations appears consistent with the Department's goal of pursuing a "market-based accountability system."[65] In other words, the existing gainful employment rule both empowers institutions to make informed decisions based on federal data that are trusted, reliable, and comparable across programs; and, through sanctions that include the loss of federal financial aid eligibility, offers a stern incentive for colleges to change course quickly on their lowest-value programs. Moreover, given the limitations of the data available for this analysis, we cannot observe how many other programs cut their prices, reduced student debt, or made other changes to their poorest-performing programs in response to the rule.

The data do show, however, that among failing programs, where outcomes are especially poor and a reasonable return on investment may not be possible on the institution's terms, colleges elected to suspend the programs' enrollment, cancel the program offering, or restructure the program at a different credential level. Moreover, the response to gainful employment appears to have been stronger

[65] 83 FR 40168

than is typically the case in other transparency efforts; for instance, state officials who have launched websites with data on institutions of higher education say that simply making the data available does little to ensure students--or even institutions--are aware of the information.[66]

While few nonprofit programs failed the gainful employment test in the first year of data, that sector has been responsive to the data and potential for sanctions, too. For instance, a Harvard graduate certificate program in theater for which the institution charges more than $78,000 and from which graduates earn approximately $36,000 has since seen its enrollment suspended by the institution.[67]

These data were collected through a survey of the institutional websites of the affected programs, conducted by New America staff. However, more precise data are available to the Department, and should be made available to the public. In June 2017, well before the start of negotiations on this rule, New America requested data on gainful employment institutions' reporting to the Department when they cease to provide a GE program for at least 12 months or change the name, CIP code, or credential level of a GE program.[68] This information, requested under the Freedom of Information Act, was denied by the Department; and an appeal for that information has been pending, with no substantive updates made available to New America, since May 2018.[69] Data on these types of changes to GE programs are required to be reported under the existing gainful employment rules; the Department's failure to analyze and return the data indicates that it has either faithlessly implemented the gainful employment rule currently on the books by failing to require that reporting, or that it has the information and has failed to comply with federal rules around transparency and public records disclosure.

Moreover, it is difficult to understand how the Department could be presumed to offer a reasoned basis for rescinding the gainful employment rule without first attempting to understand what happened with GE programs following the first year of the rule's implementation. This failure to provide basic information about the rule the Department sought to rescind suggests that the agency had little interest in understanding its true implications or adequately justifying its rescission--and instead, indicates the Department has been operating under arbitrary and capricious assumptions about the rule, how it affects institutions, and how it has been effective in addressing the persistent problem of low-value career-focused programs. The Department must consider this analysis (or conduct its own analysis using more detailed data reported by institutions); evaluate its implications for the justifications in this proposed rule; and factor these findings into the net budget impact analysis the Department has constructed.

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66 https://www.huffingtonpost.com/entry/feds-say-marketplace-will-expose-bad-colleges-but_us_5b7d6c4be4b0682df5ac7b8d

67 https://www.nytimes.com/2017/01/13/upshot/harvard-too-obamas-final-push-to-catch-predatory-colleges-is-revealing.html?_r=0

68 FOIA request number 17-02089-F

69 FOIA request number 18-00045-A

The Department itself acknowledges that the gainful employment rule is effective.
Budget estimates in the proposed rule confirm that even the Department believes that the gainful employment is--and has been--effective in reducing taxpayer pay-outs to poor-performing programs. Specifically, the Department estimated in publication of its 2014 rule, and continues to estimate here, that warnings of impending loss of financial aid eligibility and the actual loss of eligibility would drive students away from poor-performing programs that may leave them worse off than before they enrolled.[70] In total, the Department assumes more than $5 billion in additional costs over the next 10 years going to programs that should fail under this reasonable debt-to-earnings standard.[71]

Moreover, that estimate assumes that the borrowers driven away from poor-performing programs do not reenroll at other, passing institutions. But recent research found that nearly all students from for-profit colleges sanctioned for their default rates re-enrolled at public institutions that provided greater value.[72] That means the elimination of poor-performing programs may result in much higher benefits for students and society when the students from those programs instead enroll in more affordable programs somewhere else.

The gainful employment rule could have greatly increased students' lifetime earnings.
According to an analysis by The Institute for College Access and Success, the Department's proposal to rescind the rule could have dramatic impacts on students' lifetime earnings. As TICAS describes in its public comments in response to this rule, the Department estimated in the 2014 rule that GE would increase lifetime earnings gains by between $11 billion and $36 billion through improved quality and student transfers to higher-quality programs.[73] TICAS analyzed data from the first-year release of gainful employment data, and found that if the earnings and debt burdens of graduates of failing and zone GE programs had matched those of passing programs, graduates from that first year of data alone would have had $1.4 billion in higher earnings, and nearly $300 million less in expected debt payments, in one year.[74] Their lifetime earnings would have been even higher as those benefits accumulate. Given that, the Department must adequately justify--something it has not done in this proposed rule--why it should be rescinded despite the potential benefits to borrowers, and how these earnings and debt differentials factor into its cost-benefit analysis (discussed elsewhere in these comments, under "The Department should spell out more of the details of the regulatory impact analysis").

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[70] 83 FR 40179
[71] 83 FR 40180
[72] http://www.nber.org/papers/w22967
[73] 79 FR 16632
[74] Calculations by TICAS using data from the U.S. Department of Education, Gainful Employment Information, https://studentaid.ed.gov/sa/node/274. Calculations identify average earnings and debt differences between passing and failing or zone programs within the same field (CIP code and credential level), using the official pass/fail/zone rate as of April 25, 2018. Averages are weighted by the number of completers within the cohort period. The cohort period is either 2 years (2010-11 and 2011-12) or 4 years (2008-09 through 2011-12), depending on each program's size.

The Department did not conduct a reasoned rulemaking in eliminating sanctions for poor-performing programs.

The Department lists several reasons, refuted elsewhere in these comments, that it believes programs failing the debt-to-earnings measure should not lose access to federal aid eligibility. It also states that "it is not appropriate to eliminate the option [of a poor-performing program] simply because a lower-cost program exists," noting that many students do not have access to other nearby programs.[75] However, in citing to research from Nick Hillman, the Department misses the thrust of his argument. As Hillman himself writes to the Department in public comments, "[p]ublic broad-access colleges -- even if located far away -- are likely to have higher upward mobility rates, better loan repayment outcomes, and stronger labor market returns than many local but more expensive private options" (endnotes removed).[76] Hillman goes on to write, "[w]hen a local market has several high-cost and high-risk colleges and no public options, regulators have an even greater responsibility to protect consumers. My research would defend keeping GE rules in tact (sic) to protect consumers, especially those living in education deserts where options are most constrained."[77] The Department's argument here falls flat, countered by the very researcher it attempts to cite in justifying this argument.

Moreover, the Department claims that it is interested in increasing transparency through the College Scorecard, and stated during negotiations for this proposed rule that it was open to considering sanctions short of federal financial aid eligibility. However, this final rule does not address any of those considerations in the regulatory text, and suggests that the Department was never truly open to considering sanctions on programs.

Sanctions considered during rulemaking included loss of federal financial aid eligibility, warnings or notifications directly to students, warnings from the Department to students, notifications to accrediting agencies and/or state authorizing agencies, provisional program participation agreements for fully certified institutions, approval requirements before institutions can launch new programs, caps on the growth of programs, and administrative capability findings.[78] That the Department included *none* of these sanctions--or indeed, any sanctions at all--in its proposed rule suggests that there is no level of performance so bad the Department believes it should be concerned with the use of taxpayer dollars. This is a true abdication of the Department's responsibility to protect students and taxpayers, and a direct, unjustified contradiction of the Department's impetus for publishing the gainful employment rules in 2011 and 2014 in the first place.

Insufficient Evidence to Rescind the 2014 GE Rule

The Department doesn't address all areas of accountability and disclosure.

The Department outlines some of its concerns with the 2014 gainful employment rule. However, it has not explained why it believes the other elements of the 2014 rule should be submitted. Under the

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[75] 83 FR 40171

[76] https://www.regulations.gov/document?D=ED-2018-OPE-0042-13086

[77] Ibid

[78] From the author's notes during negotiated rulemaking.

Administrative Procedures Act, the Department must provide a reasoned basis for its regulatory (or deregulatory) actions, and it has failed to so by not explaining--or in some cases, even mentioning--key metrics that should be accounted for.

The Department does outline its concern with the annual debt-to-earnings threshold used for the accountability component of the 2014 rule (addressed elsewhere in these comments). But even if those concerns were a reasonable basis for eliminating the annual debt-to-earnings test, it has not described any flaws with the discretionary debt-to-earnings test. Both are key aspects of the 2014 rule, and both must be addressed by the Department's proposed rule if the public is to provide informed comment and if the Department is to demonstrate a reasoned basis for eliminating the rule.

Moreover, the Department describes concern with the job placement rate disclosures included on the disclosure template (also addressed elsewhere in these comments). However, it did not address *at all* the following aspects of the gainful employment disclosure requirements:

- Program details, including the primary occupations for which the program is designed to prepare students, the length of the program in calendar time and clock or credit hours;
- Completion and withdrawal rates for the program;
- Loan repayment rates for the program;
- The cost of tuition and fees, as well as books, supplies, and equipment, for completion of the program;
- The share of Title IV or private student loan borrowers enrolled in the program;
- Median loan debt in the program;
- Mean or median earnings of those in the program;
- Program cohort default rates;
- Whether the program satisfies licensure or certification requirements in each state included in the institution's metropolitan statistical area (MSA) or any other state for which the institution has made a determination;
- Whether the program is programmatically accredited and the name of the accrediting agency; and
- A link to the College Navigator or another federal website.

Nor has the Department described why it believes direct disclosures should not be provided to prospective and enrolled students, or included in promotional and advertising materials, aside from vague descriptions of the burden required. Yet those burden estimates are nearly identical to those in the 2014 rule, and the Department has not adequately justified why its opinion of the worthiness of imposing that burden has changed.

The Department states that it "proposes to rescind the GE regulations because, among other things, they are based on a D/E metric that has proven to not be an appropriate proxy for use in determining continuing eligibility for title IV participation; they incorporate a threshold that the researchers whose work gave rise to the standard questioned the relevance of to student loan borrowing levels; and they rely on a job placement rate reporting requirement that the Department was unable to define consistently or provide a data source to ensure its reliability and accuracy and that has since been determined is unreliable and vulnerable to accidental or intentional misreporting."[79] Both are addressed elsewhere in these comments. Its entire bases for eliminating the gainful employment rule rely on two single components of a much more involved regulation.

In short, the Department has indicated by stating that it will place program-level outcomes on the College Scorecard that it believes these metrics are important and valid. But it has also indicated, by promising only that it will hide those data on a little-accessed government website, that it does not believe students are important enough to deserve receipt of that information. The Department has not adequately justified the rescission of this regulation, and it has not even attempted that justification with most of the elements of the final rule from 2014.

The Department conducts an inadequate analysis in proposing to rescind the rule.

The Department consistently failed to attempt a reasoned rulemaking during negotiations. Negotiators requested many variations of data analysis, but the Department indicated that it had not established an agreement with another federal agency that would allow it to look at workforce outcomes, that it had no intention of attempting to provide most of the data under discussion, or that it would even provide information not already publicly available. It presented several basic statistical analyses that added little to the conversation and served only to waste negotiators' time. (One of these analyses later proved to have been conducted incorrectly, and the Department was forced to notify negotiators after the conclusion of the rulemaking to clarify its misstatements.[80]) When negotiators reached tentative consensus on the proposal to add a fourth session of negotiations, the Department stated that it wouldn't provide the information and data necessary to make a fourth session worthwhile.[81] Moreover, several public records requests have gone unanswered or responded to only with already publicly available information that is not responsive to the requests; as noted elsewhere in these comments, New America has had one such request (for changes to their program offerings that all GE programs are required under the GE regulations to report) filed with the Department for well over a year, without receiving the requested information.

Moreover, the Department has already faced an inquiry under the Information Quality Act for its failure to comply with the Act's requirement. The National Student Legal Defense Network submitted its petition on September 5, noting that the Department's proposed rule "violates the IQA by repeatedly stating conclusions that are not clearly supported by the evidence," making the entire public comment period useless for the purpose of providing informed public comment.[82] The Department has apparently made no attempt to access its own data, which it has used in the past to support the 2014 rulemaking and thus evidently has available to it, to support the conclusions asserted in the proposed rule; nor, in many cases, did it accurately state the limited research it does cite. An accounting of the IQA violations

[79] 83 FR 40176
[80] 84 FR 40171
[81] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/getranscriptsday2.pdf
[82] https://www.nsldn.org/blog/nsldn-challenges-information-quality-in-the-department-of-education-s-proposed-2018-ge-rule

in the proposed rule spans nearly 10 pages of the petition. But despite these obvious and pervasive flaws with the proposed rule, the Department has not withdrawn it to republish an accurate, corrected rule.

Taken together, there is no way to look at the gainful employment rulemaking process and reach any assessment other than that the Department has abdicated its responsibility to conduct a reasoned rulemaking based on the evidence and information available to it. The proposed rule confirms that further, with effectively no new analyses, data, or even consideration given to the effect of the regulations it proposes to rescind.

Borrower defense is not a replacement for accountability akin to the gainful employment rule.
The Department states that its proposed rule governing borrower defense to repayment claims "more appropriately addresses concerns about institutional misrepresentation by providing direct remedies to students harmed by such misrepresentations."[83] It is difficult to imagine a more disingenuous explanation for eliminating the gainful employment rule. For starters, the borrower defense rule is, as the Department notes, designed to aid borrowers only after the fact. It does nothing to prevent borrowers--or the taxpayers who front the money for their education--from wasting their time and money in poor-performing programs in the first place. To suggest back-end relief can serve as a replacement for front-end protection is both absurd on its face and irresponsible to taxpayers. The Department's proposed borrower defense rule will also not accomplish the goal of helping those harmed borrowers whose institutions did lie to them; according to the Department's own estimates in that proposed rule, no more than 2 percent of loans for such harmed borrowers will ultimately be discharged.[84] Moreover, there is certainly not a 100 percent overlap between low-value educational programs and programs that misrepresent their outcomes to prospective and enrolled students. Neither should be permissible; but the remedies for each problem are not the same. The Department should eliminate this argument from its final rule, rather than simply paying lip service to both relief and accountability.

The Value of a Debt-to-Earnings Rate

Annual debt-to-earnings thresholds.
The Department states in its proposed rule that it has concerns about the validity of the annual debt-to-earnings rate threshold used as part of the determination for sanctions under the gainful employment rule. In the 2011 and 2014 regulations, the Department cited to the common mortgage underwriting standard of 8 percent as the threshold, as described in a research paper in 2006.[85] But in contrast to the Department's own previous statements that the 8 percent standard for repayment has "widespread acceptance,"[86] the Department now says that it believes the researchers argued the 8

[83] 83 FR 40176
[84] https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-borrower-defense-proposed-rule/
[85] https://files.eric.ed.gov/fulltext/ED562688.pdf
[86] 79 FR 64919

percent standard “has no particular merit or justification” for student loans, “[raising] questions about the reasonableness of the 8 percent threshold.”[87] This is a patently unreasonable and unfair interpretation of the researchers’ interpretation of the threshold -- and does not adequately justify why the Department has changed its own interpretation now.

The research paper cited by the Department indeed recognized the shortcomings of using 8 percent threshold to determine the affordability of student debts. But this is just a small piece of the paper. [88] With a goal to define a justifiable benchmark for affordable student debts, the paper reviewed previous empirical research on manageable debts, which not only explained the ubiquity of the 8 percent rule, but also detailed different methodologies to derive an affordable debt level.

Baum and Schwartz, the authors of the paper, concluded that there is no one-size-fits-all D/E threshold for all levels of income; the percentage of income contributed to student loan payments should increase with income. Higher earners are more able to contribute a higher percentage of their income towards loan payment, compared with lower earners. However, the researchers noted that under no circumstances should the D/E rate exceed 20 percent of discretionary income. Based on the outcome of this research, the Department, in the promulgation of the 2011 and 2014 rules, applied the D/E rate thresholds of 20 percent for discretionary income and the 8 percent for annual income as the passing requirements for all GE programs. [89]

These requirements as stipulated in the proposed rules of 2011 and 2014 are already permissive for poor-performing GE programs. First, an 8 percent threshold is a passing--not failing--threshold for GE programs. In other words, programs only fail the GE rule and risk eligibility for Title IV funding if its discretionary income rate exceeds 30 percent *and* its annual income rate exceeds 12 percent for two out of three consecutive years. Programs with discretionary income rates between 20-30 percent or annual rates between 8-12 percent are considered in the zone and given time to improve before risking loss of federal aid eligibility; programs don’t lose Title IV access unless they have a combination of failing and zone rates for four consecutive years.[90]

Moreover, the researchers explained that the amount of manageable debt depends on borrowers’ incomes--those with the lowest incomes (below 150 percent of the federal poverty line) can’t reasonably afford to make any payment, while those with higher incomes can afford higher student loan payments, provided their payments are within 20 percent of discretionary income. The table below, from a New America piece published last year, replicates the researchers’ table of proposed DTE rates for students using the most current interest rate and poverty guideline.[91]

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[87] 83 FR 40171

[88] Baum and Schwartz, “How Much Debt is Too Much? Defining Affordable Benchmarks for Manageable Student Debt.” https://eric.ed.gov/?id=ED562688. See page 3.

[89] 79 FR 16443

[90] 79 FR 16444

[91] https://www.newamerica.org/education-policy/edcentral/why-department-shouldnt-weaken-gainful-employment-metrics/

Table 3: Reasonable Debt-to-Income Ratios, Based on Baum & Schwartz 2006 Analysis

Annual Income ($)	Discretionary Income ($)	Annual Payment ($ at 20% of discretionary income)	Annual Debt-to -income Ratio (%)	Total Debt Supported ($ based on interest rate: 4.45%, 10-year repayment period)
10,000	0	0	0	0
20,000	1,910	382	2	3,030
30,000	11,910	2,382	8	18,895
40,000	21,910	4,382	11	34,759
50,000	31,910	6,382	13	50,623
75,000	56,910	11,382	15	90,284
100,000	81,910	16,382	16	129,945
150,000	131,910	26,382	18	209,267
200,000	181,910	36,382	18	288,590

The scope of this problem among GE programs raises significant concerns. The median earnings of 8,637 programs in the first-year data release is $22,710. According to this research indicating that a debt-to-earnings rate should not exceed 20 percent of discretionary earnings, the rate for annual earnings at this typical income level for GE programs should be around 4 percent. But the data reveal debt amounts are actually much higher, at 5.15 percent. If programs were required to pass both 8 percent and 20 percent thresholds (instead of 12 and 30 percent), only about 4,000 programs out of 8,637 would pass, not the 6,595 that passed under the first year of data.[92] At the lowest income levels among GE programs, discretionary rates are even higher--as much as 100 percent for programs with earnings of $15,000-$20,000. In other words, GE programs with the lowest earnings are charging far beyond what research indicates is affordable.

Table 4: Median Annual and Discretionary DTE Rates, By Income Level

Median Income Level ($)	Number of Programs	Median Annual DTE Ratio (%)	Median Discretionary DTE Ratio* (%)
<=15,000	1,498	4.41	100
15,000—20,000	1,925	6.6	100
20,000—25,000	1,481	5.99	31.18
25,000—35,000	1,875	4.52	11.56
>35,000	1,858	3.6	5.57

** In GE data, programs with discretionary income of zero but non-zero loan debts are classified as a 100% discretionary debt-to-earnings ratio.*

Those thresholds were upheld by other research, as well. For instance, in 2014, the Department noted that Federal Housing Administration underwriting standards implied housing debt should leave at least 12 percent for all other types of debt. The 8 percent threshold "falls reasonably within the 12 percent of gross income allocable to non-housing debt under current lending standards," the Department noted in 2014.[93] The Department also evaluated the thresholds against existing data and found that those who

[92] Sophie Nguyen, "Why the Department shouldn't Weaken Gainful Employment Metrics." https://www.newamerica.org/education-policy/edcentral/why-department-shouldnt-weaken-gainful-employment-metrics/

[93] 79 FR 64919

would qualify as zone or fail programs under the 2014 gainful employment rule had much higher default rates and much lower repayment rates than passing programs, with more than a quarter of borrowers in those programs defaulted on their loans, and fewer than a third of borrowers successfully paying down the balance of their loans.[94]

Sandy Baum, one of the researchers whose work is cited in support of the debt-to-earnings thresholds, has herself taken issue with the Department's allegations about the thresholds, saying that "the Department of Education has misrepresented my research, creating a misleading impression of evidence-based policymaking."[95] Instead, Baum says, her research "of a range of evidence about reasonable debt burdens for students would best be interpreted as supporting a stricter standard." The Department's attempt to undermine an overly-permissive rule by indicating the rule is insufficiently based in research are disingenuous, arbitrary, and unsupported by the data. Moreover, they run counter to the entire notion of data-driven policymaking.

Recessions.
The Department has argued that economic downturns may impact graduates' earnings over a longer horizon than previously estimated in the 2014 regulation. As such, it is concerned that colleges may be penalized for factors outside their control. However, this interpretation is unjustified, outside of a single outlier.

As the justification of the 2014 regulation clearly states[96] and as the Department reiterated in its most recent proposal, the average economic recession lasts for less than a year. Even the Great Recession lasted only 18 months in the determination of the National Bureau of Economic Research (December 2007 through June 2009).[97] Given a lengthy period of time, with multiple years of failing rates required for programs to fail the debt-to-earnings rate, it is exceedingly unlikely that economic factors alone would cause a program to lose eligibility under the gainful employment rule. Moreover, by all accounts--including in the Department's own proposal--the Great Recession was an exceptional event that should not be relied upon as a baseline in policymaking. Indeed, the Department states, "The Great Recession had an *unusually* profound impact on recent college graduates, who were unemployed at a [sic] *historic* rate…" (emphasis added).[98]

Relying on the average length of an economic downturn reflects a more sound approach to policy. The Department's use of an outlier event to make the case for why graduate earnings may be unreliable in the case of economic trouble does not present strong reasoning. Moreover, the Department does not explain why a simple "extenuating circumstances" justification, in which the Secretary could suspend sanctions for one year in affected fields if the National Bureau of Economic Research and/or federal economic agencies determined a recession was in effect, would not be sufficient to account for the unlikely scenario of a particularly long recession.

[94] 79 FR 64920
[95] https://www.urban.org/urban-wire/devos-misrepresents-evidence-seeking-gainful-employment-deregulation
[96] 79 FR 64920
[97] http://www.nber.org/cycles/recessions_faq.html
[98] 83 FR 40172

Interest rates.

The Department suggests it is concerned that the interest rates used to calculate the debt-to-earnings rates of individual programs unfairly affect programs' outcomes. It projects in Table 1 that a one percentage point increase in the interest rate applied to the loans would increase the number of failing programs.[99] However, those interest rates--which are based on an average of the federal student loan interest rates over a time period prior to entering repayment, differentiated by credential level--"are conservatively low estimates of the actual debt payment made by students," in the Department's own words.[100] For instance, interest rates on private student loans are "more commonly...higher than rates on federal loans."[101] Moreover, the Department's (and a negotiator's) view that economic shifts would cause GE programs to become ineligible based on interest rates alone fails to consider the totality of circumstances.[102] Because interest rates on student loans have been tied to the success of the market since 2013,[103] high interest rates moving forward will serve as an indicator of a better economy in which more graduates will be able to find full employment--boosting the earnings side of the debt-to-earnings calculation.[104] As the Department itself notes, "during these times of economic growth [in which interest rates rise]... demand for skilled workers is greatest."[105]

The Department should conduct analysis of actual interest rates in GE programs to assess whether there are any cases in which the applied interest rate in the debt-to-earnings ratios is actually *higher* than the actual. A simple projection of what would happen if interest rates rose is simply math conducted in a vacuum; it does not adequately account for broader economic circumstances like an improved labor market alongside the rising interest rates.

Earnings.

The Department raises concerns in the proposed rule about the earnings metric used for disclosures to borrowers and in the debt-to-earnings calculation. Specifically, the Department writes that its "analysis of those [debt-to-earnings] rates raises concern about the validity of the metric and how it affects the opportunities for Americans to prepare for high-demand occupations in the healthcare, hospitality, and personal services industries, among others."[106] However, these concerns are all addressed throughout the Department's previous 2014 rule, and do not justify rescission of that rule altogether.

First, the Department notes that its analysis shows that earnings "vary significantly from one occupation to the next."[107] However, this suggests that institutions must tailor the costs of their programs to reasonably match the earnings borrowers can expect to receive--not, as the Department suggests, that

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[99] 83 FR 40172
[100] 79 FR 64919
[101] 79 FR 64940
[102] 83 FR 40172
[103] https://www.congress.gov/bill/113th-congress/house-bill/1911/text
[104] https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45653-outlookupdate2014aug.pdf; https://www.thebalance.com/bonds-and-the-economy-417070
[105] 83 FR 40172
[106] 83 FR 40171
[107] 83 FR 40172

institutions should not be held accountable if their borrowers cannot afford the debt they take on. As the Department stated in 2014, "[i]t is neither feasible nor appropriate to apply different metrics to different kinds of programs. By itself, the occupation an individual receives training for does not itself determine whether debt is manageable. Rather, it is related to the debt that the individual accumulates and the earnings achieved as a result of the program's preparation--exactly what the D/E rates measure assesses."[108] In other words, the Department allowed for earnings to be very low--provided the debt for those graduates wasn't also very high. Variation across occupations doesn't reflect a problem with the metric; it justifies the use of a sliding-scale metric with baseline thresholds, just as the debt-to-earnings metric established.

Second, the Department notes that the earnings vary "across geographic regions within a single occupation. The Department had not predicted such substantial differences in earnings to geography, which may have been exacerbated by the Great Recession and the speed with which individual [s]tates reduced their unemployment rate."[109] However, institutions have an obligation under the law to offer programs they believe will prepare graduates for employment in the field--a responsibility that requires them to consider the labor market needs and saturation for the programs they're offering. As the Department wrote in 2014, "[w]e believe that institutions should be responsive to regional labor market needs and should only offer programs if they reasonably expect students to be able to find stable employment within that occupation.... Indeed, it is an institution's responsibility to conduct the due diligence necessary to evaluate the potential outcomes of students before offering a program. We do not believe that this is an unreasonable expectation because some accreditors and [s]tate agencies already require institutions to demonstrate that there is a labor market need for a program before it is approved."[110] Moreover, allowances for multiple years of failing rates and the establishment of a "zone" in which institutions are given time to improve mean that institutions are protected from short-term fluctuations in local labor markets, and held accountable for sustained failures to offer borrowers real opportunity after they graduate.

Third, the Department takes issue with comparisons of GE graduates' earnings against those of high school dropouts. Specifically, the Department highlights that the earnings of the average high school dropout may reflect mid-career dropouts. But even after the Department National Center for Education Statistics analyzed the same Census Bureau data narrowed to those without a high school diploma who are young adults aged 25-34, the typical earnings of more than 5,000 programs fall short.[111] In total, The Institute for College Access and Success found that more than 350,000 students graduated from low-performing gainful employment programs with almost $7.5 billion in debt.[112] And further analysis from Third Way found that fully one in 10 graduates under the rule graduated from programs that failed

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[108] 79 FR 64915
[109] 83 FR 40172
[110] 79 FR 64926
[111] The median earnings of a worker aged 25-34 without a high school diploma are $25,400: https://nces.ed.gov/programs/coe/pdf/coe_cba.pdf. Of GE programs with positive earnings reported, 5,249 had median earnings below that amount; and 5,184 had mean earnings below that amount.
[112] https://ticas.org/sites/default/files/pub_files/ge_total_debt_fact_sheet.pdf

the debt-to-earnings metric in the first year of implementation.[113] Moreover, the Department fails to analyze even more disturbing findings: for instance, graduates of more than 1,500 GE programs included in the 2016 earnings file averaged *less* than the earnings of a full-time, minimum wage worker.[114] And while the Department is correct that apprentices typically earn relatively high wages[115] upon completing their registered apprenticeship programs, employers also often cover most or all of the training costs, meaning many apprentices likely have little to no debt from their education.[116]

The Department indicates that it believes earnings are unduly influenced by a variety of factors, many of which fall outside of the scope of institutional quality. For instance, it highlights a Census Bureau report, noting that it indicates "individual earnings may differ significantly due to a variety of factors, including an individual's work history, college major, personal ambition, and lifestyle choices." This is, no doubt, accurate; certainly, individuals may make choices that affect their individual earnings greatly. But as the Department stated in 2014, "[i]n examining programs generating an unusually large number of graduates without full-time employment, the Department believes it is reasonable to attribute this outcomes less to individual student choices than to the performance of the program itself."[117] In other words, programs at which the typical student who completes still does not earn enough to make his debt affordable should concern the Department, on behalf of taxpayers if not on behalf of students. After all, programs under this rule are permitted access to federal aid dollars only *if* and *because* they lead to gainful employment in a recognized occupation. The Department continued, "[r]egardless of whether a student works full-time or part-time or intermittently, the student is still burdened in the same way by the loans he or she received in order to attend the program."[118] So whereas the proposed rule assesses that, if the Department were concerned about wages, it would have "contended that the majors completed by the lower-earning graduates were lower-performing,"[119] instead the Department is--rightly--concerned with the relative affordability of the debt compared with those earnings.

In short, the Department has failed to present a compelling case for why the earnings measure, or the debt-to-earnings metric used to assess accountability, does not suffice to measure an educational program's ability to lead to gainful employment. As importantly, the Department has not compellingly explained why its view of the earnings measure has changed so significantly in just a few years; or why it believes it is appropriate to post program-level earnings on the College Scorecard, but not disclose that information directly to students through a gainful employment disclosure template, despite all the alleged flaws in the earnings measure.

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[113] https://www.thirdway.org/memo/ge-by-the-numbers-how-students-fared-at-programs-covered-under-the-gainful-employment-rule

[114] Minimum wage is $7.25 per hour; so someone working 40 hours per week all year would earn $15,080: https://www.bls.gov/opub/reports/minimum-wage/2017/home.htm. Of GE programs with positive earnings reported, 2,117 had median earnings below that amount; and 1,587 had mean earnings below that amount.

[115] http://www.esa.doc.gov/reports/benefits-and-costs-apprenticeships-business-perspective

[116] https://www.americanprogress.org/issues/economy/reports/2016/02/09/130750/how-states-are-expanding-apprenticeship/

[117] 79 FR 64926

[118] Ibid

[119] 83 FR 40175

Tipped income.
The Department alleges in its proposed rule that, "since a great deal of cosmetology income comes from tipes, which many individuals fail to accurately report to the Internal Revenue Service, mean and median earnings figures produced by the [IRS] under-represent the true earnings of many workers in this field in a way that institutions cannot control."[120] It is unusual to see one federal agency make accomodations for those violating the laws and regulations of another agency, as would be the case if the Department scrapped the gainful employment rule to accommodate those illegally not reporting tipped income.

Beyond that inconsistency, however, it is also true that most gainful employment programs--including most GE programs that failed in the 2015 debt-to-earnings rates--do not suffer from this problem. As Ben Miller of the Center for American Progress submitted in earlier comments to the Department, an analysis of the occupations predominantly associated with tipped income reveals that only "156 failing programs (19 percent of the overall total in that status) and 366 zone programs (30 percent of the overall total in that status)" attended programs associated with tipped-income occupations.[121]

The American Association of Cosmetology Schools (AACS) litigation that the Department includes mention of in this section[122] was, it is worth noting, extremely limited in its scope. In fact, the court specifically held that the gainful employment rule was valid; and instead directed the Department only to broaden the allowable forms of appeal, and only for AACS member institutions.[123] Given this, it is clear that the earnings appeal component is not sufficient to justify rescission of the entire rule.

The Department argues that the alternate earnings appeals have been "time-consuming and resource-intensive, with great variations in the format and completeness of appeals packages."[124] However, the Department does not appear to have considered any alternatives to its current case-by-case review of earnings appeals. Its concern with the implications of tipped income therefore do not adequately justify rescinding the rule entirely. For instance, the Department could rewrite the earnings appeals regulations to clarify what kind of documentation would be required, ensuring completeness of the applications; or it could create a survey instrument that institutions must use in attempting to appeal their earnings, ensuring comparability across programs. It could establish clear boundaries for which types of programs may appeal, limiting appeals only to tipped-income occupations and other special circumstances, and dictate how and when those appeals must be submitted, weeding out any frivolous submissions.

Skills gap.
The Department, in its proposed rule, attempts to argue that "[a]t a time when 6 million jobs remain unfilled due to the lack of qualified workers, the Department is re-evaluating the wisdom of a regulatory regime that creates additional burden for, and restricts, programs designed to increase opportunities for

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[120] 83 FR 40174
[121] https://www.regulations.gov/document?D=ED-2017-OPE-0090-0045
[122] 83 FR 40174
[123] https://casetext.com/case/am-assn-of-cosmetology-sch-v-devos
[124] 83 FR 40174-40175

workforce readiness." However, this fundamentally misreads both the causes of the skills gap, and the solutions that the gainful employment rule lays out.

The Center on Education and Skills at New America (CESNA) has written of its concerns with a prominent narrative around the skills gap: that workers, and not employers, are to blame. As CESNA wrote in *Beyond the Skills Gap*, "[t]here are many reasons to treat claims of a skills gap with skepticism – particularly the notion that there is something fundamentally different about today's college graduates compared with previous generations, or that jobs have become so much more complicated that workers cannot keep up. A slack labor market, weak consumer demand, and the reluctance by many employers to raise wages or hire someone without experience all help sustain the large number of job vacancies. Declining employer investment in on-the-job training and greater use of sub-contracting also make it harder for people to develop and maintain the skills and experience employers want."[125] This is the reality of the skills gap: there are many, complex causes for labor market mismatches.

But the solution to that skills gap is not to offer programs demonstrated to charge too much for too few opportunities in the labor market. Nor should the Department be more concerned with burdening those programs than it is with the costs placed on the students who enroll in them hoping to launch a career and instead winding up too deeply in debt they cannot afford. As CESNA wrote, "part of what is making the 'skills gap' so difficult to overcome are entrenched policies within higher education that inoculate institutions from the consequences of poorly designed programs and credentials."[126] Colleges--especially those explicitly promising career opportunities for their graduates--must be held to account when they fail to do so, or policymakers can never hope to shrink the skills gap.

Minimum n-sizes.

In the current regulation, the minimum number of students who completed, or "n-size," is taken into account in two places: the disclosure requirements and the D/E rates calculation. In the first place, the Department notes that an n-size of 10 is statistically reliable to produce and disclose data.[127] Specifically, the Department noted that "the probability of mischaracterizing a program as zone or failing due to statistical imprecision is…[b]y most generally accepted statistical standards… modest."[128] Moreover, an n-size of 10 is appropriate to ensure students' privacy is protected, given the metrics assessed here and "[b]ased on NCES standards."[129] Other organizations and data collections use a similar strategy; for instance, Complete College America instructs states participating in its data collection that "[c]ategories that include ten or fewer students (n<11) should be suppressed and a DS [data suppression notation] should be reported."[130] One of the College Measures "Launch My Career" websites reports earnings data with n-sizes as low as five in some cases.[131]

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[125] https://www.newamerica.org/education-policy/policy-papers/beyond-the-skills-gap/
[126] Ibid
[127] 79 FR 64946
[128] Ibid
[129] Ibid
[130] https://completecollege.org/wp-content/uploads/2017/08/2017MetricsTechnicalGuide.pdf
[131]
https://bucketeer-dc7f9b9a-03d2-4c5f-8a0e-9bf712a3d90a.s3.amazonaws.com/technical_documents/docs/1/original/Colorado_ROI_Methodology_v20160622.pdf?1477573141;

For accountability purposes, the Department relies on a larger n-size (30) to avoid year-to-year fluctuations and decrease the odds of a passing program being reported as failing. As the Department described in 2014, "[t]he average probability of a passing program becoming ineligible as a result of being mischaracterized as a zone program for four consecutive years at an n-size of 30 is close to 0 percent," particularly because programs must fail multiple years of data before they are disqualified from federal aid eligibility.[132] While this means some programs for which earnings are calculated are excluded from the debt-to-earnings calculation, the Department elected to make a reasonable tradeoff to reduce potential inappropriate sanctions.

Oddly, the Department argues that the n-size of 10 hinders its goals, saying that, "[t]he Department does not believe that GE data can adequately meet this goal [of allowing researchers and policymakers to analyze program outcomes] or inform consumer choice since only a small proportion of postsecondary programs are required to report program-level outcomes data and, even among GE programs, many programs graduate fewer than 10 students per year and are not required to provide student outcome information on the GE disclosure."[133] However, as previously noted, the limitation to only certain types of programs is a statutory one; and appears consistent with the Department's stated goal in other aspects of higher education to "honor institutional mission,"[134] given that all gainful employment programs have access to federal aid only because their stated mission and purpose is to lead to gainful employment in a recognized occupation, while that may not be the stated mission for other programs.

Moreover, the Department now claims that it intends to provide program-level earnings on the College Scorecard; but because of the Scorecard's many disaggregates and metrics, its data-suppression techniques often lead to privacy-protected variables of n-sizes considerably larger than 10.[135] And most of the metrics included on the consumer-facing site itself include a separate version suppressed for an n-size of 30, to avoid significant year-over-year fluctuations.[136] So at least under the existing privacy protocols for the College Scorecard, students may see more programs than in gainful employment, but they will likely see fewer data points than in the existing disclosure template. The Department has not explained how it plans to change these protocols to resolve any supposed problems with the minimum n-size; and without changes to the minimum n-sizes on the Scorecard, this rationale does not hold water.

During the promulgation of the rules in 2014, the Department acknowledged that many GE programs are very small in the number of enrollments. But with a minimum n-size of 30, the rules hold accountable those programs that cover 60 percent of Title IV recipients enrolled in GE programs, and

[132] 79 FR 64947
[133] 83 FR 40174
[134] See, for example, https://www.regulations.gov/document?D=ED-2018-OPE-0076-0001
[135] See, for example, page 13:
https://cdn.americanprogress.org/wp-content/uploads/2016/02/10085654/ScoringScorecard-report.pdf
[136] https://collegescorecard.ed.gov/data/documentation/

with an n-size of 10, it covers 75 percent of Title IV recipients.[137] N-size requirements as established in the current rules appropriately maintain statistical accuracy without weakening accountability under the regulation.

Tuition.

The Department contends that "because the primary purpose of the [T]itle IV, HEA programs is to ensure that low-income students have the same opportunities and choices in pursuing higher education as their higher-income peers, [T]itle IV aid is awarded based on the institution's actual cost of attendance, rather than a fixed tuition rate that limits low-income students to the lowest cost institutions."[138] But while Title IV aid does expand access for low-income students, too often it is at institutions that charge too much and/or fail to prepare graduates to comfortably repay student debt. Many for-profit college programs not only cost more than comparable community colleges, they also provide lower returns in the job market for the same credential and may even leave students earning less than they did before receiving the credential.[139] Rather than paying for a "fixed tuition" amount, as the Department alleges, the gainful employment rule instead measures the return on investment programs deliver to students. The regulation does not threaten GE programs' ability to set tuition prices where appropriate, so long as the value provided to students is commensurate with the cost.

Citing researchers from the American Enterprise Institute, the Department goes on to argue that "because public institutions receive State and local taxpayer subsidies, 'even if a for-profit institution and a public institution have similar overall expenditures (costs) and graduate earnings (returns on investment), the for-profit institution will be more likely to fail the GE rule, since more of its costs are reflected in student debt.'"[140] However, as the AEI report cited also notes, community colleges also have higher earnings in certificate programs than for-profit certificate programs ($29,213 on average, compared with $18,580 in for-profit programs, when considering the higher of the mean or median earnings).

In an analysis conducted by New America, we found that certificate programs at for-profit colleges would need to lower tuition, supplies and any other direct costs by $3,534 to pass a debt-to-earnings test (see Table 5).[141] In fact, they need not reduce students' actual debt levels; the 2014 gainful employment rule established a limitation that the total federal and private student debt used to calculate the debt-to-earnings ratio would not exceed the amount charged for tuition and other direct academic expenses like books and supplies. In other words, the amount of debt for which a college is held accountable has been capped to only include those costs within the institution's direct control, and excludes borrowing for living costs beyond tuition.

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[137] 79 FR 16451
[138] 83 FR 40171
[139] http://www.nber.org/papers/w22287?utm_campaign=ntw&utm_medium=email&utm_source=ntw
[140] 83 FR 40174
[141] https://www.newamerica.org/education-policy/edcentral/how-much-would-it-cost-profit-colleges-pass-gainful-employment/

Table 5: Principal Balance Required to Pass GE Programs, Using Failing & Zone Undergraduate Certificate Programs at For-Profit Institutions

Avg. principal borrowed per program graduate	$13,556
Avg. principal required to pass DTE ratio	$10,022
Principal debt reduction required to pass DTE rate	**$3,534**

The AEI work found that for-profit institutions charge students an average $8,649 in tuition for a certificate--over eight times the average amount a student would have to pay out-of-pocket to pursue a certificate at a community college. Even after accounting for the additional public support provided to community college students, AEI found that those who earned a certificate from a for-profit college paid roughly $3,100 more in net tuition than graduates from the average certificate program at a public college.[142] That net difference in pricing, even after accounting for government subsidies to public institutions, is similar to the amount identified by New America by which for-profit certificate programs would need to reduce their tuition in order to pass the gainful employment rule, suggesting that for-profit colleges are not failing the GE rule because of their lack of state appropriations.

A body of research has found evidence of the Bennett hypothesis--that institutions drive up tuition to match available federal aid--with respect to for-profit institutions. For instance, one study compared Title IV-eligible and non-Title IV-participating for-profit institutions, many of which offer similar academic programs, and found that “the Title IV institutions charge tuition that is about 78 percent higher than that charged by comparable institutions whose students cannot apply for federal financial aid.”[143] Thus, it should be no surprise that for-profit institutions charge more than public institutions for comparable programs, even after accounting for the subsidies that public institutions get. But this research, and the AEI and New America analyses, only affirm the importance of the gainful employment rule in measuring the debt that colleges foist onto borrowers relative to the value of the program.

Loan limits.

The Department suggests that “[a] program’s D/E rates can be negatively affected by the fact that it enrolls a large number of adult students who have higher [f]ederal borrowing limits, thus higher debt levels…”[144] However, the Department offers no evidence to suggest this is the case; and in fact, other research suggests it likely is not the case.

[142] “Students graduating from certificate programs at for-profit institutions had an average net tuition of $8,649, compared to $1,052 for their peers at public institutions.29 This represents a difference of $7,597, which is much higher than the average direct state subsidy of $4,506 the public institutions in this analysis received. Direct appropriations do not account for the entire difference in net tuition between public and for-profit colleges, meaning other factors are still responsible for the disparity between the two sets of schools.” http://www.aei.org/publication/measuring-quality-or-subsidy-how-state-appropriations-rig-the-federal-gainful-employment-test/

[143] http://www.nber.org/papers/w17827.pdf

[144] 83 FR 40172

An analysis by New America found that independent students at for-profit institutions actually borrowed *less* than dependent students did. While the lowest-income dependent students with debt borrowed $8,995.79, on average (less than all other income brackets of dependent students), independent students borrowed $8,736.66, on average. And independent students at for-profit institutions were just as likely to borrow as their low-income dependent student peers in the same sector.[145]

Moreover, as described elsewhere in these comments, the gainful employment rule caps total student debt levels for a program at the amount charged for tuition, fees, books, and supplies--eliminating the potential that additional loan limits for independent students to take on debt for living expenses could mean a program fails. In 2014, the Department analyzed data that showed just 15 percent of students in the 2007-08 cohort and 17 percent of those in the 2008-09 cohort would be affected by the cap,[146] suggesting that most students are not borrowing beyond tuition anyway, whether from higher loan limits for independent students or for other reasons.

Repayment horizons.
The Department suggests that the Department's selected repayment timeline for amortizing and analyzing graduates' debt is inappropriate, because other, longer repayment timelines are available to borrowers as well. However, the Department should consider not just what is available to borrowers, but also a reasonable expectation for the length of time borrowers actually *take* to repay their loans.

In 2014, the Department analyzed data on loan repayment, and found that, among recent cohorts of borrowers, "the majority of borrowers from two-year institutions continue to fully repay their loans within 10 years. For example, of undergraduate borrowers from two-year institutions who entered repayment in 2002, 55 percent had fully repaid their loans by 2012…. In contrast, recent cohorts of undergraduate borrowers from four-year institutions and graduate student borrowers are repaying their loans at slower rates than similar cohorts. Of borrowers who entered repayment in 2002, only 44 percent of undergraduate borrowers from four-year institutions and only 31 percent of graduate student borrowers had fully repaid their loans within 10 years… Given the significantly slower repayment behavior of recent graduate student borrowers and the number of increased extended repayment periods available to borrowers… we believe it is likely that the majority of graduate student borrowers from this cohort will complete their repayment within 20 years."[147] These data comport with the gainful employment rule's assignment of a 10-year cohort to less-than-four-year programs, a 15-year cohort to bachelor's degree programs, and a 20-year cohort for graduate programs.

The Department also addressed the availability of income-driven repayment plans, noting that "programs should ideally lead to outcomes for students that enable them to manage their debt over the shortest period possible."[148] Other data from the Department provide valuable insights into the behavior of IDR borrowers. Among borrowers entering repayment in FY 2016, the Department said that fewer

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[145] https://s3.amazonaws.com/newamericadotorg/documents/Living_on_Credit_KfCmy9t.pdf; see Appendix
[146] https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/2013-methodology.pdf
[147] 79 FR 64939
[148] 79 FR 64940

than 12 percent of them were from less-than-four-year programs, where the bulk of gainful employment programs are concentrated.[149] Moreover, most of those IDR borrowers (with the exception of Pay As You Earn-enrolled borrowers) from two-year and less-than-two year programs were expected to repay well over the amount originally borrowed, so may complete their payments prior to the expiration of the repayment period (i.e., will likely not receive any or much forgiveness).[150] And the average debt level for IDR borrowers in the public and for-profit sectors, which have more GE programs, are lower than in the nonprofit sector.[151] Borrowers with lower debt levels are more likely to repay their debts quickly if they avoid delinquency and default; that's especially true if they are not enrolled in IDR plans, because of minimum monthly payments in other repayment plans.

Income-driven repayment.

The Department makes an inexplicable argument in its proposed rule that the problem of unaffordable levels of debt has effectively been solved by the creation of income-driven repayment plans.[152] In addition to being a wildly irresponsible perspective for a federal agency responsible for stewarding over a hundred billion dollars per year in taxpayer-financed federal aid to hold, this argument rings especially hollow in the context of proposing to rescind the gainful employment rule. IDR plans, several of which were in place before the Department began its first rulemaking on gainful employment,[153] are not a solution to the problem of unaffordable for-profit and certificate programs. There is no evidence that IDR plans, some of which grew up alongside the rise of that problem, have improved the landscape of GE programs.

First and foremost, the income-driven repayment options (which include not just REPAYE, but also Pay As You Earn, Income-Based Repayment, and Income-Contingent Repayment) are designed not as an institutional accountability measure, but as a safety net for borrowers, many of whom left college with unaffordable amounts of debt relative to their earnings. In that sense, IDR plans are not always the best solution for borrowers (who may pay more over the long-term in accrued interest) or for taxpayers (who could wind up forgiving billions in student loans Congress expected to be repaid). If higher education programs leave a large share of borrowers with unaffordable debt--as is suggested where many of them must enter income-driven repayment in order to afford their payments and ultimately have debts high enough relative to their earnings to receive forgiveness rather than paying off their balances--it is all the more important that the Department hold those programs accountable, given the substantial taxpayer dollars on the line. As noted by an AEI researcher in testimony to the Senate Health, Education, Labor and Pensions Committee, "IBR can provide a large benefit to borrowers at substantial cost to the government…. The Department estimates that it costs taxpayers $27 for every $100 of loans a borrower repays through IBR due to forgiven interest and principal."[154] IDR plans do not assess whether a program

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[149] https://ed.gov/about/overview/budget/budget17/idrtables.pdf
[150] Ibid
[151] The average debt of IDR borrowers, as of Q2 of 2018, was $29,739 among proprietary schools, $37,500 among public institutions, and $56,160 among nonprofit colleges. See: IDR portfolio by school type, https://studentaid.ed.gov/sa/node/412
[152] 83 FR 40172
[153] Income-contingent repayment, for instance, was added to the Higher Education Act in 1994. http://www.ibrinfo.org/existingidr.vp.html
[154] https://www.help.senate.gov/imo/media/doc/Delisle.pdf

typically leads to gainful employment for their students or hold programs accountable for leaving students with unaffordable amounts of debt in the first place, as would the gainful employment rule currently in place.

It is also worth noting that, for some of the IDR plans, borrowers must demonstrate that their payments are higher on a standard repayment plan than they would be under income-driven repayment (a partial financial hardship) simply to qualify for entrance into the plan. That measure itself indicates that the borrower's debt is not affordable -- an argument for, not against, a gainful employment accountability rule that would prevent the need for such taxpayer costs in the first place by eliminating eligibility at persistently poor-performing programs. The Department must be concerned not just with how students manage their debts after leaving school, but also with how it stewards the taxpayer dollars that prop up programs in which most students have too much debt relative to their incomes. As the Department itself notes, "the existence of income-driven repayment plans… could make it even easier for students to borrow more than they need and institutions to charge high prices…"[155] Whereas the gainful employment rule stems the flow of taxpayer dollars entirely to failing programs at which the typical student can't afford his or her debt after graduation, income-driven repayment options permit those programs to continue operating indefinitely, without price sensitivity, at the expense of the federal fisc.

Those costs are likely to be significant. On top of the cut of taxpayer-financed federal aid dollars going to failing GE programs from the nearly $30 billion Pell Grant program, borrowers who enroll in income-driven repayment plans with low incomes are not expected to ever repay the entirety of their loans. According to estimates from the Department, borrowers entering the Pay As You Earn IDR plan with a projected income of less than $40,000 will only ever repay about 40 percent of their loans; those on REPAYE will pay back barely half of their debt.[156] Those plans are surely helping low-income borrowers to manage their debt--but they are letting colleges off the hook for leaving borrowers in those circumstances, and leaving taxpayers holding the bag for the cost. The Department's own budget estimates project that IDR plans will cost $74 billion over the course of their repayment periods.[157] In short, the presence of an income-driven repayment option to help borrowers repay their loans does nothing to address the problem of low-performing educational programs--and left untreated by the gainful employment rule or other accountability mechanisms, it will exacerbate that problem. Moreover, the singular accountability threshold established directly in the statute, the cohort default rate requirement, has been rendered hardly effective by use of deferments and forbearances.[158] In light of that, accountability for poor-performing programs through the gainful employment rule is even more important.

Finally, the Department suggests that its transparency plans will address the issue of high prices. While there is little evidence that transparency alone can drive tuition decreases,[159] the Department should

[155] 83 FR 40172
[156] https://ed.gov/about/overview/budget/budget17/idrtables.pdf. Dollars in net present value
[157] https://www.gao.gov/assets/690/681064.pdf
[158] https://www.gao.gov/products/GAO-18-163
[159] Consider, for instance, the addition of Sec. 111 of the Higher Education Opportunity Act of 2008, "Transparency in College Tuition for Consumers." https://www.gpo.gov/fdsys/pkg/PLAW-110publ315/pdf/PLAW-110publ315.pdf.

commit--in regulation--to increasing its own transparency. First, the Department should analyze the enrollment of borrowers in income-driven repayment plans and whether or not they have partial financial hardships, as well as delinquency rates, default rates, and repayment rates, separately for failing, zone, and passing programs. These data would indicate whether the Department is correct that borrowers in programs with high debt-to-earnings rates are, indeed, managing their debt using other tools and/or whether they are struggling to repay those debts. Additionally, the Department should release institution-specific rates of IDR enrollment to offer a clearer picture of what happens to borrowers in repayment--and the costs taxpayers will be responsible for covering.

Enrollment of minority students and women.

The Department alleges that the gainful employment rule “creates unnecessary barriers for institutions or programs that serve larger proportions of women and minority students.”[160] For instance, it cites to a College Board report that finds sizeable earnings gaps between Black and Hispanic women with an associate degree compared with white men of the same educational attainment level.[161] However, this and other reports that find lower earnings for minority and women students do not contradict the Department’s own findings from the 2014 rule that showed no significant correlation between programmatic outcomes on debt-to-earnings rates and demographic characteristics.[162]’

Figure 2, depicted as Table 2.4 in the 2014 regulation, shows the proportions of different demographic components--including race/ethnicity, income, gender, independent status, and the proportion of students whose mothers had completed college--across passing, zone and failing programs.[163] The Department found no outstanding or consistent difference in the proportion of minority or underserved students among programs with different outcomes. For instance, the average zone and failing programs enrolled more than 20 percent Black students, barely more than the average of 17 percent in passing programs. And while the average failing program enrolled nearly three-quarters Pell Grant students, so did average passing and zone programs, with only minimal difference. This indicates that programs’ D/E results may not be highly correlated with the demographic characteristics of students.

Yet tuition and fees at public institutions, for instance, have continued to increase beyond inflation. https://trends.collegeboard.org/sites/default/files/2017-trends-in-college-pricing_1.pdf

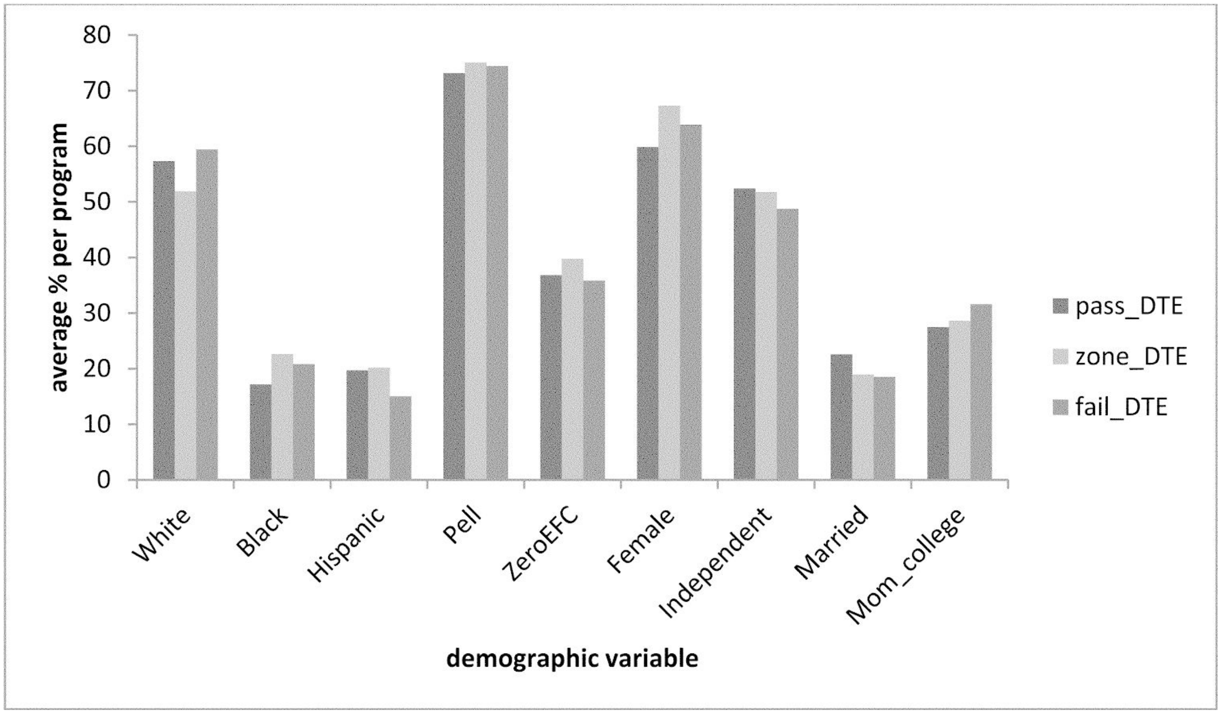
[160] 83 FR 40171

[161] https://trends.collegeboard.org/sites/default/files/education-pays-2016-full-report.pdf

[162] 79 FR 65045-65057

[163] 79 FR 65045

Figure 2: Programmatic Demographic Characteristics by Passing, Zone, and Failing Programs



Apart from this descriptive analysis, the Department also ran regression analyses showing the effects of various students' and institutions' characteristics on annual earnings rate. Tables 2.12 and 2.13 in the final regulation show the results of the regressions with and without controlling for race/ethnicity variables.[164] While both show that the share of low-income students enrolled in a program is negatively associated with annual earnings rates, the small magnitude of the coefficients imply little impact.

The series of analyses run did not indicate that the debt-to-earnings rate measure, at the program level, were driven by demographic factors rather than variation in institutional outcomes. Specifically, as it wrote in the final regulation, "[t]he Department acknowledges that student characteristics can play a role in postsecondary outcomes. However, based on the regression and descriptive analyses described above, the Department cannot conclude that the D/E rates measure is unfair towards programs that graduate high percentages of students who are minorities, low-income, female, or nontraditional or that demographic characteristics are largely determinative of results.... These and other results of our analyses suggest that the regulation is not primarily measuring student demographics."

Moreover, the findings have been upheld by a court. When the for-profit college industry charged that the Department had ignored evidence that the debt-to-earnings metric primarily measured demographic and socioeconomic factors, a district court held otherwise, noting that "[t]he Department… made extensive efforts to get to the bottom of this criticism, and this Court cannot fairly say that the agency acted arbitrarily in the face of it."[165]

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[164] 79 FR 65053-65054

[165] APSCU v. Duncan, Civil Action No. 14-1870. June 23, 2015.

On the other hand, the Department has provided no new analysis, rationale, or statistical review in this proposed rule that would indicate otherwise. Apart from citing to analyses of non-program-level data that do not look at the accountability metric in the gainful employment rule, it relies on no new or relevant information in asserting the unfairness of the metric to certain programs. It has not adequately justified *why* it believes the metric is unfair, or demonstrated that its belief is accurate.

Further research from The Institute for College Access and Success confirms that, even when accounting for the share of Black and Hispanic students and the share of low-income students (Pell Grant recipients), there are plenty of examples in which two schools in the same area offer the same programs with very different results.[166] For instance, a Strayer University criminal justice bachelor's degree program in Birmingham, Alabama passed the gainful employment test with median earnings of $36,633 and median annual loan payments of $2,853; whereas Virginia College, offering the same program in the same location with comparable demographics, failed gainful employment with median earnings of $19,293 and a median annual loan payment of $3,556. A veterinary tech program offered by International Business College in Indianapolis, IN had over $11,000 less in total median debt than a program offered by Harrison College in the same location, enrolling a similar student population. And a medical assistant certificate program at Pima Medical Institute in El Paso, Texas had higher earnings by $6,400, and lower debt by $4,100, than those at Southwest University at El Paso for the same program. These matched programs indicate that institutional variation drives differences in outcomes, even in similar programs enrolling similar types of students in similar places.

Job Placement Rates

Job placement rates provide added context for prospective students.

The Department indicates in its proposed rule that, given variation in how and whether institutions are required to calculate job placement rates, those rates should not be disclosed to students.[167] But the mere fact that many accreditors or states require programmatic job placement rates is an important reason to provide disclosures of placement rates.

As the Department notes in this proposed rule and in 2014, many accreditors and states do already require the calculation of a job placement rate. Moreover, many of them have baseline standards set, below which the program is considered out of compliance and could lose ultimately lose access to accreditation.[168] Given the implications a loss of accreditation could have for students, the Department should seek to provide students with earlier warnings about the risk of poor labor market outcomes (including low rates of in-field enrollment from programs, as well as the potential subsequent loss of programmatic accreditation that may be necessary for employment in the field).

[166] https://ticas.org/sites/default/files/u159/ge_comparisons_factsheet_910.pdf
[167] 83 FR 40173
[168] https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/21jobplacement-rate-as-metric93013.pdf

Of course, as the Department notes, the "significant variation in methodologies...could mislead students into choosing a lower performing program that simply appears to be higher performing because a less rigorous methodology was employed to calculate in-field job placement rates."[169] But the Department shouldn't throw the baby out with the bathwater. Instead, it should maintain a job placement rate reporting requirement, with minimum standards for those methodologies to weed out the most misleading and problematic definitions. Fortunately, a previous negotiating committee has already developed a proposal around the calculation of job placement rates;[170] that proposal lays out standards for the timeframe measured, the employment status as full-time or part-time, the relevance of the employment to the field of study, and reasonable salary requirements for the position. The Department explains why it does not favor the current job placement rates; but it does not explain why it will not seek to improve the metric, provide information already available to accreditors and states but largely unavailable or inaccessible to students, or at least ensure the Department itself has access to the placement rates required by accreditors and states for its own purposes in tracking misrepresentations and enforcing the borrower defense rules also being rewritten now.

Borrower Defense Disclosures

Repayment rate warnings provide additional information about institutional outcomes.
In 2016, the Education Department published the borrower defense rule, which included a requirement that proprietary institutions publish a warning if their repayment rates were particularly low. The requirement was based on the extensive problem of repayment rates, particularly in the for-profit sector; and were designed to minimize burden by relying on existing data processes. In this proposed rule, however, the Department states that commenters in 2016 argued that repayment rates "[reflect] financial circumstances and not educational quality."[171]

Yet the Department does not cite any research, analysis, or data to justify why it supports that claim. If nothing else, repayment rates are a critical measure for an agency responsible for safeguarding $130 billion per year in federal aid. Moreover, they have received increasing interest from both Republican and Democratic lawmakers interested in finding better measures of post-college outcomes.[172] Research has explored rising default and delinquency rates among student loan borrowers, determining that "the relatively weak labor market performance, high default rates, and increasing debt burdens of many borrowers raise concerns that not all students are better off."[173] One report found that repayment outcomes are closely related to other metrics of educational outcomes, like completion rates and labor market outcomes.[174] Moreover, it found a far greater risk of default from borrowers who attended

[169] 83 FR 40173
[170] https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/21jobplacement-rate-as-disclosure93013.pdf
[171] 83 FR 40176
[172] See, for example: https://www.help.senate.gov/imo/media/Risk_Sharing.pdf and https://www.shaheen.senate.gov/news/press/shaheen-hatch-introduce-bipartisan-bill-to-curb-climbing-student-debt-and-improve-institutional-accountability
[173] https://www.brookings.edu/wp-content/uploads/2016/07/PDFLooneyTextFallBPEA.pdf
[174] Ibid

for-profit colleges, supporting the 2016 rule's provision of repayment rate warning requirements for schools in that sector.

The Department also does not suggest whether it will remove institutional repayment rates from the College Scorecard, given its apparent hesitation around the metric. Given that the Department is proposing to rescind the gainful employment rule in its entirety and rely instead on its transparency efforts through the Scorecard, the Department should publicly commit at least to retaining repayment rates in the Scorecard data--and to determining the most appropriate ways to ensure students access that information moving forward, if it's not through this regulation.

Financial protection disclosures warn students of problematic events.

The Department also proposed in 2016 to consumer-test the financial protection triggers it included in the borrower defense rule and determine which, if any, of those triggering events would be most relevant to disclose to consumers. In this proposed rule, the Department notes that such issues are "complex and beyond the level of understanding of a typical high school graduate considering enrollment."[175]

We suggest that the Department should leave such conclusions to actual testing and research, rather than condescendingly making assumptions about prospective students' sophistication. While the Department suggests that disclosures about composite scores are not likely to hit home,[176] the 2016 rule actually focused the disclosures on the *precipitating event,* not the institution's specific composite score. In some cases, those triggering events may have proved to be very relevant to students, and of interest. For instance, Charlotte School of Law submitted a market study to the American Bar Association about the impact of disclosing to prospective students that the institution was out of compliance with the accreditor's standards. The study found that three out of four applicants (74 percent) would be "much less likely to enroll" after reading the disclosure.[177] Other triggering events that indicate huge risks to students, or possible impending closure of the school, are likely to be extremely relevant to students. If the Department finds the triggering event concerning enough to require financial protection--including in the Department's proposed borrower defense rule, which maintains (with some alterations) many of the triggers from the 2016 rule--it should consider and test whether that information is also relevant to students themselves.

The College Scorecard Cannot Replace Disclosures

The Department's proposed solution is woefully inadequate.

In its proposal, the Department states "that the disclosure requirements included in the GE regulations are more burdensome than originally anticipated and that a troubling degree of inconsistency and potential error exists in job placement rates reported by GE programs that could mislead students in

[175] 83 FR 40176
[176] Ibid
[177] https://studentaid.ed.gov/sa/sites/default/files/csl-recert-denial.pdf

making an enrollment decision."[178] However, the Department believes that "program-level outcomes data should be made available for all title IV-participating programs," and therefore plans to publish these data on the College Scorecard for students and parents.[179] The Department states in the proposed rule that it believes that this effort will serve to "adequately inform student enrollment choices and create a framework that enables students, parents, and the public to hold institutions of higher education accountable…"[180] It will not.

Through this proposed rule, the Department essentially intends to eliminate a method of direct and active communication between institutions and students about information vital to enrollment decisions and replace that method with information through a multi-purpose database. In doing so, the Department has essentially created a middle-man between students and institutions, placing a hurdle in the pathway of students and their educational and economic success.

While beneficial in many respects, the College Scorecard cannot replace a direct warning from an institution to a student considering a poor-performing program, the prominent posting of a disclosure template, the publication of warnings and disclosures in advertising and promotional materials, or most importantly, the loss of federal aid eligibility for persistently poor-performing programs. Consider the effort required to obtain the information via the Scorecard, as opposed to under the current rule. First, a prospective student would have to have knowledge of the College Scorecard and its contents; navigate to the site; identify the pages for the programs and institutions in which they are interested; and contextualize the information without the benefit of a red-box warning that identifies certain programs as poor-performing. Other sites that use the data may not use the information in the most impactful way, or may not use the most impactful data. Some of the most common websites for college search, such as College Board's Big Future tool and U.S. News and World Report, do not use College Scorecard data at all. Moreover, the Department has to overcome a bevy of unhelpful and/or misleading information elsewhere in the higher education environment, such as institutions that obscure their poor outcomes by citing to national data about occupational growth and implausibly high earnings, or the counterproductive nature of U.S. News and World Report rankings that incent some four-year colleges to focus disproportionately on selectivity rather than socioeconomic mobility.

Research across the consumer finance spectrum shows how hard it is to ensure consumers have access to, and make use in their decision-making of, information. A paper from NYU School of Law shared by a non-federal negotiator during this rulemaking argued that, "[i]n many circumstances there is little reason to believe that the consumer, even if given a fuller dose of relevant information, will be in a position to avail him- or herself of a more fruitful market engagement. Disclosure operates in a crowded information environment."[181] For instance, research on mortgages has shown that mandated disclosures are often incomprehensible to many consumers.[182] A review of hundreds of articles related to product

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[178] 83 FR 40168
[179] Ibid
[180] Ibid
[181] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/nyulawarticlefrombarkley.pdf
[182] https://www.aeaweb.org/articles?id=10.1257/aer.100.2.516

warning labels found “no measurable impact on user behavior and product safety.”[183] Moreover, a body of research within multiple consumer finance fields has found that “[w]hen information is unpleasant to deal with”--as would surely be the case if a prospective student learns that the program he’s been considering performs much more poorly than he hoped or anticipated--”people often fail to attend to it because attention imposes a welfare loss.”[184] One paper found that “even carefully designed messages about one of the most disadvantageous forms of consumer debt -- payday lending, and its attendant exorbitant interest charges -- has a frustratingly small influence on actual consumer behavior… even with the most aggressive form of disclosed information, there was only a 10 [percent] decline in the use of this extraordinarily disadvantageous type of consumer credit.”[185]

The higher education field is no different. Research suggests that many students may not use information even when it’s available to them. For instance, a study of Virginia high schools found that only about one-third (36 percent) of students realistically had access to a choice about where they would go to college, indicating “the need to rethink a model of higher education that leans too heavily on markets,” supplementing it with “well-designed regulation… to maximize ROI for students and taxpayers.”[186] An experimental study in which those high schoolers were prevented with program-level data on labor market outcomes found “no detectable impact on students.”[187] A study of students’ SAT score-sends to institutions also found that higher-earning colleges saw an increase in students sending scores to those institutions after release of the College Scorecard -- but the effect was “driven almost entirely by well-resourced high schools and students.”[188] And the increase in SAT score sending to higher-earning institutions did not drive any changes in enrollment behavior among those students. Even where some students will find and utilize the information, the complexity of the information to be communicated, as well as the vast array of information and trade-offs students must weigh in selecting the programs and institutions in which they will enroll, means any potential impact will likely be muted enough that it will not drive program improvement as accountability measures could. Moreover, the Department hasn’t provided any evidence that a disclosure-only regime can be effective, something it acknowledged during negotiated rulemaking.[189]

During August 2018, the College Scorecard received 63,000 visitors;[190] a fraction of the more than 329,000 students who were enrolled in zone GE programs in 2015-16 and nearly 190,000 students who were enrolled in failing programs.[191] Research also shows the importance of ensuring disclosures are clear, simple, and easy to understand -- something that can require extensive testing and iteration. The site has undergone little consumer testing on either its metrics or its format, yet focus group research on an earlier iteration of the Scorecard found it confused students.[192]

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[183] https://www.cmu.edu/dietrich/sds/docs/loewenstein/DisclosureChgsEverything.pdf
[184] Ibid
[185] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/nyulawarticlefrombarkley.pdf
[186] https://www.urban.org/sites/default/files/publication/86581/choice_deserts_1.pdf
[187] https://www.urban.org/research/publication/rethinking-consumer-information-higher-education
[188] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2768157
[189] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/day1getranscript.pdf, beginning on page 36
[190] analytics.usa.gov
[191] 83 FR 40178
[192] https://www.americanprogress.org/wp-content/uploads/2012/11/CollegeScorecard-4.pdf

The Department's plan is, effectively, akin to the U.S. Postal Service telling residents that it will no longer deliver their mail to their door, but that they can all come to a distribution center to pick it up. That change may not impact people with cars and flexibility in their schedules, but it will cause a lot of problems for people who don't have a way to get there while it's open. The Department's proposal to rescind all accountability, in favor of simply posting the information online, will limit access to information in the same way.

The College Scorecard cannot be updated with program-level data soon.
The Department states in the preamble that it intends to provide program-level data through the Scorecard, rather than through disclosures to students.[193] However, the Department does not sufficiently commit to that goal to give the public confidence it will happen soon enough to inform students enrolling in college now.

As the Department is well aware, existing data reporting is insufficient to calculate the kind of program-level earnings information it has suggested it will provide. Data collection reporting on programs for all institutions began only in 2014, to implement legislative changes to eligibility for Subsidized Stafford loans. To obtain at least six years of data--the shortest timeframe currently measured on the Scorecard, and likely the least amount of information it could have before calculating earnings for four-year programs[194]--will take the Department into at least 2019 or 2020 (depending on whether it intends to pool the earnings measures). Moreover, the Department has repeatedly warned institutions that their reporting in the first several years of program-level information has been highly inaccurate.[195] A representative from the Office of Federal Student Aid confirmed this during negotiations, saying:

> Okay, so we started collecting program-level data for all enrollment reporting for all institutions, all types of programs, in the 14-15 award year. I will tell you guys right now, it's not great data. Not all schools did it. But we at least have some data for that. And it gets better year by year as more and more schools report program-level enrollment. So if we were to do a debt-to-earnings rate using that 2014-15 award year data--let's say we used it even though it's not complete--the five- and six-year-out earnings year for that would be 2019. And because it's a calendar year

[193] 83 FR 40173

[194] The Department has stated to the media that: "Although ultimately we want to focus on longer-term earnings after graduation, we do not want to wait until those data are available to revise the Scorecard. So in the initial years of the expanded Scorecard, we will focus on two- or three-year earnings data." See: https://www.chronicle.com/article/The-Education-Dept-Wants-to/244260. However, this is a misinterpretation of the current Scorecard earnings period, which measures six to ten years from *entering* the institution--or approximately two years from *completing* a four-year program. The Department will still require six years' worth of program-level information if it intends to measure roughly the same timeframe

[195] From the author's notes of the annual Federal Student Aid conference, Nov. 28-Dec. 1, 2017. A representative from the Office of Federal Student Aid also said during negotiations, "I will talk to my data guys, but I can tell you, they're not very comfortable with that one year's worth of data [2014-15] being representative because it was the first year schools reported it." See page 64:
https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/getranscriptsday3.pdf

> earnings, it wouldn't actually be available from Social Security until a year and one month after the end of the calendar year. So that makes it February of 2021.[196]

Without question, the Department should seek to add program-level information to the College Scorecard. Indeed, that has been a goal of the Scorecard in each iteration; when the Scorecard was launched in 2015, the White House announced that it would continue to improve the data through "[a]nnual releases of each new cohort, including new data on part-time, transfer, and Pell recipient graduation rates *and program-level earnings data for the 2012 cohorts"* (emphasis added).[197] The Department confirmed that commitment the next year, saying that "beginning in 2014, the Department has been collecting data on the educational programs of all federal financial aid recipients. The Department plans to begin calculating labor market outcomes for these programs and publishing them through the College Scorecard as soon as possible, so that students and families have the best possible information about their educational opportunities."[198]

But the Department should prove it is still serious about this commitment by placing related language in the regulations governing general disclosures. Specifically, it should add reporting requirements for educational programs to permit the Department to collect prior years of information about students' programs, which will allow for better--and sooner--calculation of program-level data. Moreover, the Department should specify how it intends to calculate an earnings metric. The current College Scorecard measures earnings six through 10 years after entry into the school, and the Department should clarify if it intends to keep the same time horizon, whether it will disaggregate earnings for completers and non-completers, and whether it will group very small majors in similar content areas to ensure it is able to produce data covering as many students as possible. The Department must also give consideration as to how to present this information on the Scorecard, given the volume of information that will be included; it should conduct consumer testing, consider holding a technical review panel with behavioral economists, designers, and other experts, and construct a data download tool for users who wish to access files with the data in smaller chunks than the current large zip file.

In the absence of accountability, disclosures are the least the Department should require.

While disclosures are an inadequate solution for the scale of the problem of poor-performing career-education programs, the Department should still, at an absolute minimum, require such consumer information. In the absence of fulfilling its obligation to taxpayers by eliminating federal financial aid eligibility for persistently poor-performing programs, the Department's obligation to provide valid, reliable, and comparable information is even greater. Yet the Department proposes to eliminate the regulations dictating disclosures to prospective and enrolled students and through promotional materials.[199]

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[196] See page 62: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/getranscriptsday3.pdf

[197] https://obamawhitehouse.archives.gov/the-press-office/2015/09/12/fact-sheet-empowering-students-choose-college-right-them

[198] https://www.ed.gov/news/press-releases/fact-sheet-obama-administration-announces-release-new-scorecard-data

[199] 34 CFR 668.412 and 34 CFR 668.6

The Department does not adequately justify its reasoning for eliminating these disclosures. It notes that disclosures have been burdensome to institutions; and suggests that "[b]urden on students will be reduced by not having to respond to schools to acknowledge receipt of disclosures."[200] Yet it does not describe the benefits to students of those disclosures. This is in direct contrast to the Department's assumptions on similar disclosures in other regulations. In the delay of the rule governing state authorization of distance education programs, for instance, the Department noted that students could be harmed by the delay of the rule given the beneficial nature of the consumer disclosures provided by that rule, and that it could "lead students to choose sub-optimal programs for their preferred courses of study."[201] It also highlighted concerns with having students obtain that institution-disclosed information through another source.[202] Consistent with the Department's thinking in that analysis, the Department should realize here, too, the harm it will cause students by rescinding both the GE rule and the disclosures under that rule. The loss of those benefits must be factored into the cost-benefit analysis under the regulatory impact analysis. Moreover, the Department should realize that its efforts to simply put program-level information on the underused College Scorecard will not serve its stated goals of providing students with the information they need to make informed choices.

Additionally, the Department does not even address key elements of the disclosures listed in the regulation beyond job placement rates, such as completion and withdrawal rates, repayment rates, total costs of the program for tuition, fees, books and supplies, and the occupations (by name and SOC code) for which GE programs prepare students. This is useful information to students, and the Department's rationale for eliminating these sections must account for the value of the information to students, which the Department does not do in its proposed rule. Instead, the Department simply proposes to strike these disclosures, without any mention or justification of each one's particular utility or alleged problems with those disclosures. An institution is under no obligation to offer GE programs it believes are too onerous to offer with the necessary disclosures and other elements--particularly where those programs fail the debt-to-earnings test; but students remain under an obligation to pay for their education once they have enrolled. Institutions should be required to provide their students with salient information to make those decisions *before* they enroll, including the typical costs and debt levels of students, their completion rates, and their post-college earnings and typical occupations.

Regulatory Impact and Burden Estimates

The Department's burden estimates are not an adequate justification for rescinding the rule.

The Department notes in its proposed rule that it "has received consistent feedback from the community that the GE regulations were more burdensome than previously anticipated through the disclosure and reporting requirements" from the 2014 final rule.[203] However, it's not clear that the Department has considered the burden of the GE rule, beyond anecdotes or assumptions. It assumes

[200] 83 FR 40178
[201] 83 FR 24253
[202] Ibid
[203] 83 FR 40168

only a single burden hour more in this proposed rule than was listed in the 2014 rule--hardly “more burdensome” enough to justify rescission of the entire rule.[204] And as the Department itself noted during negotiations for this proposed rule that it has no such information. Specifically, a Department representative stated:

> ...we got a request, and actually this is a good one, and I’ll turn it back to you guys. We got a request for, “can ED share any credible estimates of administrative burden it has access to, especially information that separately estimates fixed costs of initially adapting IT systems to track information necessary for reporting, and the yearly cost of complying with reporting requirements once they systems are in place?” So we have to write a regulatory impact analysis, and we would love to have this information. So if you have pieces of this information, we welcome your submission of that data. We don’t currently have anything right now, okay, because we don’t keep -- we don’t have any way to go and open your books and know that kind of stuff.[205]

Yet in its proposed rule, the Department states that it believes the action is justified, in part, because it is so burdensome on the Department and institutions.

Additionally, the Department fails to conduct a true cost-benefit analysis, in which it directly compares the two aspects of the rule. Too often, regulatory impact analyses lack such critical information, a recent study of education RIAs found.[206] The study notes, in particular, that while some RIAs include a description of possible benefits to students, “none attempt to estimate the number of students receiving these benefits or the dollar value of these benefits.”[207] The study also notes that “[o]nly a few RIAs consider costs to students and education institutions,” and “none of them match the costs with the benefits.”[208] That’s particularly important, since Executive Order 12291 requires both that agencies describe “the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits,” and that the “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”[209]

The Department should include a quantitative analysis that directly compares the benefits under this rule against the costs (particularly to borrowers), to create a true cost-benefit analysis in the style recommended under E.O. 12291. In doing so, the Department should consider the costs of eliminating accountability, including the potential for higher default and delinquency rates (as well as lower payments from income-driven repayment plans) on student loans from borrowers attending

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[204] The 2014 rule assumed an increase in burden of 6,925,627 hours, 79 FR 65005. The 2018 proposed rule assumes a reduction in burden compared with the 2014 gainful employment rule of 6,925,628 hours--one more than was assumed in the original rule, 83 FR 40182

[205] Transcript from Session Two, Day Four, beginning on page 23. https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/day4getranscript.pdf

[206] http://journals.sagepub.com/doi/abs/10.1177/1098214018785463?journalCode=ajec

[207] Ibid

[208] Ibid

[209] https://www.archives.gov/federal-register/codification/executive-order/12291.html

poor-performing programs that would otherwise have lost federal aid eligibility; the potential for increased institutional misconduct that may meet the borrower defense standard and require greater enforcement efforts from the Department through program reviews and audits; and the increased burden on students who must seek out information about their programs on the Scorecard and through other resources rather than receiving those data directly from their prospective institutions or the institutions at which they are enrolled.

The burden of earnings appeals is unsupported and ill-defined.

The Department argues that the earnings appeals have been particularly burdensome, stating that "[t]he Department has reviewed earnings appeal submissions for completeness and considered response rates on a case-by-case basis since the response rate threshold requirements were set aside in the AACS litigation. Through this process, the Department has corroborated claims from institutions that the survey response requirements of the earnings appeals methodology are burdensome."[210] As noted earlier (see "The Department's burden estimates are not an adequate justification for rescinding the rule"), the Department does not appear to have increased its own estimates much as a result of this supposed greater burden; nor has it explained the extent of this increase in burden in its proposed rule.

Additionally, it bears repeating that the AACS litigation mentioned did not, in fact, require the Department to set aside response rate threshold requirements for all GE programs filing appeals. In fact, the judge very narrowly targeted the ruling in that case only to AACS member institutions,[211] and the Department arbitrarily and unlawfully reopened the earnings appeal requirements for *all* institutions, even those whose graduates are almost certainly not underreporting tipped income, making any added burden for reviewing the appeals of non-cosmetology programs a problem of its own making.

Moreover, the Department has not provided adequate information with which the public may comment on this alleged problem. An updated file posted to the Federal Student Aid Data Center earlier this year reveals that 873 programs filed alternate earnings appeals. Most of those (620) abandoned their appeals; 66 were approved; and the remaining 186 were unclassified. Based on the Department's description, it has denied no appeals to date, raising questions about whether the burden of filing an appeal could truly be that onerous.[212] And while the Department states that "[t]he contents of some of these review packages [of earnings appeals] would suggest continued confusion about requirements on the part of schools that would be problematic if those earnings were still tied to any kind of eligibility threshold," it has released no information that would inform these efforts.[213] In March 2018, the National Student Legal Defense Network filed a FOIA requesting all documents constituting notices of intent to file alternate earnings appeals; all documents constituting those alternate earnings appeals; and all documents constituting subsequent communications with any institutions about their earnings appeals. After failing to receive the documents, NSLDN filed a lawsuit requesting the documentation in May 2018;[214] as of the writing of these comments, it still has not received the relevant information, nor

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[210] 83 FR 40174
[211] https://casetext.com/case/am-assn-of-cosmetology-sch-v-devos
[212] https://studentaid.ed.gov/sa/node/274
[213] 83 FR 40175
[214] https://docs.wixstatic.com/ugd/60a689_67157ad9096e447bba1f7abd32b39158.pdf

has the Department released any details about the contents of earnings appeals since the AACS litigation that could inform public comment on this rulemaking.

The Department should spell out more of the details of the regulatory impact analysis.
A regulatory impact analysis (RIA) offers a critical picture of how a federal agency expects its rule to affect both consumers and taxpayers. To better capture how the Department perceives the likely effects of this rule, and to better inform the public about the consequences of the rulemaking, it should flesh out the RIA with more detail. Specifically, the Department should add several components to the regulatory impact analysis in the final rule, including:

- Factoring in the reduction in poor-performing programs during the first year of GE implementation to consider institutional responsiveness to the rule; and
- Accounting for the larger economic impact of poor labor market outcomes, which will be permissible in perpetuity should the Department rescind the GE rule without any accountability in its place, among a sizeable portion of the higher education sector.

The Department should clarify its assumptions underlying the net budget impact in greater detail, including explaining each of the above components. Specifically, with respect to the responsiveness of institutions to the GE rule, the Department should analyze data reported by institutions on their changes or closures of gainful employment programs--as described in another section of these comments ("The GE rule has been extremely effective")--and factor into its budget estimates that institutions may not close low-value programs in the future, and even that they could re-open already closed programs or open new programs in the absence of accountability. Without conducting this type of analysis, akin to the New America analysis presented elsewhere in these comments, the Department is likely underestimating the costs of this proposed rule and misstating the degree to which it has proposed an effective strategy for ensuring such programs are offered only when they lead to gainful employment in a recognized occupation, as required by the law.

Moreover, the Department should explain, through a cost-benefit analysis, why it believes the rescission of this regulation is worthwhile. The Department itself notes that it does not believe its new regulation will be effective, stating that "[g]enerally, the Department does not attribute a significant budget impact to disclosure requirements absent substantial evidence that such information will change borrower or institutional behavior."[215] And the Department believes it will impose considerable costs, particularly for students and taxpayers, in additional dollars paid to attend low-value programs. However, despite the poor results on a cost-benefit analysis, the Department has still published this proposed rule.

The Department also states that it believes students will "see benefits from not having to transfer to another institution in cases where their program would have lost [T]itle IV eligibility."[216] However, with over 189,000 students enrolled in failed programs at which the typical graduate does not earn enough to afford the debt they take on, it should consider whether access to those low-value programs can or

[215] 83 FR 40180
[216] 83 FR 40178

should actually be considered a benefit. In some cases, those borrowers may be better off not enrolled in college than enrolled in a program that will leave them deeply indebted and with exceedingly low earnings. The Department has not adequately accounted for the economic struggle, potential for delinquency or default, and very low--sometimes sub-minimum wage--earnings those graduates face.

The Department fails to consider the effectiveness of the GE rule in evaluating it under Executive Order 13777.

The Department states that "Executive Order 13777 instructs agencies to reduce unnecessary burden on regulated entities, while at the same time emphasizing the need for greater transparency. The Department believes that its proposed rescission of the GE regulations is consistent with Executive Order 13777 because the GE regulations place tremendous burden upon certain programs and institutions, as evidenced by comments from negotiators representing institutions not currently covered by the GE regulations that extending the regulations to include their institution would impose tremendous and costly burden."[217]

Even if the executive order instructed agencies to replace burden with transparency where possible (it does not do so directly anywhere in the text), these assumptions are not backed up by the regulation. To begin, the Department assumes greater transparency, without acknowledging that the regulation does not compel the Department to provide that transparency, aside from a non-binding statement in the preamble; that students themselves will not necessarily benefit from the transparency because rather than directly delivering disclosures to prospective and enrolled students and including key information in advertising materials, students would have to seek out the College Scorecard on an obscure government website; and that the Department cannot even provide the information it is promising in the near future, due to data limitations and rescinded reporting requirements, as described earlier in these comments.

Moreover, E.O. 13777 also directs agencies to identify for reform those regulations that "impose costs that exceed benefits" -- something untrue of the gainful employment rule. The Department itself estimates that rescinding the regulation will cost taxpayers well over $5 billion in the next decade. The Department must weigh the effectiveness of regulations, the costs to students and taxpayers--not just institutions--of rescinding the regulation, and the drag on society of permitting low-value educational programs to soak up taxpayer dollars and produce graduates who cannot afford the debt they take on. While transparency can be a valuable tool, it is no replacement for the accountability mechanisms in the gainful employment rule.

Additional Proposals

The Department should require disclosures of key data for all programs.

The Department requests comment on whether it "should require that all institutions disclose information, such as net price, program size, completion rates, and accreditation and licensing

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[217] 83 FR 40175

requirements on their program web pages."[218] It also requests comment on whether such disclosures should be included "in their college catalogues," and whether they should include "completion rates, withdrawal rates, ... and/or any other items currently required under the GE disclosure regulations," as well as "links from each of its program pages to College Scorecard..."[219]

In short, the Department should continue to require publication of these data on institutional websites for each program offered. Students often lack access to key information. They may not know where to find the College Scorecard or other federal resources that provide information, may struggle to understand how to use that information, and/or colleges themselves may not adequately provide the information necessary without federal oversight. Consider Pell Grant recipients' graduation rates, required in the 2008 Higher Education Act reauthorization to be disclosed to students; several years later, a survey of more than 150 four-year colleges found that only one in four were actually making the disclosures required by law.[220] The Department should require these disclosures to be made, and enforce those requirements to ensure institutions follow through.

However, those disclosures must be more than a simple laundry-list of data in order to be effective. Should the Department hope to see impact from these disclosures, they must be well-curated, carefully designed, and informed by research and focus-group testing to determine the best design, language, and delivery mechanisms. Specifically, the Department should:

- Publish disclosures of (at a minimum) debt, earnings, completion rates, withdrawal rates, repayment rates, and costs.
- Continue to require a disclosure template, to ensure information is presented in a clear, understandable, and comparable way; and limit the information presented to only these key metrics to ensure students see the most important data.
- Continue to require regular consumer-testing of the disclosure template to ensure continuous improvement in how information is presented.
- Establish a reference point for outcomes data on the Scorecard and/or template to ensure the data are compared to typical outcomes for that program at other institutions. Research has shown that comparative information is more effective as a disclosure than information provided in a vacuum.[221]
- Flag the poorest-performing programs, as compared with the outcomes of comparable programs, with a prominent warning. Research indicates that more obvious warnings--such as those accompanied by pictorial warnings--are more effective than simple text-only disclosures (though still only modestly effective).[222]

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[218] 83 FR 40173
[219] 83 FR 40169
[220] https://www.air.org/sites/default/files/Higher-Education-Disclosure-Laws.pdf
[221] https://www.cmu.edu/dietrich/sds/docs/loewenstein/DisclosureChgsEverything.pdf
[222] See, for instance, http://www.who.int/bulletin/volumes/87/8/09-069575/en/; https://tobaccocontrol.bmj.com/content/early/2015/05/03/tobaccocontrol-2014-051978; and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431910

- Minimize institutions' ability to obscure, confuse, or undermine the data by limiting extraneous text and requiring the disclosure template to be prominently posted, in readable text, and included in promotional and advertising materials, as well as shared directly with prospective students to ensure they see the information that the Department has deemed important.

Requiring a link to the College Scorecard will not make up for the elimination of direct delivery of disclosures and the rescission of accountability for poor-performing programs. However, it can help to ensure more students have access to an important federal website with key data points. The Department should, at a minimum, establish a requirement that institutions link to the Scorecard, effective as soon as possible--even if program-level information is not yet available--from their home, program, admissions, and financial aid webpages.

The Department must establish a GE definition going forward.

The Department's proposal is to rescind the 2014 gainful employment rule, and leave the term "gainful employment in a recognized occupation" entirely undefined. After three rulemakings, nearly 200,000 comments considered, legal challenges withstood, and almost a decade of research on this work, that is a wholly unsatisfactory solution to a problem that persists in the career education space. The Department cannot, and should not, leave this term entirely undefined in regulation. It must consider viable alternatives and develop an appropriate definition. If not based on debt-to-earnings rates, the Department must ensure it has some way to assess whether a program does, indeed, prepare students for gainful employment in a recognized occupation. It must ensure that taxpayer dollars do not, against statutory intent, go to GE programs that do *not* prepare students for gainful employment in a recognized occupation. And it must consider the mountain of research and evidence that post-college earnings are so unacceptably low in some career education programs that they cannot be legitimately considered as providing for gainful employment in a recognized occupation.

The Department should require certification that programs meet licensure requirements.

The current gainful employment regulations and the currently delayed state authorization rule for distance education programs include an important and reasonable certification requirement that should be maintained going forward--and which should be applied to all programs. Specifically, 34 CFR 668.414(d)(3) states that an institution must state, for each gainful employment program it operates, that the program satisfies all licensure or certification requirements in the states where it obtains authorization to operate; and 34 CFR 668.50(c)(1)(i) clarifies that institutions must make individualized disclosures to students if their distance-education programs have been determined *not* to meet licensure requirements in the state where the student resides.

During the rulemaking, non-federal negotiators who tended to disagree on other aspects of the rulemaking came together and developed joint language recommending changes to this section. As the community college negotiator wrote in an issue paper submitted to the Department, "[i]t cannot be said that a program leads to gainful employment in a recognized occupation if it does not even meet the minimum bar for graduates to become licensed. Therefore the Department should clarify in the regulations that institutions must certify they meet licensure requirements for all of their students, in all states in which they operate."[223] This is even more important in light of the total rescission of gainful employment that the Department has proposed and the upcoming negotiations the Department has announced on state authorization for distance education programs; students are even less likely to know where they stand when the Department's new rules take effect than they are today.

The Department should accept the language agreed upon by most negotiators and incorporate it into the final rule (see below). The language below could also be broadened, to apply to all educational programs, if the Department believes that is appropriate; all students have the right to expect that, when they sign up for a program, they will--at a minimum--be eligible to try to find employment in the field. If it does not believe the language should be incorporated, the Department must explain why it believes that taxpayer-financed programs that statutorily must lead to gainful employment should not be required to meet the basic licensure standards for obtaining employment in a particular field, where applicable.

> *34 CFR 668.414 - Certification requirements for GE programs.*
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> *(d) GE program eligibility certifications.* An institution certifies for each eligible program included on its Eligibility and Certification Approval Report, at the time and in the form specified in this section, that -
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> (3) For the State in which the institution is located or in which the institution is otherwise required to obtain State approval under 34 CFR 600.9, or the State in which a student enrolled in the program resides, each eligible program it offers satisfies the applicable educational prerequisites for professional licensure or certification requirements in that State so that a student who completes the program and seeks employment in that State qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter, unless prior to enrollment the student affirmatively states in writing, in the student's own words, that the student knows that the program does not meet the state licensure requirements, and explains the reason the students seeks to enroll in the program; and
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Similarly, non-federal negotiators proposed to require that, where programmatic accreditation is required to find employment in a field where the student resides, institutions certify that they have obtained that accreditation. For instance, the community college negotiator submitted in an issue paper that "[t]he Department should update its rule to reflect the programmatic accreditation requirements of the state in which the student resides, rather than simply the state in which the institution is located. As with state licensure, students who live across state lines from their institution may otherwise find themselves in debt and having wasted their time in a program that will not permit them to gain employment in their home states. For a program to be called one that leads to gainful employment in a

[223] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/gememoissue8metune.pdf

recognized occupation, as is required by the Higher Education Act for proprietary and certificate programs, it must meet this minimum bar."[224] Again, this language could be broadened to apply to all educational programs.

The Department should accept the language on programmatic accreditation agreed upon by most negotiators and incorporate it into the final rule (see below). Again, this language could be broadened to apply to all educational programs. If it does not believe the language should be incorporated, the Department must, again, explain why it believes that taxpayer-financed programs statutorily required to lead to gainful employment should not be required to meet the basic programmatic accreditation standards for obtaining employment in a particular field, where required.

> *§ 668.414 Certification requirements for GE programs.*
>
> *(d) GE program eligibility certifications.* An institution certifies for each eligible program included on its Eligibility and Certification Approval Report, at the time and in the form specified in this section, that -
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> (2) Each eligible GE program it offers is programmatically accredited, if such accreditation is required by a Federal governmental entity or by a governmental entity in the State in which the institution is located or the State in which a student enrolled in the program resides, or in which the institution is otherwise required to obtain State approval under 34 CFR 600.9, unless prior to enrollment the student affirmatively states in writing, in the student's own words, that the student knows that the program does not meet the state programmatic accreditation requirements, and explains the reason the students seeks to enroll in the program;
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The Department specifically requests comment in this proposed rule about whether institutions should be required to disclose on their program webpages that the program meets the requirements for licensure in the state where it is located and in any other state where it has made a determination about licensure requirements. This is, at a minimum, absolutely something that should be a requirement of institutions. It is critical that students know--*before* they have enrolled in a program and invested their time and money--if that program will not meet the minimum requirements for that field. However, the Department needs to escalate this requirement to ensure programs that do *not* meet the relevant licensure requirements are ineligible for federal student aid. Taxpayers should not be expected to front the costs of programs that have no hope of preparing students for the jobs for which they think they're studying. A certification requirement, not just a disclosure requirement, is deeply important for the Department to establish in regulation.

Whether or not the Department adopts this recommendation, it should also ensure that it is doing its part to understand the postsecondary landscape. To that end, the Department should establish a common database of licensure requirements. By requesting state licensure requirements for fields tied

[224] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/gememoissue8metune.pdf

to educational programs, the Department can effectively crowd-source a database of licensure requirements that will facilitate institutions' ability to identify and resolve mismatches with licensure requirements in other states; help students by offering information that may protect them from making costly choices that won't pay off; and even facilitate licensure reform efforts by state and local policymakers. This would be a public service that benefits all actors in the higher education space, and would remove much of the burden from institutions that the Department purports to be concerned with regarding licensure certification requirements.