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September 2, 2010

To: All Higher Education Clients & Friends

From: Ron Holt, D&D Higher Education Practice Leader

Re: **Analysis of Proposed Gainful Employment (GE) Regulations***

CC: D&D Higher Education Practice Attorneys – Megan Banks, Mitch Kempker & Dave LeFevre; Carol Reid

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On July 26, 2010, the U.S. Department of Education ("**DOE**") issued a notice of proposed rulemaking (the "**GE NPRM**") that proposes a two-part 'gainful employment' test (the "**GE Standards**") intended to be used to measure Title IV eligiblity of the following academic programs:

(1) **ALL** Title IV eligible academic degree and non-degree **programs** offered by **for profit institutions** (excluding any liberal arts bacculareate degree program); and

(2) All Title IV eligible **non-degree programs** offered by any **nonprofit** and **public institutions** (mostly community colleges).

Assuming the final version of the GE regulations is published by November 1, 2010, the regulation would become effective as of July 1, 2011. By its current terms, however, it will not apply to most programs until July 1, 2012 but on July 1, 2011 it will be applied to the lowest 5th percentile in performance of each kind of program (as explained in Part H below on page 11). The GE NPRM is published at 75 Federal Register 43615-43708 (July 26, 2010); it can be accessed at http://www.ifap.ed.gov/fregisters/FR072610ProgramIntegrity.html.[1]

A. Comments on GE NPRM: The **deadline** for submitting **comments** on the GE regulation is **September 9** and comments can be submitted electronically at http://www.regulations.gov, where you will need to enter

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[1] A separate NPRM, which was issued on June 18, 2010 and which covers a wide range of proposed new 'integrity' regulations, establishes new requirements for colleges to make disclosures to students and the DOE about various components of the GE Standards. For each program, the institution must annually report its CIP code (Classification of Instructional Programs), the SOC codes (standard occupational code) of occupations for which the program provides training, the graduates in the institution's last fiscal year and the federal and private debt of those graduates. The institution also must disclose to all students: the cost of each program, the on-time graduation rate of each program, the median debt load for each program (as defined in the GE Standards), and the placement rate for each program beginning by June 30, 2013. The comment period for this NPRM closed on August 2, 2010. The NPRM, published at 75 Federal Register 34806-34890 (June 18, 2010), can be accessed at http://www.ifap.ed.gov/fregisters/FR061810ProgramInterityIssuesNPRM.html.

the docket number “ED-2010-OPE-0012” in the text box labeled “Enter Keyword or ID.” Then you will then be routed to a page where you will be required to fill out a submission form with your name and other information, at which point you may either enter your comments into a text box or upload them as a Word or PDF document. After completing this step and clicking the “submit” button, you will be given an electronic receipt verifying your comments have been successfully submitted. Alternatively, you can enter your comments through a special website, “Preserving Educational Choice,” set up by CCA (the Career College Association is changing its name to APSCU, the Association of Private Sector Colleges and Universities), http://www.bipac.net/page.asp?content=startpage&g=CCA.

B. GE Standards – General Description: The GE Standards consist of two metrics related to student debt, each applied by program:

(1) the **loan repayment rate** (only federal Stafford loans – Direct & FFELP) based on an immediate prior four fiscal year time period; and

(2) the **ratio** of **median** annual **debt service** for all loans (federal, private and institutional) taken out by program graduates during an immediate prior three fiscal year time period (or possibly a three-year period prior to the immediate three prior years) **to income** (average graduate earnings during the immediate prior calendar year).

References to “fiscal years” are to federal fiscal years, running from October 1 to September 30, but note that portions of the GE Standards refer to award years and calendar year.

C. Passing Grades: There is a **range of acceptable performance** for each metric.

(a) debt to income – either 8% to 12% of total earnings or 20% to 30% of discretionary income; and
(b) loan repayment – 35% to 45%.

If a program does not fall within the acceptable range of either metric, i.e., its debt to income is greater than 12% of all earnings and 30% of discretionary earnings and its repayment rate is less than 35%, ***it loses Title IV eligibility***, apparently for one (1) year.

D. Annual Approvals: Note that **programs will be annually measured** against these two metrics and have to pass muster each year.

E. Mechanics of the Metrics: The expression ‘the devil is in the details’ is, unfortunately, quite true for each of these metrics, the mechanics of which are fairly complicated, as explained below.

(I) LOAN REPAYMENT RATE (Proposed New Regulation, 34 CFR § 668.7 (b))

(a) ***Grads & Drops***: As stated above, for each academic program, this rate measures loan repayment for **all graduates and dropped students** whose loans entered repayment during the **immediate prior four fiscal years**, *excluding* (I) all loans that entered repayment during the *last six months* of the most immediate prior fiscal year and (II) all loans with (A) *in-school deferments* or (B) *military deferments*.

(b) ***Principal Balances***: The repayment rate fraction, in both numerator and denominator, uses the **original principal balances** existing at the time loans enter repayment, with

(1) the **Denominator** consisting of the dollar amount that is the total of the principal balances, including any capitalized interest, for all Stafford loans – of graduates and drops – that entered repayment within the past four fiscal years, other than the exclusions noted above; and

(2) the **Numerator** consisting of the dollar amount that is equal to the total of the original outstanding principal balances, including any capitalized interest, for: (i) Loans Paid in Full ("**LPF**") by or during the most the immediate fiscal year; (ii) reduced principal loans ("**RPL**"), i.e., loans on which there was a reduction in the original principal (existing at the time the loan entered repayment) during the most immediate prior fiscal year; and (iii) loans on which qualifying payments were made in the most immediate prior fiscal year under the Public Service Loan Forgiveness Program, 34 CFR § 685.219 (c) [teachers in at-risk districts, legal aid attorneys, Americorps, Peace Corps, etc.].

(c) ***Weighting Effect:*** The repayment rate fraction, by using original loan principal balances instead of just the number of students with outstanding loans, effectively is weighted by loan amounts. Thus the repayment rate will be higher in any given fiscal year where loans being paid are the relatively higher dollar loans among those included in the Denominator.

(d) ***Caveats***: There are several important caveats to be noted about the repayment rate calculation:

(1) Loans in **deferment** (other than in-school and military deferments) or in **forbearance** and loans in **IBR** (income based repayment) or **ICR** (income contingent repayment) ARE included in the Denominator but ARE **NOT** included **in** the **Numerator** unless they have come out of that status at some point in the most immediate fiscal year long enough for some payment that reduces principal by any amount (even as little as $1.00).

(2) As Mark Kantrovitz of www.FinAid.Org has noted, **accrued interest** on federal loans **sometimes** is not capitalized and **added to the principal** of the loan until some point during the first year **after** the **loan has entered repayment**. The effect of this can be that, although the borrower is making regular scheduled monthly payments throughout the year, the principal of the loan will not be reduced and the loan will not be included in the Numerator. THIS IS A PROBLEM THAT WILL BE NOTED IN COMMENTS TO DOE, AND HOPEFULLY IT WILL BE CORRECTED IN THE FINAL REGULATION.

(3) The LPF component in the Numerator (loans paid in full) does *not* include the payment of loans through a **consolidation loan.** According to the NPRM, **until consolidation loans are paid in full, they are not included in the Numerator** but are included in the Denominator, but an August 24, 2010 Q&A from DOE suggests that DOE may use current status of consolidation loans to determine whether they should be included in the Numerator. As some observers have already noted, this is a flaw in the rule – consolidation loans on which a borrower is current in payments are performing loans that should be in the Numerator. THIS IS A PROBLEM THAT WILL BE NOTED IN COMMENTS TO DOE, AND HOPEFULLY IT WILL BE CORRECTED IN THE FINAL REGULATION.

(e) ***Example***: Assume an institution that, as of July 1, 2012 (the currently planned fully effective date of the GE standards), has a certificate *Medical Assistant Program* (40 weeks in length, two 15-week semesters and one 10-week semester, with 30 semester credit hours) that it has offered during the immediate four prior federal fiscal years – 2011, 2010, 2009 and 2008.

During those four prior fiscal years, this hypothetical program had a total of *190 graduates* and *60 drops* (76% completion rate) or 250 total students (annual average enrollment around 65), all of whom have Stafford loans. The *aggregate* of the original principal balances of the Stafford loans for these students is *$2,200,000* (roughly an average of $8800 for all students). [Our example assumes all accrued interest was capitalized and added to the principal balances of these loans before they entered repayment.]

During the immediate prior fiscal year (2011), none of the 250 students paid their loans in full or were in the loan forgiveness program and the following was the status of their loans:

(i) 60 students, with original principal balances totaling $500,000, had forbearances and deferments (not in-school or military) with no payments reducing principal;

(ii) 30 students, with original principal balances totaling $300,000, consolidated their loans and none have paid their consolidation loans in full;

(iii) 30 students, with original principal balances aggregating $120,000, defaulted on their loans;

(iv) 30 students, with original principal balances totaling $150,000, entered repayment after March 31 of the immediate prior fiscal year;

(v) 10 students, with original principal balances aggregating $100,000, have in-school or military deferments;

(vi) 25 students, with original principal balances totaling $125,000, were in the IBR or ICR programs and made interest-only payments; and

(vii) 65 students, with original principal balances totaling $905,000, made payments that reduced their original principal balances.

The repayment fraction then is:

Numerator: $ 905,000 (category (vii) only)
Denominator: $1,950,000 (all categories except (iv) & (v))

The **repayment rate** for our **hypothetical MA Program**, thus, is **46.4 %,** above the preferred rate of 45%.

(f) ***Underlying Data:*** On August 2, 2010, the DOE issued a spreadsheet of fiscal 2009 repayment rates for all Title IV eligible institutions, which is accessible at http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html. Note these repayment rates are not rates for the individual programs offered by an institution, but rather are *rates averaged across all of an institution's programs*.

After releasing the 2009 repayment rate spreadsheet and in response to many questions raised about the accuracy of the rates, on August 24, 2010 the DOE issued a Q&A on the rates, which is also available at the previously cited link. Thus far, the DOE shows no sign of retreating from the use of the repayment rates, despite growing criticisms of the methodology of this metric and the use of this metric in addition to the fairly new three-year cohort default rate.

If an institution wants to check repayment rates for its programs, then, starting with a list of all grads and drops in a particular program in a given fiscal year, institutions should be able to determine the repayment rate for a program by accessing loan status data in the National Student Loan Database System ("**NSLDS**") for each loan in the four-year denominator for each program.

II. DEBT TO INCOME RATIO (Proposed New Regulation, 34 CFR § 668.7 (a))

(a) ***Basic Formulas:*** The Debt to Income ("**DTI**") metric consists of two ratios, each comparing annual debt service (using a 10-year amortization and federal interest rate) for median student debt ("**Median Debt**") to income:

(i) Median Debt must be between **8% and 12%** of **average annual** gross student **earnings** during the most recently completed calendar year ("**Average Earnings"), OR**

(ii) Median Debt must be between **20% and 30%** of **average annual "discretionary income**,"defined as the difference between average annual gross earnings (from the most recently completed award year) and 150% of the annual poverty level income for a single person, which currently is $10,800.

A program can satisfy the DTI metric by meeting either one of the two foregoing ratios.

(b) ***Median Debt***. Median debt for a progam is measured for (i) all program **graduates'** (ii) total **educational loan debt**, including federal loans (excluding PLUS loans), institutional loans (remaining unpaid after graduation) and private lender loans (iii) during the **immediate three prior award years** (**"3YP"),** but can, by request, be during the **three preceding award years**, i.e., 4th, 5th & 6th prior years ("**P3YP**") if average program graduate earnings tend to substantially increase by those career years, but then maximum ratios of 8% of total earnings and 20% of discretionary income will apply. Institutions will be required to annually report to DOE the private loan debt and institutional loan debt of each of the graduates of their programs.

(c) ***Average Earnings***. Using a list of program graduates for the 3YP or the P3YP, DOE will obtain actual earnings of all of these program graduates, during the **most recently completed calendar year**, as reported to the Social Security Administration, and will calculate an average of those earnings.

(d) ***Caveats.*** There are several caveats concerning the DTI metric:

(i) Years being examined can be confusing. Unlike the repayment rate which uses federal fiscal years, the DTI metric pulls together a group of **graduates** from **award years**, either the 3YP or the P3YP. The **earnings** evaluated for this group of graduates, however, is for the most recently completed **calendar year**.

(ii) ALL graduates are included in the average earnings calculation, not just those graduates who were placed.

(iii) It appears that all earnings of all graduates during the most recently completed calendar year are considered, whether from employment related to their program of study or other employment, i.e., there does not appear to be any mechanism for eliminating earnings of graduates from employment unrelated to their programs of study.

(iv) Only earnings of graduates reported to the SSA will be considered – excluding any self-employment earnings of graduates not reported to the SSA. The DOE will obtain the earnings information from the SSA after the 3YP or P3YP is over and then provide the information to institutions

(v) Median Debt will not be based on any loans a student took out at another institution, unless that other institution shares common ownership with the institution at issue.

(vi) Average "discretionary income" will be measured based on the poverty rate in effect at the time the institution's DTI metric is being measured. The rate can be found at the Department of Health & Human Services (HHS) website, http://aspe.hhs.gov/poverty.

(e) ***Example***. Using the same hypothetical Medical Assistant Program, from Part E (I)(e) above on page 4, here are the facts relevant to the DTI metric.

(i) ***Earnings****:* Of the 190 graduates from the prior 4 fiscal years (the loan repayment universe), **150 graduates** were from the **prior 3 award years** or 3YP, i.e., 2011, 2010 and 2009. [We are not examining the P3YP in this example, which would be a separate calculation looking at MA Program graduates in the 2008, 2007 and 2006 award years].

* Of the 150 graduates in the 3YP, assume 110 were placed (73% placement rate), with total W-2 **earnings reported** to the SSA of **$2,400,000**. [Average annual earnings for placed MA grads was $25,000 (average hourly wage of $12.50), but 35 of the graduates had graduated during the immediate prior year and thus had less than a full year of earnings.]

* Note that, unlike cosmetology and certain other occupational programs (e.g., automotive, HVAC, electrical technician) that can result in somewhat significant levels of self-employment, MA Program graduates would almost always be employed by a doctor's office, a clinic or hospital and have W-2 wages. So, our example does not assume any self-employment, and, consequently, does not pose the problem of self-employment income not reported to the SSA.

* We assume our 40 non-placed graduates had total earnings of **$175,000**, assuming that half of them obtained minimum-wage, part-time employment (20-25 hours per week @ $7.50/hour).

* Total earnings of the 3YP graduates in calendar 2011 was **$2,575,000**.

Average earnings per MA Program graduate thus was **$17,167** **(**$2,575,000 divided by 150).

(ii) ***Median Debt***: Total institutional charges for our hypothetical MA Program are $14,000. Over 60% of our MA Program students qualify for at least one-half of a maximum Pell Grant. The federal loan borrowing of our graduates ranges from a high of $12,600 (maximum loans [sub, unsub + ECASLA] for 1 1/3 academic years) down to a low of $4500. Some of our graduates, upon graduation, also have an institutional loan due over the next 24 months, with balances ranging from $500 to $2000 (students qualifying for less federal aid borrow more on their institutional loans). None of our graduates have private lender loans. Total educational debt for our 150 graduates ranges from $6500 to $13,000. For our example, we will say the **Median Debt** point – or position number 75 on our list of debt totals for the 150 graduates – is **$10,500**, since an overwhelming majority of our students borrow the maximum federal loan amount.

(iii) ***Debt Service on Median Debt***: We amortize our average graduate debt of $10,500 over 10 years and use the current 6.8% federal loan interest rate. In year one of repayment, this results in annual debt service of **$1764** on **Median Debt**.

(iv) ***Comparison of Annual Debt Service on Median Debt to Average Total Earnings***: $1764 of Median Debt Service is **10.28 %** of $17,167 of average annual earnings of our Medical Assistant Program graduates, above the preferred 8% level but below the maximum 12% level.

(v) **Comparison of Annual Debt Service to Average Discretionary Income**: Average "discretionary income" of our graduates, average annual earnings minus 150% of the annual poverty earnings of a single person, is only $967 (150% x $10,800 - current annual poverty earnings for a single person - is $16,200, and $17,176 minus $16,200 yields $967). This full figure of $967 is far less than our annual debt service of $1764 on Median Debt, so 30% of this figure – the maximum level for this alternative DTI metric – is also far below the debt service. Our hypothetical MA Program thus fails the DTI metric focused on discretionary income.

(vi) **Conclusion**: Our MA Program passed one of the two DTI metrics, but only at a restricted level. However, our program passed the preferred 45% level on repayment rate, as explained above in Part E (I)(e). So, as explained below in Part F, our program would be eligible and subject to debt warnings, but not enrollment restrictions and employer affirmations.

F. Eligiblity Consequences of Metric Outcomes.

(a) ***Program Status Outcomes*:** The GE regulations essentially create four Title IV status categories for academic programs:

(i) **FULL**: Fully eligible without conditions;

(ii) **WARNING**: Eligible with warning/disclosure requirements;

(iii) **RESTRICTED**: Eligible with warning/disclosure requirements, employer affirmations and enrollment restrictions; and

(iv) **INELIGIBLE**: Ineligible for any new students after notice of ineligiblity, but able to disburse Title IV aid to existing students for balance of award year and next award year.

The chart below illustrates various outcomes on the repayment metric and the two DTI metrics :

METRICS: OUTCOME LEVELS	REPAYMENT RATE	DTI, FULL EARNINGS	DISCRETIONARY EARNINGS - DTI	ELIGIBILITY STATUS, CONSEQUENCES
1	**45% or More**	**8% or Less, 3YP/P3YP**	**Over 20%, 3YP or P3YP**	**FULL** – no conditions
2	**45% or More**	**Over 8% 3YP/P3YP**	**Under 20%, 3YP or P3YP**	**FULL** – no conditions
3	**45% or More**	Over 8% but under 12%, 3YP or P3YP	Over 20% but under 30%, 3YP or P3YP	**WARNING** – debt warnings/disclosures
4	Under 45% but above 35%	Under 8% 3YP or P3YP	Over 20% but under 30%, 3YP or P3YP	**WARNING** – debt warnings/disclosures
5	Under 45% but above 35%	Over 8% but under 12%	Under 20%, 3YP or P3YP	**WARNING** – debt warnings/disclosures
6	Under 45% but over 35%	Over 8% but under 12%, 3YP or P3YP	Over 20% but under 30%, using 3YP or P3YP	**RESTRICTED** – warnings, enrollment restrictions, employer affirmations
7	Under 45% but over 35%	Over 12%, 3YP	Over 30%, 3YP	**RESTRICTED** – same as above
8	Under 35%	Over 12%, 3YP	Over 20% but under 30%, 3YP	**RESTRICTED** – same as above
9	Under 35%	Over 8% but under 12%, 3 YP or P3YP	Over 30%, 3YP	**RESTRICTED** – same as above
10	**Under 35%**	**Over 12% 3YP <u>and</u> over 8% of P3YP**	**Over 30% 3YP <u>and</u> over 20% of P3YP**	**INELIGIBLE**

As shown above, having a repayment rate of 45% or more is the dominant factor for meeting the GE standards. And, as stated earlier, programs are measured annually for compliance with the GE standards, so a program could move from one status category to another, from one year to the next.

Another perspective on the eligibility impact of various combinations of metric outcomes is depicted in the chart below (which is provided courtesy of Phil Balis of Abacus Mergers & Acquisitions):

Gainful Employment Proposed Rule

		Debt Burden		
		Above 12% of Total Income AND Above 30% of Discretionary Income	**Between 8 & 12% of Total Income AND Between 20 & 30% of Discretionary Income**	**Below 8% of Total Income OR Below 20% of Discretionary Income**
Repayment Rate	**Above 45%**	**Eligible (with Warnings)**	**Eligible (with Warnings)**	**Fully Eligible**
	35% to 45%	**Eligible (with Restrictions)**	**Eligible (with Restrictions)**	**Eligible (with Warnings)**
	Below 35%	**Ineligible**	**Eligible (with Restrictions)**	**Eligible (with Warnings)**

(b) ***Due Process*** – DOE will initiate termination actions against programs failing to meet the 'outer limits' of both GE standards. Institutions could oppose DOE's average earnings calculation, either by (1) demonstrating that DOE did not use an accurate list of graduates or obtain SSA earnings for those graduates, or (2) by presenting reliable evidence of different earnings amounts for the graduates – e.g., copies of W-2 slips, tax returns, student declarations as to their earnings (this, of course, assumes self-employed students are willing to go on record as to their actual earnings).

(c) ***Regaining Eligiblity (?)*** – if a program loses eligiblity due to failing both GE standards, it is unclear when and how the program can later re-qualify for Title IV aid. It is possible that such a program might be evaluated under the standards for new programs, which require employer affirmations.

(d) ***Provisional Certification*** – if one or more of an institution's programs become ineligible or enrollment restricted, DOE may also place the institution on provisional certification.

(e) ***Warnings/Disclosures*** – prominent warnings must be placed on all admissions materials (paper and web-based) informing students that they may have problems repaying loans taken out to attend the program at issue and disclosure must be made of loan repayment rate and DTI rates (**Debt Warnings & Disclosures**").

(f) ***Enrollment Restrictions*** – for the affected program, the institution may not enroll any students in excess of its average enrollment in the program over the past three completed award years ("**Enrollment Restrictions**").

(g) ***Employer Affirmations*** – for the affected program, the institution must obtain and submit to DOE the same Employer Affirmations required for new programs, as described in Part G.

G. New Program Requirements. If an institution is offering, or plans to offer, an academic program not already approved by DOE (where approval is required) and if the program will be subject to the GE standards, then the institution must file an application with DOE to seek approval, providing:

(i) Accrediting body substantive change approval;

(ii) Projections of 5-years of enrollments for all campuses where the program would be offered;

(iii) Documentation from some unaffiliated employers (not on any college advisory board) affirming: (1) the proposed program's curriculum aligns with recognized occupations within the employers' businesses; and (2) there are projected vacancies or expected demand, for these positions [over some undefined time period] at the employers' businesses ("**Employer Affirmations**"). How many such Employer Affirmations are needed is unclear, but they must be "commensurate with the anticipated size of the program," whatever that means. Presumably some reasonable ratio should be acceptable; for example, a new program with projected enrollment of 50 perhaps could be validated by Employer Affirmations from 5 different employers;

(iv) If the institution has been offering the program as a non-eligible program for some period of years, DOE will calculate repayment and DTI rates with available data, which must meet the standards outlined above; and

(v) If the institution has no prior history of offering the program, DOE will use data for any other programs at the institution which are in the same "job family," based on Bureau of Labor Statistics ("**BLS**") grouping of jobs, which can be found at http://online.onetcenter.org/find/family.

Depending on the availability of prior history data on the program or the reliability of projections, DOE may decide to approve the program with enrollment restrictions.

H. 2011 GE Implementation for Lowest 5%. The 12 months between July 1, 2011 and July 1, 2012 will be a transition period where most programs will not face any consequences from their performance on the GE standards, but:

(i) Title IV eligiblity will be lost by those programs failing both GE standards (meaning failing both GE standards as shown on level 10 of the chart in Part F above), which also fall within the lowest 5% of repayment rates for each type of program, but not going beyond a collection of those lowest performing programs which represents 5% of all graduates for that type of program at all instutions; and

(ii) For all other programs which fail both GE standards, institutions will be required to: (1) provide Debt Warnings & Disclosures, (2) apply Enrollment Restrictions, and (3) submit Employer Affirmations.

I. Suggested Comments on Proposed GE Standard. The following suggested comments are grouped by areas of focus:

(a) *Policy Issues – Reasons WhyTheProposed GE Standards Should be Abandoned*:

(1) **Educational Choices:** The 12% full earnings and 30% discretionary earnings DTI limits effectively deprive students of educational and budget choices they should be free to make about what institution they will attend and what amounts they will borrow. At the same time, those limits unfairly punish institutions for the choices made by students. Institutions have no authority to forbid low income students from borrowing maximum federal loan amounts, even when significant portions of those amounts are being disbursed as credit balances to students, which can be used for expenses having nothing to do with educational costs.

(2) **Selective Price Controls – Anticompetitive Effect**: By subjecting only for-profit degree programs to the GE Standards, the regulation is effectively aimed at forcing for profit institutions to reduce their tuition for their degree programs – the only component of the GE Standards over which they have any control – while leaving nonprofit institutions free to charge as much as they deem fit for the same programs. Ultimately this hurts students, because for profit institutions will either discontinue certain programs, withdraw from serving certain student demographics or go out of business, all of which will deprive students of competing educational providers and choices, while doing nothing to restrain upward tuition price movement by nonprofit institutions.

(3) **Safeguards Under Existing Rules**: Two existing regulatory standards help to weed out under-performing institutions and poor quality programs: (i) three-year CDR standards; and (ii) national accrediting body outcome standards. If additional protection were required, the CDR standards could be applied, not just at the institutional level, but to each program. In addition, existing national accrediting body completion and placement standards could be applied to each program as a Title IV eligiblity standard. And, with respect to those for profit and nonprofit colleges accredited by regional accrediting bodies that do not have completion and placement standards, their programs could be evaluated using numerical averages for these two standards derived from the numerical levels of the standards of all the national accrediting bodies.

(4) **GE History**: For the 45 years that the HEA has existed with the requirement that programs offered by proprietary institutions must lead to "gainful employment," DOE has applied this broad standard by reference to occupations recognized by the Department of Labor, and DOE has failed to demonstrate why this approach no longer is effective in establishing whether an academic program offered by a for profit institution leads to gainful employment in a recognized occupation. As an example, it is specious to assert that, within the meaning of the HEA provision, a bachelor of accounting program offered by a for profit institution (approved by an accrediting body recognized by DOE and utilizing curriculum and faculty comparable to those of a public university) somehow does not lead to "gainful employment," simply because students choosing to take that program at the for profit institution – which enjoys no public subsidies and must pay a considerable part of its revenue as taxes – may pay higher tuition and also may choose to borrow maximum loan amounts, resulting in metrics that fail to meet one or more of the GE Standards.

(b) ***Problems with Mechanics/Fairness of the Metrics*****:**

(1) **Economy**: Both the DTI metrics and the repayment metric contain **no mitigating provisions** to take account of the high unemployment and under-employment that our nation has been facing for the past 3 years – and may continue to face for some unknown future period – as a result of **one of the worst recessions** in our nation's history. Across all sectors of higher education, limited part-time employment

opportunities for students lead to higher education debt, especially for low income students lacking savings. Limited full-time job opportunities for graduates lead to lower placements and/or lower wage placements.

> *__POSSIBLE SOLUTION__: Programs either (i) should **not** be **subject** to the **GE Standards** until the state/regional unemployment rate applicable to the institution (the "**Relevant Unemployment Rate**") has returned to the level existing on January 1, 2008 or some other earlier point preceding the start of the current economic malaise (the "**Reference Date**"), or **(ii)** should have the outer limits of the GE Standards (i.e., 35% repayment, 12% DTI full earnings, 30% DTI discretionary income) increased/decreased, as the case may be, by a percentage equivalent to the percent of increase in the Relevant Unemployment Rate since the Reference Date. [For example, if the Relevant Unemployment Rate now is 12% and it was 8% on the Reference Date, then it has increased by 50%, and the lowest acceptable repaymenrt rate should be decreased by 50% to 17.5 % and the maximum DTI rate for full earnings should be increased to 18% and for discretionary earnings to 45%.]

(2) **<u>Demographics</u>**: Colleges serving primarily a **low-income at-risk demographic**, by reason of their physical location and the nature of their programs, unavoidably will have a higher percentage of drops/graduates needing and qualifying for ICR, IBR , deferments and forbearances – no matter how high the quality and occupational relevance of their programs.

> *__POSSIBLE SOLUTION:__ A program should enjoy an annual exemption from loss of eligibility or other sanctions in any year in which it meets the two-fold test for exemption under the cohort default rate (CDR) mitigating circumstances statute and regulaton – i.e., two-thirds of the students in the program qulaify for at least half of a maximum Pell Grant (or are at the HHS poverty income level) <u>and</u> the program has a 44% placement rate (for non-degree programs) or a 70% completion rate for degree programs. *See* 20 U.S.C. § 1085 (a)(3) (2008); 34 CFR § 668.213 (2009)

(3) **<u>Regional Wage Differences</u>**: The DTI metrics fail to account for the fact there are **regional variations in wages paid** for the same occupation, while maximum federal loan amounts that can be borrowed by students may not be appreciably affected by those variations, especially for a low income student demographic.

> *__POSSIBLE SOLUTION__: Return to DOE's original proposal (back in January 2010) for using BLS national average occupational compensation figures.

(4) **<u>Lack of Fair Notice</u>**: Since only DOE will have access to SSA earnings for graduates and DOE will only provide institutions with notice of aggregate earnings of all program graduates following the end of the measuring period for debt (3YP), institutions will be deprived of any ability to revise operational policies to improve their metrics.

> *__POSSIBLE SOLUTIONS__: Revert to the BLS national averages on compensatin as noted above, or adopt the probationary period concept noted below in Part I (c)(2).

(5) **<u>Unalterable History</u>**: As currently proposed, in the initial year of application the GE Standards would be imposed on programs, in large part, on the basis of two or more past years of operations that institutions can no longer affect. The GE Standards, thus, would amount to an unlawful ex post facto rule.

*POSSIBLE SOLUTION: Adopt the phase-in period proposed in Part I (c)(1) below.

(6) **Persistence of Interest:** As outlined above in Part E (I)(d)(2), Mark Kantrowitz of FinAid.Org has identified the possibility that some interest accruing while a student is in school or in the grace period may not be capitalized and added to the principal of the loan until after it has entered in repayment, which might mean that a student making scheduled payments still would not reduce the loan principal in the first year of repayment and thus the loan not be counted in the Numerator of the repayment rate.

*POSSIBLE SOLUTION: Clarify that any loan on which a student is making scheduled payments that include principal and interest is a performing loan to be treated as part of the RPL in the Numerator of the repayment calculation, even if the loan's principal is not reduced during the year as a result of the timing of the capitalization of past accrued interest.

(7) **Consolidation Loans:** Consolidation loans are not treated as RPL loans to be included in the Numerator of the repayment calculation, even if students are current during the immediate prior on their payment schedule under their consolidaton loans.

***POSSIBLE SOLUTION:** Provide that any consolidation loan on which the student borrower has made scheduled payments, including interest and princpal, during the immediate prior calendar year qualifies as RPL loan to be included in the Numerator of the repayment fraction.

(8) **Re-Entry Standards:** The regulation needs to specify when, and under what standards, an institution could apply to have a program that lost eligiblitycould regain that eligibility.

POSSIBLE SOLUTION: Specify that, after one full award year following loss of eligiblity, the institution could apply for re-entry, using the standards and requirements that the regulation proposes for new programs.

(c) ***More Reasonable Transitional Provisions***: If the DOE is determined to maintain use of some version of its new GE Standards, then it should adopt two additional transition measures:

(1) **Gradual Phase-In**: Just as the Congress developed a three-year phase-in period for the new three-year CDR measurement (fiscal 2009 to fiscal 2011), DOE should provide a **three- year transtion period**, beginning with July 1, 2011 and continuing through July 1, 2014, during which instituitons would receive notice of how their programs performed under the GE Standards and would be required to submit plans for improving the metrics of any program failing to meet the outer limits of all of the GE Standards.

(2) **Probationary Period**: Even after the the GE Standards are fully phased in, a program should be placed on **probationary status** following the first year in which it fails to meet the outer limits of all of the GE Standards (repayment, DTI-all income and DTI-discretionary income) and should only lose Title IV eligibility following a second successive year of failing to meet the outer limits of the GE Standards. When Congress adopted the HEOA in 2008, it amended the 90-10 rule in this manner, providing that institutions lose Title IV eligibility only after failing to meet the 90-10 Rule for two successive years. For programs on probation, DOE could require institutions to submit a plan outlining changes designed to bring one or more of the GE Standard metrics into compliance.

*The views expressed in this article are opinions of the author about a proposed federal regulation and are not intended as legal advice about any particular academic program at any particular institution. A final regulation is expected to be issued by November 1, 2010. The provisions of that final regulation may be different from the proposed regulation, hopefully in a favorable way. No prediction is being made about the legal effect of that final regulation upon particular academic programs and readers seeking such analysis are encouraged to retain legal counsel of their choosing.