Consumer Federation of California,
Consumers Union, and
Margaret Reiter

Comments on Program Integrity: Gainful Employment Proposed Regulations

Docket ID ED-2014-OPE-0039

Submitted: May 27, 2014

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Introduction

These comments address particular sections of the proposed rule. The sections are discussed in the order in which they appear in the proposed regulation. The first section, however, addresses overall or recurring issues that apply throughout the proposed rule.

Concerns about Recurring Problems with the Proposed GE Program Rules

We recognize that DE staff devoted long hours and diligent effort to draft the proposed rules. They have compiled a wealth of data. We know they understand the intricacies of the rule as well as the places where dangers to an effective rule lurk. We applaud their efforts. Nevertheless, it appears that the proposed regulation was infected somewhere in the process by "regulatory capture syndrome." In many instances the rules choose to be more protective of schools than of the students and taxpayers the gainful employment requirement was intended to protect. And in many instances, the rules seem oblivious to the kind of gaming the system and misrepresentation or other fraud well known to exist among many predatory schools. Although we try to point out these problems where they occur, because they occur throughout the regulation, we believe a brief description of them can be useful in consideration of the overall effect of the rule.

1. Generally, When a Bright Line or a Criterion Must Be Chosen, the Proposed Rule Takes an Approach that Veers from a Conservative Adherence to the Legislative Intent, and, Instead, Applies a Liberal Interpretation that Works to the Detriment of Students and Taxpayers and to the Benefit of Schools Offering Programs of Questionable Merit

The preamble faithfully cites the statutory language and the legislative history to demonstrate that programs subject to the statutory requirement were expected to not burden students with high loan debts nor pose a "poor financial risk" to taxpayers. To carry out that legislative intent, one would expect the proposed rule to adhere closely to

those goals. Yet, whenever DE must make a decision to effectuate the proposed rules, it most often chooses a course that is less protective of those goals and more protective of schools subject to the law. Examples are plentiful.

The D/E rule is a prime example. The preamble correctly notes that research shows that students cannot afford to pay loans when the debt exceeds 20 percent of discretionary income.

> "The percentage of income that borrowers can reasonably be expected to devote to student debt repayment increases with income. Individuals with incomes near the median should not devote more than about 10 percent of their incomes to education debt repayment, and the payment-to-income ratio should never exceed 18 to 20 percent."

"How Much Debt Is Too Much? Defining Benchmarks for Manageable Student Debt," by Sandy Baum and Saul Schwartz, 2006. Available at http://ticas.org/files/pub/Manageable_Debt_FINAL_4.20.06.pdf. That research on which DE relies explained, "not that 20 percent of income is a reasonable debt-service ratio for typical borrowers. Rather, it is that there are virtually no circumstances under which higher debt-service ratios would be reasonable." Id. Nevertheless, the proposed rule allows programs in which the loan debt loan exceeds 20% of discretionary income to continue operating for four years more.

The preamble also correctly notes that the research on which it relies indicates that those earning 150 percent of the poverty level or lower have no capacity to repay student loan debt. Nevertheless, the proposed rule allows debt up to 8 percent (even up to 12 percent for several years) of annual earnings because otherwise programs that prepare students for low-paying jobs could not be eligible. If that were not skewed enough already from the underlying goals, the proposed rule defines the poverty level as the poverty level for a single individual. DE's own analysis, however, shows that about a third of students in GE programs are married. More discretionary income is needed to support a family of two than to support an individual, but the proposed rule does not take that into account.

The preamble also recognizes that 8 percent of annual earnings, while commonly used as a credit-underwriting standard, is a standard intended to include all forms of non-housing debt, such as credit card payments and car loans, as well as student loan debt. As for-profit schools often point out, most of their students do not come directly from high school. DE's own analysis shows about a third of students in GE programs are married. They are likely to have car loans or credit card debts already. Nevertheless, the proposed rule allows for programs that have a student loan debt ratio of 8 percent of annual earnings.

If SS cannot match a student in the cohort for earnings, the proposed rule starts eliminating from the list of loan debts the highest loan debts, rather than a more neutral elimination of, e.g., the highest and lowest or the median. 79 Fed. Reg. 16458. Again,

to the extent this skews results, it skews results to benefit schools with weak programs and to the detriment of students and taxpayers.

Similarly, the preamble claims the proposed certification rule will provide accountability, yet the proposed rule does not apply to most GE programs. Any programs offered by distance education in a different state from where the brick and mortar school is located are apparently not covered by the rule.

And, of course, although the preamble demonstrates that an n=10 measure for programs to be evaluated provides excellent statistical validity, the proposed rule nevertheless uses the more liberal n=30. The calculations included show that an n=30 rule leaves out of the protection offered by D/E calculations an estimated 1,070,953 students in nearly 30,000 programs.

The proposed rule also purports to further the second goal of providing transparency to students, prospective students, families, the government, and the public, but time and again the rule limits transparency. The proposed rule does not disclose to students the first year a program in which they are enrolled is in the zone or failing the pCDR measures. In fact, the rule would keep students in the dark for three years while their program remains in the zone, not meeting the minimum required GE levels.

Nor is there any commitment to make the GE metrics public; the proposed rules says only that DE may publish them. And the proposed rule seems to limit information about a school's performance so that even parents, guidance counselors and others who may inquire about enrollment would not be entitled to the information about a school's completion rates, student loan debts or costs.

In short, at almost every turn where DE could propose a rule to best effectuate the legislative goals, DE chooses to do something less likely to effectuate those goals, even though the means to more effectively reach those goals are readily available.

This is not to say that DE did nothing to improve on the weaker rule previously proposed. DE did revise the D/E measure to more closely track the research than under the prior rule, and it offered an independent measure (pCDR) to apply to all students' debt repayment. It is just that so much more could have been done to adhere to the legislative goals. That DE chooses not to do so is very disappointing.

2. The Proposed Rule Reflects Incredible Naiveté, if Not Willful Blindness to Current and Potential Manipulation to Avoid Title IV Regulation

DE is well aware of some schools' current tactics to evade the impact of CDR. DE knows that the CDR was changed from two years to three years in an attempt to address some of that manipulation. DE knows that such manipulation continues. Yet the preamble does not even discuss the potential impact of such manipulation on pCDR's or how that will diminish the benefits of the proposed rule.

The preamble suggests that schools will affect the D/E ratio by "lowering tuition and fees." 79 Fed. Reg. 16444. Yet DE is already aware that schools are using another tactic to affect D/E. Rather than lowering tuition and fees for all students, some schools are selectively offering so-called scholarships, which only students who complete courses may receive, and then often only after the course is complete. Students who do not complete the program, so have less chance of obtaining employment, may wind up with higher debts for tuition and fees per unit than those who graduate.

Similarly, the preamble identifies numerous prosecutions and investigations that have pointed to misrepresentation and fraud predatory schools use to recruit students. Nevertheless, the proposed disclosure rules seem oblivious to the ways in which a required disclosure can be hidden among stacks of papers or distracting or deprecating verbiage. DE seems also naïve about the misuse of documents students sign, which state the student received required disclosures.

The proposed rule seems to have received no focused attention on drafting so as to preemptively address the kind of cunning and malevolent tactics predatory schools will undertake to evade, undermine, and distort the proposed rules. The history of efforts to curb predatory schools should be sufficient to ensure that DE seriously considers ways the rules need to be strengthened to prevent predatory schools from continuing to game the system.

Comments on Specific Sections of Proposed Rules

668.402 Definitions

Length of Program

The length of the program is defined as what the school says it is in its official documents or marketing materials. We are concerned about length creep. You may recall that before airlines had to report their on-time and late arrivals, posted flying times between certain cities were shorter than they have become after the requirement was promulgated. So, a flight that used to be posted as taking 45 minutes, may now be posted as taking 1 hour and 10 minutes. Consequently, the on-time arrival rate for the flight is very good, but no time is saved for the consumer.

Similarly, as schools must publicly disclose how many students who enrolled completed within 100% and 150% of the program length, schools will have the incentive to claim longer and longer program lengths as the norm. We urge DE to consider how length of a program is measured elsewhere in regulation and ensure that, e.g., short certificate programs may not be identified as programs requiring four years to complete.

Poverty Guideline

This definition affects the level of discretionary income that will be sufficient to meet the D/E threshold for passing, zone, failing, and ineligible programs. For larger family sizes, the amount needed for basic costs is greater, so discretionary income from the same income is less. And the amount of earnings needed to reach the poverty level for a family of two is higher. So, to the extent the proposed rule treats students as single, for the purpose of determining discretionary income, the rule allows programs that overburden students who have families. No rationale is offered for choosing the poverty level for a single individual.

As Table 3 shows (pp. 16533-34) about a third of students in gainful employment programs are not single, but married. So, for about a third of students in GE programs, this definition is not conservative, i.e., weighted toward the legislative goals of protecting students and taxpayers from unproductive programs, but rather is skewed toward allowing schools to keep operating programs that do not provide sufficient income to allow students to repay their loans. This problem is compounded because this is only one of several ways that the proposed rule skews the D/E calculation to benefit schools and burden students and taxpayers. See below. The proposed rule could be directed to more closely adhere to the stated goals by a simple change. For example, to remain faithful to the legislative intent, the rule could and should use a blended poverty level which assumes one-third of students are married and two-thirds are not.

Prospective Student

Schools must provide certain disclosures to "prospective students." The definition of "Prospective student" applies only to the potential students themselves, but not to parents or older siblings, aunts, uncles, grandparents or high school counselors, any of whom may also contact, or be contacted by the school about a young person's potential enrollment. The preamble states,

> "Better outcomes information would benefit: students, prospective students, and their families, as they make critical decisions about their educational investments; the public, taxpayers, and the Government, by providing information that would enable better protection of the Federal investment in these programs; . . . ."

79 Fed.Reg. 16426. Yet the proposed rule limits the breadth of those entitled to disclosure of such information by its use of this definition of "prospective student." See proposed rule 668.412(d)(1) and (e).

Why shouldn't the information be provided to anyone contacted by, or contacting the school about enrollment in a GE program, even if the information concerns another person? Consider that a parent or other relative may be attempting to learn the cost, potential debt or other pertinent information in connection with helping a family member decide about college enrollment. Aren't they as entitled as the potential student to learn

key information about the school? This sort of information could also be vital to high school counselors trying to help a student determine the possibilities for training in a particular occupation. The definition should be revised as follows:

> Prospective student. An individual who has contacted an eligible institution for the purpose of requesting information about *enrollment* ~~enrolling~~ in a GE program or who has been contacted directly by the institution or indirectly through advertising about *enrollment* ~~enrolling~~ in a GE program.

668.401 Scope and Purpose

668.401(c)(1)(i)(B) Use of Annual Earnings Rate

The proposed rule includes in its debt-to-earnings (D/E) measures, a standard based on a person's annual earnings, rather than on the discretionary portion of earnings. The preamble correctly notes that the research on which the rule relies indicates that those persons earning 150 percent of the poverty level or lower have no capacity to repay student loan debt. Nevertheless, the proposed rule allows debt up to 8 percent (even up to 12 percent for several years) of annual earnings because otherwise programs that prepare students for such low-paying jobs could not be eligible. In effect, the rule sacrifices the students' and taxpayers' interests in having manageable debt and a sound lending program. Instead, the proposed rule allows the continuation of programs that enroll students who cannot qualify for better jobs, prepare students so poorly, or prepare students for such low-paying jobs that typical students cannot possibly afford to pay their loan debts. This choice is not to further the legislative goals, but rather for the benefit of the schools and employers.

We believe that at a minimum, DE should carry out a study of those programs that produce mean or median earnings below 150 percent of the poverty level and consider for future regulation whether such programs can legitimately be considered to prepare students for gainful employment. Should taxpayers be subsidizing not only the schools that prepare students for such employment, but in effect, the employers who pay wages so low that students do not have sufficient income to repay taxpayer-financed loans? Do such occupations require costly, specialized training at all? Could employers continue to pay such low wages and yet require trained employees if the training were not so heavily subsidized? If some of these low-paying jobs serve the public, then DE should consider recommending special grant programs for students in those programs. For other programs, it should not continue to expect students and taxpayers to subsidize both the schools who offer training for those jobs and the employers who benefit from the subsidized training. The original Congressional intent did not give imprimatur to such programs. It did just the opposite. Looked at another way, does anyone think Congress today would institute a student loan program in which half of the borrowers who completed the program would earn so little they would not be able to repay their loans?

The preamble also acknowledges that 8 percent of annual earnings, while commonly used as a credit-underwriting standard, is a standard intended to include all forms of non-housing debt, such as credit card payments and car loans, as well as student loan debt. Here, however, if the proposed rule is to address the ability of students to repay their loans, by allowing up to 8% of income for student loan debt, the proposed rule is, in effect, assuming that students have no other debt non-housing debts. As for-profit schools often point out, however, most of their students do not come directly from high school. DE's own analysis shows about a third of students in GE programs are married. They are likely to have car loans or credit card debts already. Given this, and the lack of research support for using an annual earning rate at all, we believe 8 percent should be the absolute upper limit for programs to be able to continue to participate in the student loan programs, at least after an initial transition period. Instead, the proposed rule allows even higher debt levels for up to four years before the program becomes ineligible. Meanwhile, four more years of students will suffer from these over burdensome debts.

668.401(c)(1)(iv)(B) Length of Time Allowed for Programs that Do Not Pass

The proposed rule would allow programs that do not meet the minimum passing standards to continue to operate for four years. No rationale or analysis is offered for providing this lengthy period for subpar programs to continue to operate. Nor is there any analysis of the alternative of a requirement that a program must pass at least once in every three years.

The lengthy period chosen is particularly troubling in light of other aspects of the proposed rules. First, the determination that a program is not passing is based on the impact the program had on students who attended years before. For example, the D/E data to be finalized in 2016, relies on the loan debt of students' who completed their programs between 2010 and 2012. 79 Fed.Reg. 16505. And, except for the transition period, it is based on their earnings, as well. Consequently, if a program can continue for four years after having been shown not to be passing, that program would continue to negatively impact not just four years, but eight years of student completers. (Those who completed from 2010 through 2018). Second, the proposed rule offers no transparency to students or prospective students in zone programs until the last possible moment – the year before the program could be declared ineligible. And finally, the proposed rules provide no relief for any of the students impacted by their enrollment in these subpar programs during any of the eight years such a program could continue to operate.

In the review of alternative measures included in the NPRM, there is no analysis of the impact of a three-consecutive-year period for non-passing programs to continue. At a minimum, DE should analyze and consider the impact of the alternative of setting the non-passing limit at three, rather than four consecutive years. See discussion at 668.410 for other recommended measures.

668.404 Calculating D/E Rates

668.404(b)(2)(i) Amortization Period

The loan debt should not be amortized over more than 10 years. In no circumstances should undergraduate debt be amortized over more than 10 years. Amortizing graduate debt over 20 years is also unwise.

The proposed rule uses staggered amortization periods for determining D/E results. The preamble notes that those in graduate programs and first degree programs have higher debts. But the proposed rule already accounts for that by excluding debts incurred by a student for undergraduate programs when calculating a program's D/E ratio. The discussion in the preamble also does not consider that those who complete graduate school programs or first professional degree programs can be expected to have larger incomes with which to pay those debts.

The analysis provided shows a difference between undergraduate and graduate programs in which the amortization schedule students choose and in how quickly students repay their loans, but does not show much difference among two and four year undergraduate programs. 79 Fed. Reg. 16454. The analysis also does not show whether those who pay off their loans over extended time periods of 15 to 20 years, are really paying them off, or are having tax refunds or social security payments seized to pay off old loans. In effect, we do not know how much of the repayment after the initial 3-year CDR period is due to drastic collection measures and how much is due to students being able to afford to pay their loans. Using a lengthier amortization period in the calculation of D/E may just be a way of allowing poorly performing programs to continue to saddle students with debts they cannot pay off in a reasonable time period. The preamble acknowledges that students overburdened with debt cannot buy cars and homes or plan for retirement. Consider that if students are paying off student loans over fifteen or twenty years, they are not going to be able to set aside money for a down payment or retirement during most of their working years. A sensible loan program should not be based on such lifelong repayment periods

The preamble also points out that, adjusted for inflation, loan amounts have generally not increased that much over the period studied. "From 1999, when the majority of borrowers repaid their loans within 10 years, to 2009, average loan size has increased by about 6 percent (in 2011 dollars)." 79 Fed.Reg. 16452.

Another factor not considered in the analysis is that part of the problem with the for-profit sector, results from the sector's expansion into longer programs for which its mission of training students for gainful employment is less amenable to its methods, or to institutional or governmental oversight and monitoring. See Shireman, Robert, "Perils in the Provision of Trust Goods, Consumer Protection and the Public Interest in Higher Education," Center for American Progress, May 2014.

The analysis presented does not support lengthening the amortization period, but only suggests another way students overburdened with loans cope -- by continuing to pay over their working years. DE should restore the 10-year amortization period. In no event should DE provide a longer amortization period for undergraduate work.

668.404(b)(2)(ii) Interest Rate Applied

We endorse the comments of The Institute for College Access and Success (TICAS) on this subsection.

668.404(c)(3) Programs Offered under the Same Ownership or Control

Despite concerns expressed at Neg.Reg., the proposed rule leaves DE vulnerable to challenge by keeping to itself the sole discretion, without any limiting parameters, to include in a single GE calculation all GE programs of the same credential level and CIP code at schools under the same ownership or control. The proposed rule justifies this saying DE does not categorize schools by ownership or control, and the only reason to include programs at other institutions is if there were evidence of manipulation of GE measures. 79 Fed.Reg 16454.

One problem with this explanation is that it offers no criteria for what would be considered manipulation of GE data or what evidence would be necessary to trigger DE's decision to include programs from the owner's other schools. This is the kind of vague regulation that, if ever applied, would beg for due process or other challenges. Consequently, DE's discretion would be unlikely to be invoked, as DE would recognize the difficulty of sustaining its decision. More practically, evidence of manipulation is likely to appear well after the fact and, in the absence of specific standards, could be argued to simply be legitimate business management.

The other rationale, that DE doesn't categorize schools this way does not explain why DE could not capture that information, either directly from existing filings showing ownership or change of ownership or control (see e.g., 34 CFR 668.15 or 668.174(c), or by requiring schools to report that information along with the other data needed to calculate GE measures.

In the prior GE NPRM, DE itself proposed to include in the same GE calculations programs offered at any schools under common ownership or control or operated by related entities:

> "However, it would not include any student loan that a student incurred at prior institutions or at subsequent institutions unless the other and current institutions are under common ownership or control, or are otherwise related entities."

75 Fed.Reg 43623, see 43639.

As we stated in response to that proposed D/E measurement,

> "We strongly support the inclusion of all loans made to students at the same or related institutions in the debt-to-income metric. This should prevent unscrupulous school owners from gaming the measure by setting up numerous purportedly independent entities and shuffling students from one school to another. For the regulation to have the intended effect, however, it is critical that "ownership," "control," and "related entities" be defined in a clear and complete manner that achieves the goal of eliminating the ability of institutions to subvert the intent of the rule. We propose that the Department look to sections 668.15 or 668.174(c) for guidance in defining "ownership and control." Because those sections do not exactly track the terms to be defined here, the Department will need to take into account the different terms needed. For example, those sections define "substantial control," in part, as having at least a 25-percent ownership interest. We suggest, however, that the word, "control," should be defined by less than a 25-percent ownership interest. We believe that as little as 5-percent ownership triggers disclosure requirements for publicly-held corporations because one can impact the corporation's conduct with that share of ownership."

The clearest way to handle this issue is simply to include programs with the same CIP and credential level, if offered at schools under common control or ownership, or operated by related entities, as DE previously proposed. Alternatively, DE should specify the standards for when it will count programs at different schools as being offered at the same school.

At the very least, DE needs to return to the justification and explanation it included in the prior GE rules for when it could use this authority and provide some examples of what it considers manipulation of GE measures. See 76 Fed.Reg. 34450, 34458; see 34 CFR.31.

668.404(e)(1)(2) and (3) Exclusions
(Also applies everywhere else these exclusions are applied, e.g., 668.413 (b)(3(vi)(A)(B) and (C)

Once again, we have here a rule apparently drafted without consideration to how it can be gamed. A student is excluded from the GE measures (and disclosures) if a student is under consideration for disability discharge, has a military deferment for one day, or was enrolled a single day during the award year.

Disability discharge "under consideration": This subsection does not explain what is meant to say a disability discharge is under consideration. Generally, the mere assertion by a student or a representative of the student that the student is seeking disability discharge suspends collection. See 34 CFR 685.213(b)(ii). Does the mere request for disability discharge mean the request is "under consideration"? If so, a predatory school could get a student's authorization to represent the student and make

an assertion of disability, which would then remove the student's loan from GE calculations. Even if to be "under consideration" requires filing an application, an unscrupulous school representing the student could file a deficient application, again, merely to remove the student from the GE calculations. In either scenario, a predatory school could use this tactic to game the GE measures with impunity.

Getting a student to enroll for a single day during an award year would be even easier for an unscrupulous school to engineer.

These provisions must be tightened up. These possible ways of gaming the GE measures were discussed during negotiated rulemaking, but the NPRM offers no explanation of what procedures the proposed rules include that could prevent such gaming. DE may believe such measures are extreme, that most schools would not engage in such conduct. History does not support such a view. The history of the student loan program shows that gaming the system is the norm, not unusual behavior. In any event, these rules are meant to address the programs that do not prepare students for gainful employment. That is exactly where we are most likely to find predatory schools operating. They will likely use every means possible to avoid losing a lucrative program. During negotiated rulemaking, negotiators proposed requiring a length of time for exclusion, such as active enrollment for six months during the award year. DE then acknowledged that the exclusion should be based at least on 60 days of enrollment or military deferment. The preamble offers no explanation for now proposing this loophole.

Disability exclusion should be defined to refer to the period after the student has submitted all necessary documentation to DE.

668.404(f)(1) N-Size

An n-size of 30 is unnecessarily large. The analysis provided shows that an n-size of 10 adequately provides validity. The analysis shows the small chance that a program would erroneously be considered not to pass the GE measures, even with an n-size of 10. Charts in the NPRM show the number of students who would be included in the protection provided by the GE measures, if an n-size of 30 were used (79 Fed.Reg 16544), but the NPRM does not bring these numbers together in the narration of impacts so as to show the negative impact on students from using the n-size of 30. . Doing so reveals that more than 1 million students in GE programs would be unprotected by any GE measures and only about 20 percent of GE programs would be evaluated if the n-size were 30. 79 Fed.Reg. 16544, 16557, Table 8. For these reasons and the reasons explained in the comment by TICAS, we urge DE to use the lower n-size of 10.

/ / /

668.404(g) Transition Period

We agree that the proposed approach to the transition period is much better in this NPRM than was the previous proposal to place a cap on how many bad programs could be eliminated in the first years of the rule. In light of schools' efforts to begin adjusting to the prior GE framework, We are concerned that DE expects that this provision will result in lower tuition and fees:

> "Because the transitional calculation would apply the loan debt of students completing a program after the proposed regulations go into effect, immediate reductions in tuition and fees and other adjustments by an institution in order to decrease debt of current students would be reflected in the results of a program's transitional D/E rates."

79 Fed.Reg. 16455. In fact, what we have already begun to see is that one way schools are reducing graduates' loan debts is by so-called scholarships that are treated as credit against tuition and fees. The student never receives the so-called scholarship and in some cases, does not earn it until completing the units or even until completing virtually the entire program. By these means, the institution can improve its programs' D/E measure, without lowering tuition and fees. Students who cannot complete the program wind up with the highest tuition and fees per unit. See, e.g., http://achieve.strayer.edu/home-1354BA-72806B.html?MarketingCode=DG4&TFN=&MCV=&keyword=strayer+university&gclid=CM-CiNSryr4CFYdrfgodZwYAxQ&siclientid=9769&sessguid=40a8cf02-f0b8-48d6-9074-03a7afbece24&userguid=40a8cf02-f0b8-48d6-9074-03a7afbece24&permguid=40a8cf02-f0b8-48d6-9074-03a7afbece24 (scholarship "(f)und must be redeemed for the final courses leading to a bachelor's degree. . . . Tuition credit earned only after successfully completing courses . . . ."); http://www.itt-tech.edu/os.pdf (scholarship to reduce tuition for each quarter you stay in school). While there may be nothing inherently wrong in providing tuition relief to those who succeed, and may be beneficial to a small group of graduates, this appears not to be the kind of significant change to poorly-performing programs that DE hoped to see. This underlines the need for schools to have to meet both the pCDR or a positive repayment measure and the D/E measures. Obviously, without a measure related to students who do not complete, schools will simply manipulate costs by these "scholarships" to keep their D/E measures above the threshold. These efforts also suggest that for many for-profit schools, which charge high tuition and have high dropout rates, the D/E measures alone will not effectuate the needed changes to poorly-performing programs.

668.405 Issuing and Challenging D/E Rates

668.405(c)(1) Student Lists Presumed Correct

As it did during the Neg.Reg, DE proposes language that inadvertently limits its ability to stop fraud in the schools' compilation of lists of students, e.g., those who completed the program during a particular award year. DE relies on these lists to carry out the GE calculations and to provide disclosures. This proposed rule says DE presumes the school's list is correct. That provision is intended to deal with schools claiming errors in their own lists. But this language also will limit DE's ability to reject the list a school provided if DE learns the school provided a bogus list of completers. Why might schools do this? One obvious reason is to reduce the number of completers to below the n-30 (or n-10, which we propose) threshold. DE could address this by a slight change in the language. For example, the rule could be changed as follows:

> (1) The Secretary may presume~~s~~ that the list of students and the identity information for those students are correct unless, as set forth in procedures established by the Secretary, the institution provides evidence to the contrary satisfactory to the Secretary. If an institution challenges the accuracy of the list, t~~T~~he institution bears the burden of proof that the list is incorrect.

This same formulation should be corrected each place it occurs in the proposed rules. See, e.g., 668.405(f)(1) and 668.413(b)(8)(iii).

668.405(d)(1) and (e)(2) Earnings Data Matched

During Neg.Reg, DE clarified that to "match" earnings data, a match could occur if the agency located the identified individual and certain identifying information, such as a social security number. But, the match could show zero earnings. For clarity, DE may want to make that explicit in the final rule or its preamble, as it is not crystal clear here.

668.405(g)(3) Secretary "May" Publish D/E Rates
(and 668.413(e)(1)(iii) and everywhere this same formulation occurs)

Here and elsewhere, the proposed rule states that DE "may" publish certain information, such as GE measures, completion, withdrawal, and repayment rates, and the median loan debt. To provide transparency, one of the twin goals of this proposed rule, DE should automatically publish this information, and in a way that is easy to find, access and link to particular schools and programs. DE should not have the option to withhold this information. Each place this formulation occurs, the "may" should be changed to "shall."

668.406 D/E Rates Alternate Earnings Appeals and Showing of Mitigating Circumstances

668.406(a)(3)(i) Earnings Survey Requirements

We are concerned that the allowance of a survey to challenge zone or failing D/E measures is not adequately protected against predatory schools' abilities to impact the

results. When, after the NCES presentation at Neg.Reg, one of the negotiators questioned the representative of NCES about procedures to guard against a predatory school that might want to skew survey results, he stated that their procedures assume the survey takers want to take an honest survey. Their tools simply provide the means to do so. They do not address improper efforts to skew the survey. They do not, for example, deal with efforts to pre-interview the former student and provide incentives or threats to encourage answers the school desires. These improper influences could take the form of offers of free goods for preferred answers or withholding of transcripts, recommendations, or placement assistance for unwanted answers. In addition to the requirement for certification of the survey, DE should routinely audit the surveys to determine if they have been conducted without improper interference from the school.

In light of DE's desire to keep information related only to Title IV recipients, we see no reason to allow inclusion of non-Title IV recipients in these surveys.

668.406(a)(3)(ii)(A) Certification of Survey

In light of the above explanation, the required certification by the school officer should also certify no actions were taken to influence or skew the results.

668.406(a)(3)(i) and (4)(ii) Identity of List of Students

The list of students used in the alternative earnings challenges should be defined to be the same list that the school is initially required to provide DE for its use in calculating GE measures, with any corrections DE accepted to that list.

668.406(a)(5)(ii) Protection of Student Rights During Appeal

The proposed rule would withhold from students the results of GE measures (under 668.410) while the school appeals them. Schools should be subject to the requirements of 668.410 (warnings to students) during the 60-day appeal and the additional time until DE determines the results. Once again, here, the proposed rule opts for less transparency, rather than more. These rules should not be assisting schools in keeping from students vital information. The warnings can be given with the caveat that the school is appealing the determination. Apparently, DE is concerned that some students will act on that information, thus hampering the school's efforts to improve the program. As noted elsewhere, schools are very capable of handling their marketing, without government regulations assisting in preventing students from learning the current state of their GE Programs. Such a paternalistic approach – shielding students from information the government thinks might be harmful to them or the schools, should not be tolerated.

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668.407 Calculating pCDR

We have two primary concerns with the use of pCDR. First, the NPRM ignores the clear evidence that schools have been able to manipulate CDR's to prevent defaulting students from showing up until after the 2- (now 3-) year CDR period. The NPRM offers no explanation as to how the proposed rule would be protected from such manipulation of pCDR. We are skeptical that, without any measures to prevent manipulation, pCDR will provide adequate protection against poorly-performing programs.

Second, we continue to be concerned that DE has not developed a repayment rate measure, other than as a disclosure. After all, DE is a lender. Lenders determine what repayment rates are needed to ensure viability of the program and, when as here, public policy is also a concern, how to prevent over burdensome debt. DE says no one has offered a rationale for any level of repayment. We believe DE needs to look to other financially successful lending programs, both public and private to see what repayment rates are expected. Paying down a debt by at least a dollar a year is not a long-term strategy for success, for either the lender or borrower. What is the expected annual pay-down percentage for, for example, credit union loans, car loans, credit card debt, or other government loan programs, such as agriculture or small business loans. Clearly, models exist. While there are differences among such credit operations, they are not impossible to relate to student loans. DE must undertake to review and apply them here.

668.410 Consequences of GE Measures

We join in the comments of Young Invincibles, TICAS, and NCLC on the need for student relief.

We further note that such relief will provide an incentive, not just to schools, but to DE itself. It appears that DE has shirked its enforcement obligations for years, but protected DE against program costs by limiting borrower relief, rather than by aggressively enforcing requirements of the Title IV programs. If students could raise the failure of GE programs as a defense to payment, DE would have to step up its enforcement activities to ensure programs are truly preparing students for gainful employment, or DE would face the losses on the loans it provides for those programs. The preamble to the proposed rule is telling in that it recounts the actions and investigations numerous state attorneys general and other federal agencies are taking to try to rein in fraudulent for-profit schools, but it is silent on just what DE itself has done to prevent the rampant fraud and abuse others are investigating.

If, as the proposed rule constantly demonstrates, the agency's concern lies more with the impact on schools (or the likelihood of yet another industry sponsored lawsuit or major lobbying campaign against the GE rule) than with the impact of a weak rule on taxpayers and students, DE could protect schools from rapid change by ramping up student relief over the a four-year transition period. So, for example, initially, the only

consequence of not passing the GE measures would be warnings; after one year, the consequence could include limitations on enrollment. That would prevent the last gasp reaction, in which a school pushes a failing program to the maximum enrollment it can, to take in all the profit it can before the program is terminated. Finally, beginning in the fourth year of a transition period, student relief, as outlined by NCLC, YI and TICAS could be implemented. This would not be an ideal solution because it would still leave students unprotected for a few more years. Achieving the goal of a standard mechanism for student relief over the long term, which would ultimately benefit future students, might be worth a transition period as a way to alleviate DE's and the schools concerns about the immediate impact on schools.

668.410(a) Timing of Student and Prospective Student Warnings

This proposed rule fails to carry out the goal of increased transparency in multiple ways.

The proposed rule would keep students in the dark about the status of their program until the program will fail the following year if it does not improve. For students in zone programs, this would mean the student could spend three years in a program that does not pass the GE measures before learning of the problem. For programs that fail the pCDR, this could mean students could spend two years in a program that does not meet the minimum standards before finding out about the failings of the program.

Students (and their families, counselors and others) have several significant reasons for needing this information much sooner. Obviously, they should be able to make long term plans. If they are in a four-year program, or a shorter program that they may need more time to complete, they need to know whether they can count on the program continuing for their full term of enrollment. If there is to be a disruption, most of us would rather face it sooner rather than later. And let's also face the fact that it is not just a question of whether the program will continue to be eligible for Title IV aid. Because many schools, including many of the largest for-profit schools, depend on Title IV funds for up to 80 to 90 percent of their revenues, if a program fails the GE measures, the school is unlikely to continue to offer it. In most cases students at for-profit schools would also find that their credits will not transfer at all, or not transfer for credit toward their program requirements. They should have the information necessary to decide if they want to leave a zone program as soon as that program is found to be in the zone, so they would not waste time and money earning credits in a program they may not be able to complete and that may not be transferable if the program does become ineligible.

Second, that a school is in the zone is important not just to learn if Title IV aid will be available, or if the program will continue, but to help a student distinguish programs and choose the best one they can. Would you encourage your child to enroll in a program in the zone or one that fails the pCDR? Being in the zone or failing the pCDR is an indication of a poor or costly program, one that enrolls students unsuited for the occupation, or that prepares students for jobs in which they likely won't earn enough to

handle their loan debt. Fundamental to outcomes information affecting students' and their families' decisions is that they actually receive and can act on that information.

A third reason students and prospective students need to receive the GE warnings promptly is that schools with programs in the zone may decide to voluntarily terminate the program, before they are forced to do so. The student needs to know the possible consequences of a program being in the zone, including that a school may drop that program well before the student completes.

A rationale for withholding this important information from students and prospective students is hard to find. The preamble states only,

> "[P]articularly in the initial years of the proposed regulations, institutions should be given time and incentive to improve those programs that are not among the very worst, but still have outcomes that do not meet minimum acceptable levels of performance."

79 Fed.Reg. 16468. Implicitly, this statement recognizes that given the information earlier, some students would likely act on it. The proposed rule seems to opt to hide the information from students so that institutions will be able to keep students in poorly performing programs, in the hope the program can be improved. Such a choice is shameful. The for-profit schools, among which more programs are likely to fail, are masters at marketing. They do not need government assistance to help hide the ball from students. A public agency should not be participating in such a game. The warnings must be provided whenever a school does not pass a GE measure.

668.410(a)(1) and (2) Improving Delivery of Warnings

There are several important aspects that impact whether a warning about programs that do not pass minimum standards will adequately inform the consumer – the content, the format, and the means of conveying the message.

As discussed above, the warning should have two purposes, both to alert the recipients that the program may soon lose eligibility for student loan and grant programs, and to alert the recipients that the program is not meeting the minimum passing standards. Both are important information. The warning must be tested to determine how well it meets both of those goals.

DE plans consumer testing to make the warning as meaningful as possible. It is unclear, but should be made clear, that such testing will include how the warning should be delivered and the format to be used to make the warning meaningful. The bare bones description of the method of delivery suggests that lessons to be learned from the investigations by the GAO or Attorneys General about how other important information is concealed or denigrated so students do not receive meaningful disclosures, have not been applied here. For example, saying the warning must be

hand-delivered, means that the warning can be stuck in the midst of a sheaf of other documents about the school, its programs, loan programs, grant programs, scholarship programs, internships or what-have-you, so that the student will never notice the document, even if the student is required to sign it. Getting consumers to sign documents that say the consumer has read and understood the document, without the consumer ever reading or understanding it, is the meat and potatoes of most deceptive schemes by predatory companies.

DE should also consider other means of getting the information across. For example, DE could require the warning to be posted in each room in which the program is taught, as well as in reception and financial aid areas. DE could also provide a video containing the appropriate warning to each school that does not pass. DE could require the school to show it to all students in the program, require it to be sent by email or social media, or require it to be prominently posted on the website wherever the school mentions the program or occupations for which the program trains students. DE should also consider requiring a format using short FAQs, which are easier to read than paragraphs.

DE specifies that other required disclosures must be prominent, which would include the warnings after they are incorporated into the disclosure template (see, e.g., proposed sections 668.412(c)(1) and (d)(i)). DE does not so specify for any part of the warning notice when it is first given to students. DE needs to specify the form and format to ensure the message will stand out. Unless DE provides the warning format itself, predatory schools will likely use formats that diminish the prominence of the warning.

As discussed above in connection with 668.402, the definition of prospective student proposed there should be used here at 668.410(a)(2).

668.410(a)(1)(iii)(B) Clarification of Explanation of Not Passing Program

This clause ends with an "and," which may be confusing as a school is not likely to offer all these alternatives. 79 Fed.Reg. 16511. This could be corrected as follows:

(iii) Indicate which ones, if any of the following, ~~whether or not~~ the institution will do—
(A) Allow the student to transfer to another program at the institution;
(B) Continue to provide instruction in the program to allow the student to complete the program; ~~and~~or
(C) Refund the tuition, fees, and other required charges paid to the institution by, or on behalf of, the student for enrollment in the program.

668.410(b)(2) Periods of Ineligibility

This provision appears to contain a giant loophole that would swallow whole the mechanism for application of a GE rule. All the careful calculations would be in vain. When this section refers to a "failing or zone program," does it include programs only after the GE measures have been made final, or does it include programs considered

failing or zone programs when the draft GE measures have been provided to the institution, but before they become final?

Unless clarified, the three-year ineligibility provision of this section would likely be interpreted to apply only to the voluntary discontinuance of programs determined to be failing or zone programs when the final GE measures are released. If so, a school that received draft GE measures showing a program was a failing or a zone program could discontinue the program before the final GE measures were released and not be subject to the three-year ineligibility period. Presumably, the school could start the program anew shortly thereafter.

If the school used the same credential level and 6-digit CIP code to start a new program before the current program is finally determined to be failing or in the zone, would DE consider the new program a continuation of the old one and use the old program's cohort period to calculate the next year's GE measures? DE should make that clear.

Even if DE were to consider the new program a continuation of the old program so as to calculate further years of GE measures for the program, the school could easily avoid that result. The school would simply need to change the program length, for example from a less than one-year certificate to a one year certificate program making it a different GE program. See 668.402, definition of GE Program. If the school discontinued the program before it was finally determined to be failing or in the zone, it would be able to start a virtually identical "new" program at any time. A "new" program, would have no cohort period of students to use to calculate the GE measures (The cohort period includes students who completed three or four years previously, but for a new program, there would be none.). So the school could continue to offer the "new" program until enough years had passed so that DE would have a cohort period to use in GE measures calculations. Then the school could simply voluntarily discontinue the program before any final GE measures were provided, and then start another "new" GE program, this time returning to the slightly shorter, less than one-year certificate program, and on, ad infinitum.

It appears a school could repeatedly drop programs and restart virtually identical programs, but never face the possibility of a program becoming ineligible, if the school simply carefully timed the discontinuation and re-starting of a program.

Similarly, schools that monitor their programs could discontinue a program when they realize it would likely be a failing or zone program as soon as the school obtains its own statistics, even before it receives the Department's draft figures. Again in this fact scenario, schools would be able to restart a "new" slightly longer or shorter program. As in the example above, a school could keep the program running almost continuously, without having to meet either the criteria for a passing program or for restarting a poorly performing program.

DE should carefully consider the various ways in which this proposed rule can be gamed, some of which are discussed here. DE should revise the rule to defeat gaming. Changes should include:

1. If a school voluntarily discontinues a program at any time after DE provides a list of students (to be used to calculate GE measures) to the school, that program should be subject to the ineligibility restrictions if the final GE measures for that year determine the program is failing or in the zone.

2. The rule should provide that DE will determine GE measures for programs even if a school voluntarily discontinues them at any time. That way, even if the school were not subject to the ineligibility restrictions on voluntary discontinuance, it could become subject to the ineligibility restrictions on ineligible programs.

3. Schools should be prohibited for at least three years from offering any new GE programs of any length with the same four-digit CIP code as failing or zone programs that were either voluntarily discontinued or subject to eligibility loss.

4. DE should examine four-digit CIP codes to determine which ones may allow schools to start very similar programs, e.g. see the SOC codes for school teacher and mathematics teacher. DE should consider whether for certain CIP codes, the limitation on starting substantially similar programs should be based on 2-digit SOC codes rather than 4-digit codes.

668.411 Reporting Requirements for GE Programs

The proposed rule does not require schools to report the SOC codes for which they claim their programs prepare students, but does require schools to disclose them to students. DE staff would have that information more accessible, useful for monitoring whether programs have necessary accreditation or other requirements for state licensing, if the SOC codes had to be reported directly, as well as disclosed to students. Also, having to report them to DE might induce more accurate and realistic reporting of SOC codes associated with the program's CIP code. The preamble explains the proposed rule does not include a reporting requirement for SOC codes because the reporting requirements in this section are at a student level, not a program level:

> "[I]nstitutions would not be required to report the SOC codes for the occupations that a program prepares students to enter. [T]he institutional reporting under this section of the proposed regulations is at the student level and not on a program level."

79 Fed.Reg16473. Actually, this section requires reporting of some items at a program level and some at a student level. For example, this section requires reporting of the program's CIP code, credential level and length of the program. There seems no sound reason not to require reporting of the program's associated

SOC codes, but, on the contrary, sound reasons for requiring schools to report SOC codes.

668.412 Disclosure Requirements for GE Programs

Allowing DE to choose among various disclosure possibilities to include in the template is a good strategy. Consumer testing can be used to determine which data is most important to students and prospective students.

One piece of information about colleges which students clearly rank at or near the top is how well graduates do in finding employment, as two recent surveys demonstrate. Mishory, Jen and O'Sullivan, Rory, "The Student Perspective on Student Financial Aid Reform," November 2012 available at http://younginvincibles.org/wp-content/uploads/2012/11/Student-Perspective-on-Federal-Financial-Aid-Reform.pdf.; and Gallup, "Americans Say Graduates' Jobs Status Key to College Choice," June 28, 2013 available at

http://www.gallup.com/poll/163268/americans-say-graduates-jobs-status-key-college-choice.aspx.. Once again, however, the proposed rule does not require uniform disclosure of placement rates. The excuse is that

> "limitations in available data preclude the development of a national placement rate methodology that is consistent across all GE programs. The Department's NCES convened a technical review panel (TRP) in 2011 to develop a national placement rate methodology. The TRP determined that a single job placement rate methodology could not be developed without further study because of limitations in data systems and available data. The TRP suggested requiring greater transparency about how rates are currently calculated as an interim step for institutions disclosing these rates."

79 Fed.Reg. 16477. This is a weak excuse. For nearly 20 years California had a clear, specific definition of what counted as a job placement, required disclosures of placement rates, and had a required job placement threshold programs had to meet to continue operating. The California AG was able to use the clear placement disclosure and threshold requirements to prosecute violations.

There is a lack of a standard methodology because DE has not prescribed one. How can any rational person believe that programs required by law to prepare students for gainful employment should not have to at least report how successful students are in obtaining employment in the occupation for which they study?

The continued solution -- allowing such disclosure to depend on whether a school's accreditor or state agency requires such disclosure results in a holey patchwork quilt and fuels a march to the bottom. Regional accreditors do not require any standard related to job placements, or even any reporting of job placements -- even

for programs required to prepare students for gainful employment. Clearly, for-profit schools that must prepare students for gainful employment should have that as one of the school's missions. But regionally-accredited schools generally do not. And neither DE (perhaps feeling constrained by certain legislative language) nor their accreditors demand it. If preparing students for gainful employment is not included in the schools' own statements of their mission, their accreditors do not require them to meet any standards related to it. As more for-profit schools seek regional accreditation, more such schools become exempt from any reporting of their graduates' success, or lack thereof, in finding work in the occupation for which they studied. A federal regulation that makes reporting dependant on whether the accreditor requires reporting adds incentive for schools to make the switch to accreditation that does not require them to report their poor job placement data. Thus, they avoid transparency on one of, if not the most important issue for students choosing a college.

Informal surveys of national accreditors shows that, while they generally have a standard prescribing some level of job placement, the definition of job placement does not require any specific amount of time on a job to count as placement. Only one of the agencies surveyed had any time requirement, and its requirement was a mere 15 days on the job. Some accreditors have numerous exceptions as to which graduates must be counted, whether virtually any job will count, and if restricted to jobs in the field, what is considered a job in the field. See, e.g., Burd, Stephen, "New Disclosures Show What's Wrong with For-Profit College Job Placement Rates," From New America Foundation, February 20, 2014. The proposed rules' goal of transparency rings hollow when it does nothing to ensure transparency on the most important fact for students about a college program.

This was a topic of clearly under consideration during the negotiated rulemaking. DE can remedy this glaring omission in the proposed rule. Over various meetings various negotiators and commenters have proposed language to establish job placement reporting. Here is one detailed example of suggested language to replace 668.412(a)(8):

> (8) The placement rate for students completing the program, calculated, documented, and verified as follows:
> (i) Determine the number of students who, during the award year,
> (A) completed the program and
> (B) were eligible to receive the degree or certificate for successfully completing the program.
> (ii) Of the total obtained under paragraph (a)(8)(i) of this section, determine the number of those former students

(A) who obtained paid employment in one of the occupations identified by SOC code in (a)(1), and the number of those former students who did not obtain such employment, but did obtain paid employment with a starting salary equal to or exceeding the 25th decile of salaries reported by the Bureau of Labor Statistics for the highest paid SOC code for which the program prepares students

(B) who obtained that employment within 180 days after the date they completed the program and became eligible to receive their degree or certificate or,

(C) if a license or certification is required or generally requested for positions in the occupation, obtained that employment within 180 days after the results were available from an exam for that license or certification the student would have been able to take within six months of completion of the program, or if none is available within that time period, within six months of the date the results from the first available exam become public;

(D) who have been employed for at least 32 hours per week for at least 60 work days after completion of the program.

(iii) Determine the number of students under paragraph (a)(ii)

(A) by a state workforce data system, but if the system cannot determine whether the student was employed continuously during a 60 work-day period, then by using at least two dates for data inquiry – one within 170 to 180 days of completion or after the exam results become available, as applicable, and a second within 60 work days thereafter; or

(B) if reporting by a state workforce data system is not available to the institution, then as calculated by the institution.

(iv) If the institution chooses to demonstrate placement rates by the number of graduates placed in one of the SOC codes identified for the program, the institution shall document that the employment satisfies the requirements of paragraph (a)(8)(ii) by a statement from the employer certifying the name of the employer, the contact information for the employer, the identity of the student, the position for which the student was employed, the duties of the position, the first and last date of employment, the number of hours per week worked, and the starting salary for the position; and by the institution's statement of the SOC code the institution determines is applicable to the position. If the individual is self-employed or if the institution chooses to demonstrate placement rates by the salaries graduates earn, the institution shall document that the employment satisfies the requirements of paragraph (a)(8)(ii) by signed copies of State or Federal income tax forms or a W-4 or paystubs evidencing the income claimed to have been earned.

(v) Divide the number of students determined under paragraph (a)(8)(ii) and (iii) of this section by the total obtained under paragraph (a)(8)(i) of this section.

(vi) Substantiate the placement rates by

(A) A certification signed by the institution's chief executive officer attesting that the survey was conducted in accordance with the requirements of this subsection and that the placement rate was accurately determined from data obtained.

(B) An examination-level attestation engagement report prepared by an independent public accountant or independent governmental auditor, as appropriate, that the data was gathered in accordance with the requirements set forth in this subsection. The attestation must be conducted in accordance with the attestation standards contained in the Government Accountability Office's Government Auditing Standards promulgated by the Comptroller General of the United States (available at www.gao.gov/yellowbook/overview or its successor site), and with procedures for attestations contained in guides developed by and available from the Department of Education's Office of Inspector General; and

(C) Supporting documentation requested by the Secretary.

Note, to the extent if any, students would need to authorize contact with their employers, DE can provide standard language for schools to include in their enrollment agreements by which students authorize such contact by the school and DE for the limited purpose of preparing this analysis.

668.412(a)(14) and (15) Disclosure that Program Provides Prerequisites for Certification, Licensing and Employment

Disclosure of information about whether a program must meet certain educational criteria, such as programmatic accreditation to allow students to take certification or licensing exam or otherwise qualify for widely accepted minimum standards for work in that occupation should be treated similarly to the proposal we make for what is required for certification of a GE program, post, comment on section 668.414. The disclosure should be for the state and MSA where the program is offered, not just where a school is located, for the reasons explained there. The disclosure should identify the occupation and the name and link to the exam, accrediting organization or testing organization, as applicable.

One further note, to assist in drafting. As was explained by various negotiators at Neg.Reg, describing a particular programmatic accreditation or other educational prerequisite as "necessary" for a student to qualify for employment or to take a licensing or certification exam does not accurately address the problem. A school may argue that such prerequisites are not "necessary." Technically, there may be ways for a person to take the exam or obtain the employment without even having enrolled in the program or without the program being accredited or otherwise providing sufficient prerequisites. The point of the program, however, is that the education provided means the student does not have to meet alternative requirements.

For example, for some certifications, a person with a four-year degree may qualify to take the certification exam, even if the person did not take the specific programmatically accredited career certificate program. Sometimes certification standards allow for those who have been working for many years in the occupation, probably because they were hired before certification became the standard, to take the exam for certification or

licensing. Or perhaps a student may petition the examining body for an exception to the general route of having passed an accredited program.

The point is that a graduate of a program that purports to prepare students for a particular SOC-coded occupation should not have to seek alternative routes to licensing or certification. In many cases technically available alternatives are not certain (examining body may not accept the petition to accept the unaccredited program as sufficient); they require additional education the student cannot afford; or they require work experience the graduate cannot get without having the educational prerequisite -- graduation from a programmatically accredited program.

In drafting regulations on this topic, DE should be careful to avoid creating loopholes that undo the rule. DE should not describe the criteria as "required" or "necessary" without adding sufficient explanation, such as, "necessary to qualify to take the exam without needing further education, work experience or individualized determinations on the sufficiency of the education."

668.412(c)(1) Web Link to Disclosures

Allowing a link to the "program," to be defined by credential level and location, would require students to burrow far into the website to find out the data on their program. DE should consumer test whether this can be done effectively, or whether the school should also have to disclose a composite score for all locations in the state where it is offered.

668.412(c)(2) Disclosures by Program Location or Format

It appears DE intended by this rule allowing different disclosures by location or format to get better, more accurate disclosures. There are inherent problems with this subsection, however.

First, for several of the disclosures, DE is providing the data, for each program. Presumably, DE does not have the information necessary to provide the data for different formats or locations for the same program, because those differences would not change the CIP code, school code, or credential level. So this rule seems to suggest the schools would break out the data themselves. This deviates from DE's goal of providing as much of the data itself as possible to avoid inaccuracies and distortions. It should not be allowed unless DE can provide the data for these disclosures.

Second, as can be seen by looking at for-profit schools' websites, the more the information is broken down, for example, by location, the harder it can be to find the data. DE should test whether data broken out so finely would really provide better, clearer, more accessible information. It could do this by offering schools the opportunity to be part of a small subset participating in a test of this idea. Only if the test shows disclosure is improved, and new regulations are promulgated to address that type of data disclosure should this option be allowed.

668.412(d)(1) Promotional Materials for Prospective Students

This subsection, and all other provisions that use the term, “prospective student,” should use the revised definition for prospective student as discussed in connection with section 668.402, the definition of “prospective student.”

668.412(d(1)(ii) Prescribe Prominence of Linked Information

We can expect that predatory schools will hide this information in tiny, even illegible type, unless the proposed rule requires that the information and link be provided prominently, as well as clearly and conspicuously. As discussed during Neg.Reg, DE could benefit by providing schools examples of what is acceptably prominent or clear and conspicuous, as the FTC and FCC have done in areas they enforce.

668.412(e) Distribution to Prospective Students

This subsection, and all other provisions that use the term, “prospective student,” should use the revised definition for prospective student as discussed in connection with section 668.402, the definition of “prospective student.”

668.412(e)(2) Signed Disclosures Before Enrollment

By this subsection, DE seems to intend that prospective students would receive and be able to review the disclosure template before enrolling. Unlike the warning disclosures, however, the proposed rule does not require any interval between the student receiving the disclosure template and enrolling. Apparently, the school could include the disclosure template in a stack of documents the student is to sign, such as policy on campus violence, internship program, library policies, etc., with the enrollment at the bottom of the stack, and still comply with the rule. The proposed rule needs to specify an interval after the student receives the disclosure, before the student can be enrolled or committed to any financial obligation.

As discussed in connection with the warning about GE programs that do not pass, DE plans consumer testing to make the disclosure as meaningful as possible. Proposed rule 668.412(a). It is unclear, but should be made clear, that such testing will include how the disclosure should be delivered. The bare bones description of the method of delivery suggests lessons from the investigations of the GAO or Attorneys General about how predatory schools conceal or denigrate other important information so students do not receive meaningful disclosures have not been applied here.

For example, saying the disclosure must be provided as a separate document means that the disclosure can be stuck in the midst of a sheaf of other documents about the school, its programs, loan programs, grant programs, scholarship programs, internships or what-have-you, so that the student will never notice the document, even if the student is required to sign it. Getting consumers to sign documents that say the consumer has read and understood the document, without the consumer ever reading or

understanding the document, is the meat and potatoes of most deceptive schemes by predatory companies.

All the signature requirement does is give a predatory company another defense to the misrepresentations it makes orally. Testimony from former employees sometimes recounts how predatory schools clean up the student files before a visit from an accreditor or the DE Inspector General, by getting students to sign required statements well after the fact, having others forge the student's signature, or padding the file with copies of other documents students were supposed to have received. The student signature requirement should be removed. Ask any experienced fraud prosecutor. It does not provide any benefits to students or taxpayers, but does provide predatory companies an argument for their defense to allegations of misrepresentation or other fraud.

In this era, DE should also consider other means of getting the information across. With modern technology, the most effective type of disclosure, oral disclosure, is both feasible and inexpensive. For example, DE could provide a video to each school, which describes the disclosure template and advises students to study it and compare with other schools before they enroll. DE could require the school to show a similar one targeted to current students. DE could require these short videos to be sent by email or social media or prominently posted on the website wherever the school mentions the program or occupations for which the program trains students. DE could post such videos on U-tube or similar sites and work with web-traffic-generator companies and search engines to get DE information up front in typical searches in which prospective students are seeking information about schools or programs.

668.413 Calculating, Issuing, and Challenging Completion Rates, Withdrawal Rates, Repayment Rates, Median Loan Debt, and Median Earnings

668.413 (b)(1) and (2) Clarification of Cohort Information Disclosed

The former glitch in this disclosure has been corrected by this proposed rule. A question does arise, however. The section speaks of the school providing data for the enrollment cohort for the "relevant award year." For purposes of disclosure of completion and withdrawal rates, what is the relevant award year? Presumably, this would have to vary for less-than-one-year, one-year, two-year, and four-year programs. Will the disclosure format make clear for which year the data is provided -- for example, by saying "it is for the most recent year for which data is available," or by specifying the cohort enrollment year?

668.413 (b)(3(vi)(B) and (C) Exclusions

See above comments in connection with 668.404(e)(2) and (3).

668.413(e)(1)(iii) Secretary "May" Publish Disclosure Information

See above comments in connection with 668.405(g)(3).

34 CFR 668.414 Certification Requirements for GE Programs

The Proposed Rule Is Nothing But a Fig Leaf and a Disgrace

The most fundamental requirement for a program to prepare students for gainful employment in a recognized occupation is that completion of the program qualifies a graduate to take any exam generally required for licensing or employment in that occupation. This proposed rule on this fundamental issue contains major loopholes. The rule and its justification are in need of major substantive changes, which can be easily drafted, if this rule is truly to prevent fraud and harm to both students and taxpayers.

1. Ineffective Certification Does Little to Further Either Accountability or Transparency

In the negotiating sessions, numerous negotiators recommended that schools have to submit an application demonstrating that the program provided any necessary educational requirements for taking licensing or certification examinations that are either legally or generally required for obtaining employment in the occupation for which the student prepared. DE resisted this requirement, noting the burden it would place on DE to review and approve or deny the application. DE's last iteration of such a rule at the negotiation sessions was the object of ridicule for allowing a program to become eligible, even if the school's application stated that the program did not have the programmatic approval or other educational requirements to qualify a student to take a needed licensing or certification exam. To great laughter, some described the proposal as even worse than the formalities in which businesses in some communist countries engaged. There the businesses claimed they had met required goals, when they had not. Here, the schools could truthfully admit they did not meet the required standards, but still be approved.

Unfortunately, DE's proposal here appears to work like that, but be stated so as to avoid ridicule. Under the proposed rule, schools do not have to identify which programs lead to occupations in which certification or licensing is needed, which programmatic approvals the school has from which organization for which programs, or what the other prerequisites are, if any there are, for certification or licensing of graduates. Nor does DE describe what procedures it will use in reviewing program participation agreements for accuracy. Will it determine which programs the school offers, which require which certification or licensing, and which organization, if any, has accredited those programs?

From all appearances, this proposed rule relies nearly entirely on the *in terrorem* effect of a chief executive officer signing a certification. Given that the school need not

identify any information about the claimed compliance with licensing or certification prerequisites, it would appear all too easy for that officer to claim error or confusion and avoid prosecution for a false certification, if anyone ever checked. But any practical enforcement, it appears, would only occur years later, if a student happens to figure out to complain to an agency that acts to investigate and prosecute the violation. With no obvious oversight provided upfront, and no data being provided to DE to make it easy to check, students bear the burden for years of programs that do not meet even the basic requirement for a program to prepare students for gainful employment in a recognized occupation – that completing the program fulfills the educational requirements for licensure.

Then there is the transparency aspect. How available are the Program Participation Agreements, anyway? Can advocates for students, much less a prospective student easily reach them on the DE website? The school's website? And what good would that do? DE does not propose that the PPA even disclose any information about the prerequisites, licensing or certification. Perhaps the thinking was that the proposed disclosures would provide the transparency the certification does not. As discussed in that section, however, the disclosures also fail to provide the needed certainty that a program at least meets minimum educational prerequisites for licensing, certification or employment.

If this accountability measure is to be limited to the PPA, rather than require an application, it needs at least to require disclosure in the PPA of the pertinent information about programs if licensing or certification come into play, have a mechanism to check them for accuracy within a reasonable time period, and disclose in the final rule what procedures DE will use to do so.

2. The Certification Rule Is Arbitrarily Limited to a Minority of Those Programs that Purport to Prepare Students for Occupations in Which Certification or Licensing Is Needed

In the discussion of "Significant Proposed Regulations" the preamble states,

> "To establish a program's eligibility, an institution would be required to certify that each of its GE programs meets all applicable accreditation and licensing requirements necessary for a student to obtain employment in the occupation for which the program provided training."

79 Fed. Reg. 16437. Perhaps DE intended for the rule to cover all GE programs the school offers, wherever it offers them.

The rule, itself, however, is limited to those states where a school is located, or areas within the metropolitan area of the school's location, if that area crosses a state line. Although neither the preamble nor the rule define or reference a definition of what "in the state in which the institution is located" means, negotiators

expressed concern when DE offered a similar term during negotiations. There, DE seemed to intend to apply the rule only to the state requirements where the school was physically located. But we are not all back in the 1980's, before the blossoming of distance education. As negotiators pointed out during negotiations, because many schools offer growing numbers of programs on-line across the country, such a rule would arbitrarily be limited and helpful to only a small number of students and programs. This is particularly of concern because the other accountability measures don't eliminate ineligible programs for years after a student has attended.

The analysis of the rule in the NPRM does not consider how many students and programs would be left unprotected by applying the rule only to the institution's location. Nor was there any rationale offered for so limiting this rule.

Perhaps, as in many aspects of the proposed rules, DE was looking at the proposed rule from the viewpoint of a for-profit school and considering what burden the school might have in learning or reporting this information. We don't know, because the NPRM is silent on the rationale. In any event, such a rationale would not hold water.

A school would run afoul of prohibitions on misrepresentation under state and federal law if it offers a program to prepare students as medical assistants, for example, even though graduates do not receive the educational prerequisites that would entitle them to take the certification test for medical assistants, if that is generally needed for employment. Consequently, legitimate schools already offering GE programs know what the educational prerequisites are for certification or licensing exams where they offer their programs. For them it would be no burden at all to obtain the information, as they already have it. And for new programs, what legitimate school would offer a new program that did not meet the educational prerequisites for licensing and certification routinely needed for the student to obtain employment?

We know that some unscrupulous schools do not qualify to receive programmatic accreditation that is widely accepted as needed for employment in the occupation, or they start new programs quickly before they qualify to receive such accreditation. But DE need not be overly solicitous of such schools. After all, those are exactly the types of programs that should not be eligible for taxpayer-funded student grants and loans.

On the other hand, failing to broaden the regulation to apply to where the programs are offered would burden students with having to obtain the information. How many

more hours would be spent by each of tens of thousands of students having to research the needed certification or licensing exam criteria for themselves, than would be spent by a school to do it, once, for the programs it offers those current and future students. We know how much of a burden it is because we have concrete examples (see, e.g., testimony before Senate Committee) that students, especially first-in-the-family college students, like those for-profit schools claim to attract, do not find out until it is too late. And, because a very active, well-funded, industry-wide organization represents for-profit schools, one might suppose that such an organization would already provide, or at least would soon begin to provide that kind of service so all of its member schools could access the information easily. We believe that public and non-profit schools would not find this modest requirement a burden, either. One additional change, for clarity in section 668.414(d)(3) is needed. As written, arguably, as long as the program provides the prerequisites necessary for one occupation for which the program prepares students, the program satisfies the rule. Clearly, that is not what is intended. It can easily be corrected. Additionally, clarity as to which occupations this rule concerns is needed and supplied here:

Section 668.414(d)(3) can easily be corrected as follows:

> (3) For the State in which the ~~institution is located~~ program is offered and in all other States within the ~~institution's~~ MSA where the program is offered, each eligible program ~~it~~ the institution offers satisfies the licensure or certification requirements of those States so that a student who completes the program and seeks employment in those States qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in any occupation that the institution represents the program prepares students to enter.

It may also be useful to make clear that the occupations "the institution represents" are those occupations it is required to disclose under the disclosure rule.

3. The Certification Rule Fails to Require Programs to "Meet Widely Accepted Minimum Standards" for Particular Occupations

The preamble notes that under the proposed certification requirements, "institutions would be required to assess whether their programs meet widely accepted minimum standards . . . ." 79 Fed. Reg. 16486. The proposed rule, however, does not address programs that fail to meet widely accepted minimum standards for particular occupations. Repeatedly, negotiators explained that addressing requirements for taking state licensing exams only deals with the smaller part of the issue. Many occupations,

especially in the health field, are generally unavailable to students who have not completed programs that meet certain criteria, such as programmatic accreditation. Students who attend programs that don't meet widely accepted minimum standards are caught in a catch-22.

They may find that there is an alternative route to qualify to take the exam. However, that route requires a certain number of years of experience in the very occupation for which they cannot find work, without the certification to take the exam. The educational requirements -- for example, program accreditation by a particular professional organization-- are widely accepted minimum standards, yet many of these occupations do not require passing an official state license exam. These widely accepted standards need to be addressed in the same way as suggested above for section 668.414(d)(3).

For example, to be a medical assistant in California, no license or certification is required, but to be able to carry out normal functions of a medical assistant, such as drawing blood or giving injections, the individual must have a certain number of hours of training. http://www.mbc.ca.gov/Licensees/Physicians_and_Surgeons/Medical_Assistants/Medical_Assistants_FAQ.aspx#1, May 24, 2014. Because no license or certification is required by California, proposed section 668.414(d)(3) appears not to apply. But, realistically, to get a medical assistant job in California a student would have to have received certain training. Additionally, according to the Bureau of Labor Statistics Occupational Handbook, employers prefer medical assistants who are certified. http://www.bls.gov/ooh/healthcare/medical-assistants.htm#tab-4, May 24, 2014.

Another example points out a similar limitation of the proposed regulation. To be a sonographer (a person who takes sonograms) in California, the California Community Colleges website (http://ca-hwi.org/ccchealth/program_detail.cfm?pk=176) notes that a state license is not required, but registration with the American Registry of Diagnostic Medical Sonographers (ARDMS) is desirable. The federal Bureau of Labor Statistics Occupational Outlook Handbook also notes that in addition to being trained in the field, "[m]any employers also require professional certification" (www.bls.gov/ooh/healthcare/diagnostic-medical-sonographers.htm). To become registered with ARDMS, a person must take an ARDMS exam. Unless the person has a higher degree or experience in the occupation (which they cannot get without the exam), the person may not take the exam unless the person graduated from a program accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP). Www.ardms.org/files/downloads/Prerequisite_Chart.pdf, see prerequisite 2. See also, Wikipedia: "In the United States the most widely accepted sonographic education is provided by CAAHEP/JRC-DMS accredited programs." See also,

testimony of Ysamine Issa before the Senate Committee on Health, Education, Labor, and Pensions (unable to obtain work because she could not take the necessary exam for certification because her sonography program did not have the necessary accreditation.)

For the reasons explained above, a new subsection 668.414(d)(4) should be added as follows:

> (3) For the State in which the program is offered and in all other States within the MSA where the program is offered, each eligible program the institution offers satisfies widely accepted minimum standards for certification or similar credential so that a student who completes the program and seeks employment in those States qualifies to take any exam for certification or other credential that is generally needed for the student to practice or find employment in any occupation that the institution represents the program prepares students to enter.

Other Areas Where DE Invited Comment

In numerous locations the preamble specifically invites comment. The above comments have spoken to many of those requests. We briefly address some here that may not have been included in the above comments:

P. 16448: Should fewer metrics be used to measure GE? For the reasons explained above, at least the measures proposed are necessary. A sound repayment measure should also be added or used to replace pCDR, if sufficient analysis shows its usefulness.

P. 16454: At a bare minimum, books, supplies, equipment, as well as fees and tuition – in short all required costs should be included in the debt amount. But really, students' entire loan debt should be included in the D/E measures. Schools control the amount included in cost of attendance, so schools control the total amount that can be borrowed. Because many students in GE programs already have families and are out on their own, if they are to stop work, or work only part time so they can attend school, they need money for their cost of living. The debt they can afford to repay is still only about 20 percent of their discretionary income. Excluding part of their debt from the calculation means that the D/E measure (in yet another way from those discussed above) does not fully reflect the student's debt burden.

P. 16463. We do not believe any less intensive survey method would be appropriate for appeals of D/E measures. Successful surveys should not change a program to a passing program, but only mean it is not ineligible.

P. 16463. We support the inclusion of an exception from GE measures for programs in which fewer than 50% of students borrow. These are typically lower-cost programs that do not overburden students with debt. They should be held out as exceptional programs.

P. 16464. To determine whether the school's claimed borrowing rate is under 50%, DE should require the same sort of certification it requires of schools as to the accuracy of the list of completers, etc. schools are required to report to DE.

P. 16477. If a school must determine more than one placement rate, e.g., for both its accreditor and a state, as discussed above, this could be alleviated by DE establishing a single definition of what constitutes a placement and using that for disclosure purposes. But if the rule continues to allow the patchwork of disclosure, and If a school is subject to more than one rate, it should only disclose the lowest rate. Having additional rates can be confusing.
P. 483. DE's approach, to provide as much of the data itself, rather than have the school provide it is a better approach and should be continued.

Commenting Parties

A brief description of the parties to this Comment follows:

Consumers Union

Consumers Union is an expert, independent nonprofit organization founded in 1936. Its mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It accepts no advertising and pays for all the products it tests. It is not beholden to any commercial interest. Its income is derived from the sale of Consumer Reports®, ConsumerReports.org®, and its other publications and information products, services, fees, and noncommercial contributions and grants. Its Ratings and reports are intended solely for the use of its readers. Neither the Ratings nor the reports may be used in advertising or for any other commercial purpose without its permission. Its publications and services have 8.3 million paid subscribers. For many years, its public policy offices in California and Washington D.C. have advocated for consumer protections for students at proprietary schools as well as for financial services protections, including on student loans. In addition, Consumer Reports has reported on student loan and proprietary school issues, for example in "Schools for Scandal" (May 1992), an article setting out the need for policy solutions

from the Department of Education and Congress to prevent abuses by schools that promise more than they deliver.

Consumer Federation of California

The Consumer Federation of California is a non-profit consumer advocacy and education organization established in 1960. It advocates for stronger consumer protection laws and regulations at the federal, state and local level. Its work in California has included supporting protections against fraud for consumers, including students enrolled at private postsecondary proprietary educational institutions. For the past several years it has been engaged in legislative work around the reauthorization of California's Bureau for Private Postsecondary Education, where it has worked with other consumer and student advocacy organizations to advance legislation that protects students' rights.

Margaret Reiter

Margaret Reiter has a California adult teaching credential in several subject matter areas and taught adult students and designed curricula for adult education for more than six years. She was a consumer investigator with the Los Angeles County Consumer Affairs Department for four years and after becoming a member of the State Bar of California, worked for 20 years as a consumer prosecutor with the California Attorney General's Consumer Law Section. She investigated or prosecuted businesses engaged in many types of misrepresentations, consumer fraud, or other unlawful business practices. A number of those prosecutions resulted in permanent injunctions and multi-million dollar settlements or judgments against postsecondary for-profit schools. While with the Attorney General's office, and currently, she also has submitted comments on, drafted, and/or testified on various iterations of proposed federal and state consumer regulations and legislation, including regulations and laws concerning proprietary colleges. In 2009, 2010, and 2013, she served as the primary negotiator for consumers in the U.S. Department of Education's negotiated rulemaking on program integrity, including Gainful Employment, for the federal student assistance programs. She has authored consumer books for lay people, including "Solve Your Money Troubles," which includes information and advice on handling student loan debt. She is currently the Vice-Chair of the Advisory Committee of California's Bureau for Private Postsecondary Education.

Conclusion

Despite the enormous and difficult task DE undertook in proposing these rules, we are disappointed. They are rife with loopholes we can spot even now. At least those need to be plugged because the bad guys, the predatory schools will find them and probably others we have yet to discover. The rules need to be strengthened and loopholes plugged. We encourage DE and this administration to focus on the primary goals identified, ensuring students are not overburdened with

debt and taxpayers are not supporting programs that do not prepare students for gainful employment. We recognize that DE has faced one after another legal challenge from for-profit schools, the very schools where predatory schools are found. But regardless of what rules are promulgated, these schools will likely challenge them. The best protection for the rules is to make the changes needed to finally provide an accountability and transparency framework worthy of Congress' original intent, a framework that can finally halt the decades of fraud, abuse and widespread failed gainful employment programs.