the institute for
college access & success
405 14th Street
Suite 1100
Oakland, CA 94612
510.318.7900
www.ticas.org

TO: Interested Parties
FROM: The Institute for College Access & Success
DATE: August 19, 2013
RE: Background for the September 9-11 negotiated rulemaking meeting

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This memo lays out issues that could be addressed by the negotiated rulemaking panel on gainful employment. If the Education Department follows its past practice, a week or two before the panel's September 9 meeting, it will send written materials to negotiators that will lay out the issues the Department would like to address, typically paired with proposed regulatory changes. This memo reviews the issues that The Institute for College Access & Success (TICAS) has urged the Department to address in our public comments.[1] *If the Department's written materials do not address all of these issues, negotiators will have an opportunity at the September 9 meeting to suggest that the panel address these and/or other issues related to gainful employment.*

Any questions about this memo may be directed to Pauline Abernathy or Debbie Cochrane of TICAS at (510) 318-7900.

Brief Background on Gainful Employment Regulations. In order to participate in federal student aid programs, the Higher Education Act (HEA) requires career education programs to "prepare students for gainful employment in a recognized occupation." The HEA defines the programs subject to this requirement as non-degree programs at all colleges and most degree programs at for-profit colleges. The gainful employment regulation finalized in June 2011 was designed to make this requirement meaningful and enforceable by defining a program as preparing students for gainful employment if they pass at least one of three tests in at least two years of any four-year period. Programs that could not do so (i.e., failed all three tests in three out of four years), would lose eligibility for federal financial aid. The three tests were that: (1) program graduates had debt-to-income ratios less than or equal to 12 percent; (2) program graduates had debt-to-discretionary income ratios less than or equal to 30 percent; and (3) at least 35 percent of former students' loan debt was being paid down. Since July 2011, programs subject to the gainful employment requirement have also been required to disclose certain program costs, typical debt levels, and completion and job placement rates.

The June 2011 rule was much weaker than the draft rule and was criticized for being too weak and leaving students at too great a risk of ending up overcharged and under-served. Still, the association of for-profit colleges (APSCU) sued the Department, challenging the Department's legal authority to define gainful employment. While the court strongly upheld the Department's legal authority and need for the regulation, it vacated much of the regulation based on two aspects of the regulation discussed below. As a result of the court ruling, the consumer disclosures are the only portion of the gainful employment regulations currently in effect.

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[1] See TICAS' June 4, 2013 comments at http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf. These submitted comments also review the reasons why the recommended changes are urgently needed.

Overview of Issues: The new gainful employment regulations should addresses the court's concerns *and* improve the regulations. Specifically, TICAS recommends that gainful employment regulations be developed to:

1. end funding for the worst career education programs by retaining a three-test rule, including outcomes for both program completers and noncompleters;
2. address the court's two concerns;
3. require poorly performing programs to *improve* to keep receiving federal funds;
4. make the consumer disclosures, including job placement and completion rates, easier to find, understand, and compare;
5. end funding for programs whose graduates are ineligible for employment in the relevant occupation;
6. prevent schools from evading accountability under the rule;
7. do not delay protection for students and taxpayers;
8. provide relief to students who were enrolled in programs that lose eligibility for federal funds; and
9. reconsider changes that weakened the gainful employment definition in light of experience and new data since the final regulation was issued in June 2011.

Each of these issues is discussed below.

1. **End funding for the worst career education programs by retaining a three-test rule, including outcomes for both program completers and noncompleters.** While the final gainful employment regulation did not set high enough standards for career education programs receiving federal student aid, its overall approach remains sound: provide consumers with important information about career education programs at all types of colleges, and stop taxpayer funding to programs that *routinely* leave students with debts they cannot repay. Repayment rate and debt-to-income metrics provide a reasonable gauge of how a program's former students – both completers and non-completers – fare after they leave the program. The repayment rate metric includes students who do not complete the program and measures the extent to which they are repaying their federal loans, while the debt-to-income metrics include only students who complete and measure the extent to which they consistently have excessive federal and private loan burdens.

    a. **Debt-to-income and debt-to-discretionary income tests.** As documented in Sandy Baum and Saul Schwartz's 2006 paper commissioned by TICAS and the College Board, debt-to-income ratios arose from mortgage underwriting standards.[2] However, the Department acknowledges that the thresholds used in the June 2011 gainful employment rule are substantially higher than those recommended by existing research. For instance, whereas the gainful employment rule expected programs to have a debt-to-discretionary income ratio less than 30 percent, Sandy Baum reiterated in a September 8, 2010 post for the *Chronicle of Higher Education* that the Baum-Schwartz paper referenced above supports using a debt-to-discretionary-income

[2] The College Board and the Project on Student Debt. 2006. *How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt.* http://www.ticas.org/files/pub/Manageable_Debt_FINAL_4.20.06.pdf.

threshold of *20 percent or less*. She and Michael McPherson write that the paper "concluded that manageable payment-to-income ratios increase with incomes, but that no former student should have to pay more than 20% of their discretionary income for all student loans from all sources."[3] The final regulation's use of a 30% limit for student loan debt relative to discretionary income goes well beyond this research, particularly as the regulation does not include an adjustment for family size. *Accordingly, we recommend the regulation use a single 20 percent threshold for the debt-to-discretionary-income ratio, particularly if it continues to assume a family size of one for all borrowers.*

Similarly, the mortgage industry debt-to-income ratio is eight percent, whereas the gainful employment rule expected programs to have ratios below 12 percent. Baum's attempt to document the historical basis for the eight-percent rule of thumb found that it was initially intended to include *all* forms of non-mortgage debt, such as credit card payments and car loans. Even if eight percent were an appropriate student debt threshold for traditionally aged college students who may have little debt outside of student loans, it is decidedly less so for career education programs, whose students are more likely to be working adults with families and significant financial obligations. *To the extent that eight percent is an inappropriately high threshold, twelve percent is even more so.*

b. **Repayment rate test.** The repayment rate also has a solid basis in the lending industry. It is widely accepted in consumer finance that negative amortization loans, where loan principal does not decrease, are risky. In fact, the Office of the Comptroller of the Currency (OCC) in 2009 recommended a prohibition on negative amortization mortgages where borrowers "dig deeper into debt with each monthly payment," and these types of mortgages have been banned in California since 2010.[4] Recently, the OCC reiterated that such loans "do not reduce the borrower's outstanding liability or the bank's credit exposure…" and "…benefit neither of the parties involved in the loan."[5] The program repayment rate measures the share of loans to the program's former students in negative amortization, thereby measuring the riskiness of continued investment in the program to students and taxpayers.[6]

For several reasons, it is critical that the regulations contain *both* a repayment rate and debt-to-income measure. Some have suggested that the Department may propose

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[3] Baum, Sandy and Michael McPherson. September 8, 2010. "Gainful Employment." *Chronicle of Higher Education*. http://chronicle.com/blogPost/Gainful-Employment/26770/.

[4] U.S. Department of the Treasury, Office of the Comptroller of the Currency. November 18, 2009. Press Release. "Comptroller Dugan Urges Regulators Around the World To Set Minimum Mortgage Underwriting Standards." http://www.occ.gov/news-issuances/news-releases/2009/nr-occ-2009-143.html. California Assembly Bill No. 260 (2009): ftp://leginfo.public.ca.gov/pub/09-10/bill/asm/ab_0251-0300/ab_260_bill_20091011_chaptered.pdf.

[5] May 14, 2013 letter from OCC to the Consumer Bankers Association (CBA), in response to comments on CBA comments on private loan modifications. See Appendix C.

[6] Depending on a borrower's income, family size, and amount owed, the loan principal of borrowers in Income-Based Repayment (IBR) may decrease or increase. However, IBR differs fundamentally from negative-amortization mortgages in that any debt remaining after 20 or 25 years of IBR payments is forgiven. IBR is a benefit for borrowers of federal student loans, which are a form of student financial aid.

eliminating the repayment rate measure in response to the court's finding that the Department had not provided adequate justification for the 35 percent repayment rate threshold in the final gainful employment regulation. *However, the use of a repayment rate measure was not at issue, just the rationale for the 35 percent threshold.*

As a coalition of organizations representing students, consumers and college access organizations wrote in May 2010, the gainful employment metrics need to avoid creating loopholes for programs with both high student borrowing and low completion rates.[7] A low completion rate is one of the ways programs can fail to prepare students for gainful employment. Students who borrow but do not complete are often left carrying substantial debt without the increased earning power that should come from a completed degree or certificate. Therefore it is important that the definition of gainful employment not create a loophole for schools to ignore the debt burdens of students who do not complete or create incentives for schools to discourage completion by students with high debts.

The Senate HELP Committee investigation revealed the extent to which some companies are willing to ignore the debt burdens of students who do not complete because such students were not included in the final gainful employment rules' debt-to-income measures. The Senate report cites a confidential presentation to ITT's board of directors prepared in response to the draft gainful employment regulation that notes that "the <u>overwhelming majority of our programs do NOT comply</u> with the proposed 'GE bright line'" but that ITT "*could comply with the proposed rule by reducing tuition levels by an average of 11 percent*." [emphases in the original][8] The Senate report concludes:

> Essentially reducing tuition and thus debt for students who dropped out was deemed inefficient because they were, at that point, not captured in the regulation. The board presentation went on to state that the "most economically efficient" solution would be to provide selective financial awards to students likely to graduate. By focusing on graduating students, these awards "effects only revenue from program completers," but would still "result in a reduction of the median loan debt balance of graduates in each program of study." [9]

Consistent with this presentation, ITT subsequently created "Opportunity Scholarships" that are given *retroactively* to students after they complete a given quarter. ITT reserves the right to "at any time in its sole discretion, terminate the [Opportunity Scholarships], which termination will be effective as of the start of the next quarter.[10] In this way, ITT reduces the debt loads of graduates, without "inefficiently" reducing debt for students who are not expected to graduate. This underscores the need for at least one of the

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[7] Coalition letter to Secretary Duncan urging stronger rules for career education programs. May 20, 2010. http://projectonstudentdebt.org/files/pub/Neg_reg_coalition_support_letter_to_Duncan.pdf.

[8] ITT Educational Services. April 19, 2009. *Board of Directors Meeting.* Cited in Senate HELP Committee 2012. Pp. 524-525 of ITT Educational Services profile, http://www.help.senate.gov/imo/media/for_profit_report/PartII/ITT.pdf.

[9] Ibid.

[10] ITT "Opportunity Scholarship" fact sheet, posted on company web site in April 2013. Attached as Appendix D of TICAS' June 4 comments at http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf.

gainful employment metrics to include non-completers, and the need for the regulations to prevent and anticipate gaming by companies that leave students with debts they cannot repay.

Second, the repayment rate measure is highly complementary to the Department's longstanding measurement of cohort default rates (CDRs). Whereas CDRs measure the share of borrowers who, within a few years of entering repayment, make no payments for a year, the repayment rates measure the share of borrowers' debt that is being paid down. Taken by themselves, colleges can – and some do – manipulate their CDRs by putting former students into forbearance during the window when default rates are being measured. The repayment rate provides a disincentive for colleges to put former students in forbearance unnecessarily because, while doing so will lower CDRs, it will also lower program repayment rates.[11]

If the Department proposes eliminating the repayment rate measure, the Department would need to identify how it would avoid creating loopholes for programs with both high student borrowing and low completion rates regulations, and the steps it will take to curb the abuse of forbearance to manipulate CDRs.

2. **Address the court's two concerns.** The court's two concerns can easily be remedied in a way that reduces the burden on schools offering quality, affordable programs:

    a. **Justifying a repayment rate threshold.** The court concluded that the Department did not provide sufficient rationale for setting the minimum program repayment rate threshold at 35 percent. Indeed, it is difficult to justify continued funding of programs where 65 percent of the debts of former students are not being paid down, year after year. There are numerous studies, regulations, and laws on which a more appropriate, higher repayment rate could be based. For instance, as discussed earlier, negative amortization loans, where loan principal does not decrease, are widely considered risky. The repayment rate in the final gainful employment regulation measures the extent to which a program's former students are not reducing their loan principal, and the resulting risk to students and taxpayers of continuing to subsidize the program. This provides a reasoned basis for limiting funding to programs where loans are generally in negative amortization: those with repayment rates below 50 percent and whose graduates have high debt ratios.

        Other justifications for higher repayment rate thresholds can be found in the full TICAS comments to the Department.

    b. **Use of the National Student Loan Data System (NSLDS) to collect data on students not receiving federal aid.** The court concluded that adding students who do not receive federal student aid to NSLDS violated the statutory ban on creation of a student unit record system. This concern can be remedied simply by deeming a program to have passed both debt-to-income metrics if a majority of the program's

[11] For more information on the abuse of forbearance, see pages 14-16 of TICAS' June 4 comments to the Department at http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf.

graduates do not take out loans. This would focus scrutiny on programs where debt loads may be problematic—since debt-free graduates cannot have problematic debt loads—and would have the added benefit of reducing the administrative burden on schools, including many community colleges, offering programs where a majority of the students do not borrow. For programs where most graduates do have debt, the measures would still exclude the minority of graduates who did not borrow. This would mean that some graduates (those who do not borrow) would be excluded in the program assessments, but that program assessments would always be based on the majority of graduates.

In addition to addressing the court's concerns, the regulation should be modified to better ensure that it functions as intended. Since the rule was finalized in 2011, new information has become available, including program-level informational gainful employment data, experience with the required gainful employment program disclosures, and a better understanding of how some colleges may try to manipulate the debt measures. Such information demands that appropriate modifications to the regulation be considered.

3. **Require poorly performing programs to improve to keep receiving federal funds.** Under the final regulation, programs' federal funding was not affected until they failed *all three metrics* in *three out of four years*. Until they reached that point, programs that were clearly poor performers could continue enrolling as many students as they could, without any requirement to improve. For instance, the medical assistant certificate from Sanford-Brown College in Missouri would not face any consequences, despite having a repayment rate of 18 percent and a debt-to-discretionary income ratio over 100 percent. Le Cordon Bleu's culinary arts associate degree in Portland and Westwood College's animation bachelor's degree in Illinois both have debt-to-income ratios above 20 percent and debt-to-discretionary income ratios above 100 percent, but – with repayment rates both just above 35 percent – neither would be at risk under the final gainful employment rule.

   Poorly performing programs such as these must be required to improve in order to keep receiving federal funding. To ensure that they do, programs that *fail two out of three measures* should face increasing consequences if they do not improve.

   For example, programs failing two out of three measures for two consecutive years could be required to disclose certain information to all prospective and current students, or face restrictions on the number of students they can enroll or federal aid they could receive. After a third year, disclosures or limitations could apply to the entire school, rather than just to specific programs, or enrollment or aid limits could be reduced. After a fourth year of failing two out of three measures, enrollment or aid to that program could be further reduced, or the program's eligibility could be eliminated entirely. Taxpayers should not be expected to indefinitely fund programs that fail two out of three measures year after year.

4. **Improve program disclosures.** While the court ruling invalidated much of the original gainful employment rule, the requirement for gainful employment programs to disclose information about cost, debt levels, and completion and job placement rates *still remains in effect and must be improved*.

a. **Specify the form and location of gainful employment program disclosures so students can find and understand them.** The format and location of the gainful employment consumer disclosures must be specified. The current disclosures on college web sites are frequently extremely difficult to find and understand.[12] The Department should specify the location and format to make them easier to find, use and compare.

b. **Improve the job placement rate disclosures.** As discussed in the comments of multiple state attorneys general,[13] the job placement rates currently disclosed by career education programs are highly problematic for multiple reasons. First, there is no standard definition of a job placement so, for instance, students who were employed for just a day or in a position that did not require the degree may be counted as a job placement. Second, national accreditors each have different methodologies for defining a job placement, so rates using one methodology cannot be compared to rates using another. Third, regional accreditors do not require job placement rates, so regionally accredited schools are not required to report any job placement rates (e.g., University of Phoenix, Kaplan University, Bridgepoint's Ashford University). Finally, multiple for-profit colleges have falsified and inflated their job placement rates.[14]

   Regulations finalized in 2010 (34 CFR 668.6(b)(1)(iv)) require schools that are required by their accrediting agencies and/or State to calculate a job placement rate for career education programs to disclose these placement rates and identify the accrediting agency and/or State agency under whose requirements the rate was calculated. Due to problems with current job placement rates, the 2010 regulations required the Department to convene a technical panel to determine an appropriate and standardized definition. The Department convened the panel, but the panel concluded in 2011 that it was unable to develop a single job placement rate methodology due to data limitations.[15] In light of this outcome, the issue needs to be revisited; the current job placement rate disclosures were intended to be a *temporary* solution until the solution recommended by the technical panel could be implemented. This issue is too important to simply kick the can down the road. Recent research underscores the

[12] For examples of disclosures that are very difficult to find and/or understand, see Appendix F of TICAS' June 4 comments at http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf.
[13] See official comments from the offices of the attorneys general for Kentucky, Illinois and Colorado. http://www.regulations.gov/#!docketDetail;D=ED-2012-OPE-0008.
[14] For examples of schools that have inflated job placement rates, see Burd, Steve. August 9, 2011. "A Widening For-Profit College Job Placement Scandal?" *Higher Ed Watch.* http://bit.ly/rusowL.
[15] Laurium Evaluation Group, for the IPEDS Technical Review Panel. 2011. Background Paper: Calculating Job Placement Rates Under Gainful Employment Regulations. http://nces.ed.gov/npec/data/Calculating_Placement_Rates_Background_Paper.pdf. See also RTI International. 2011. Report and Suggestions from IPEDS Technical Review Panel #34: Calculating Job Placement Rates. https://edsurveys.rti.org/IPEDS_TRP/documents/TRP34__SummaryPackage_suggestions_final.pdf.

importance of job placement rates to consumers, who deem graduates' ability to acquire jobs one of the best indicators of college quality.[16]

If the Department cannot come up with a uniform standard for job placement rates that ensures both accuracy and comparability, steps must be taken to at least ensure the rates are not misleading. Along these lines, minimum standards for all job placement rates could be developed, including, for example, how long a person must be employed to be counted as placed. The regulations could also require schools to disclose the definition and methodology used to calculate rates and that they may not be comparable to rates using different methodologies, and have schools that are required by their accreditor to report job placement rates to have those placement rates independently audited (similar to what Texas recently required ATI Career Training Center to do).[17]

c. **Fix the on-time completion rate disclosures.** Current regulations require all career education programs to disclose their "on-time completion" rate. However, as the student and consumer representatives and TICAS wrote to Secretary Duncan in 2011, as currently calculated, the on-time completion rates disclosed can provide *misleading* information to students and the public.[18] The calculation needs to be modified to reflect the share of all students who start the program who complete on-time, rather than reflecting the share of student completions that were "on-time." The rate also needs to clearly specify what is considered "on-time" for that program. As illustrated by the examples in Appendix F of TICAS' submitted comments, many of the current "on-time" completion rate disclosures do not indicate what is considered on-time. In addition, some schools say they consider 4.5 years to be "on-time" completion for a certificate program.[19]

5. **End funding for programs whose graduates are ineligible for employment in the relevant occupation.** As a condition of receiving federal financial aid, career education programs should have to provide evidence that the program will in fact prepare students for gainful employment in a recognized occupation. This includes ensuring that the occupational titles promoted by the program actually exist in the job market and that the program satisfies all of the conditions needed to secure employment in those positions. This includes certifying that programs have met all programmatic and specialized accreditation requirements. Without such a condition, unscrupulous schools can continue to swindle students like Yasmine Issa who enrolled in and completed an ultrasound sonography program

[16] Shireman, Bob, Sandy Baum, and Patricia Steele. 2012. *How People Think About: College Prices, Quality, and Financial Aid.* Change: The Magazine of Higher Learning. http://gsehd.gwu.edu/documents/gsehd/research/project%20findings/baum/Document3-ChangeMag.pdf.

[17] Texas Workforce Commission. 2011. "Notice of Intent to Revoke Certificate of Approval." http://images.bimedia.net/documents/72711ATIIntenttoRevoke.pdf.

[18] Letter to Secretary Duncan. October 21, 2011. http://www.ticas.org/files/pub/On-time_completion_rate_letter.pdf.

[19] As illustrated in Appendix F of TICAS' official comments, Strayer University defines "on-time completion" of certificate and diploma programs to be 4.5 years.

only to later learn that her program's lack of accreditation meant finding employment as a sonographer was virtually impossible.[20]

6. **Ensure schools cannot evade accountability under the rule.** The regulations need to prevent schools from evading accountability by doing things such as closing poorly performing programs and reopening a similar or identical program under a different name; keeping programs small; or making payments on a student's loan to artificially inflate the program's repayment rate.

    a. **Closing and reopening programs**. The Department has rightly been concerned that some institutions might attempt to circumvent the gainful employment standards simply by creating new programs, which take time to assess. To prevent the evasion of the rule by creating new programs, TICAS and more than 20 organizations representing students, consumers and civil rights organizations have urged that the regulations require colleges with one or more failing programs to apply for approval of any new programs.[21] This will more effectively prevent gaming and provide an additional incentive for schools to meet the modest debt standards while reducing the administrative burden on schools with a strong record of preparing students for gainful employment.

    b. **Small programs.** Under the final regulation, programs with fewer than 30 students were automatically deemed to have passed the metrics. This number should be lowered so schools cannot easily evade accountability by keeping programs small. A minimum of 10 students is more than sufficient to protect student privacy. For example, the National Center for Education Statistics provides data on CollegeNavigator.gov covering as few as three students.

    c. **Making payments on loans to manipulate repayment rate.** At the Department's annual Federal Student Aid conference in 2011, a for-profit college representative asked if schools may make payments on a student's loan in order to artificially keep a program's repayment rate below the relevant threshold. If the regulations do not already prohibit such payments, they should immediately be amended to prohibit them.

7. **Do not delay protection for students and taxpayers.** Despite being finalized in June 2011, the earlier gainful employment rule would not have eliminated funding for any programs, no matter how poor, until 2015. This delay served as a transition period, allowing programs to consider the informational rates provided by the Department and use them to inform program improvements.

    The new gainful employment regulation should not further delay potential sanctions; it should begin eliminating funding for programs *in 2015*. Informational rates for career

[20] Yasmine Issa's testimony to the U.S. Senate HELP Committee, June 24, 2010. http://www.help.senate.gov/imo/media/doc/Issa.pdf.
[21] For more information, see http://www.protectstudentsandtaxpayers.org/wp-content/uploads/2012/03/GE_New_program_approval_commentsFINAL_Nov14.pdf.

education programs have been available since 2011, including income data from the Social Security Administration that provides actual earnings for program completers. The availability of this information is important because some had argued that, without access to the actual earnings data used in assessing debt-to-income ratios, it would be inappropriate to hold programs accountable to unknown standards.

In addition, other modifications, such as the allowance for using Bureau of Labor Statistics earnings data rather than actual program graduates' earnings, should also end after fiscal year 2014.

8. **Provide relief when programs are found not to prepare students for gainful employment.** Students enrolled in programs that lose Title IV eligibility and are unable or choose not to complete their program in the time remaining, and those who are unable or choose not to transfer to an alternative program within the same institution, should not be accountable for federal student loan debts incurred to attend that program. Federal student loan debts incurred to attend programs subsequently deemed ineligible under this regulation should be discharged. Also, the determination of a program's subsequent ineligibility should be an allowable defense to collection for students who borrowed for a program and later were unable to afford payments on those loans. The Department has the authority to compromise loans,[22] and we further urge the Department to seek reimbursement from institutions for discharges granted to borrowers and for federal Pell Grant funds awarded to students.[23]

9. **Reconsider changes that weakened the final gainful employment regulation.** New information suggests that changes made to the final regulation – virtually all of which weakened the standards and disclosures – deserve reconsideration. The ways in which the final rule was weakened are numerous, including: requiring only private, emailed warnings be provided to students enrolled in weak programs; the exclusion of Perkins loans from the debt ratios; limiting the debt included in the ratios to the amount of tuition and fees assessed; and excluding high cumulative debt amounts when graduates' Social Security Administration earnings cannot be matched. *At the absolute minimum*, the following changes must be revisited in light of experience since the final rule was issued in June 2011:

    a. **Calculating debt-to-income ratios using both mean and median earnings, and using the one that reflects more favorably on the program**. As became clear with the informational data release, calculating ratios using both mean and median and using different measures for each program and ratio renders the data useless for comparison purposes. Neither consumers, researchers, schools nor policymakers can compare the resulting ratios because some are means and some are medians, and there is no way to tell which is which. This led to confusion and accusations that the Department had erred in calculating the ratios. We encourage the regulations to use

[22] See, e.g., 20 U.S.C. § 1082(a) (FFEL); 31 U.S.C. § 3711 (General authority to compromise government debts); 34 C.F.R. § 30.70.

[23] For example, for discharges granted under the closed school or false certification authority, the regulations provide that after discharge, the borrower is required to cooperate with the Secretary to recover for amounts discharged. 34 C.F.R. § 682.402(e)(4).

either mean or median earnings *in all cases*, and recommend using the mean as under the Notice of Proposed Rule Making (NPRM).

b. **Granting programs an allowance for negative amortization loans in repayment rates.** Unlike the NPRM, the final regulation allowed some borrowers repaying under Income Based Repayment (IBR) and the new Pay As You Earn plan to be counted as paying down their debt when their balance was actually increasing because their payments were too small to cover accrued interest. This is inappropriate. IBR is a safeguard for borrowers, not a shelter for schools. As the NPRM had aptly noted, mortgage insurance is intended to protect homeowners, not to enable builders to build dangerous, substandard homes. By providing for negative amortization loans to be counted as being paid down, the final rule inappropriately turns IBR and Pay As You Earn into potential shelters for schools. A program that enrolled all its former students in income-contingent repayment programs would be *guaranteed* federal funding under the final gainful employment regulation, even if it consistently left students with debts they could not repay. Further, as with the debt ratios, granting each program an unspecified allowance for negative amortization loans renders the repayment rates far less comparable.

c. **Including debt from related institutions.** All debt incurred at a school under the same control structure must be included in any measure of gainful employment that considers debt. Unlike the NPRM, the final rule allowed for this but did not require it. Including this debt is critical as, without it, schools controlled by the same company could simply move students from one school or program to another. The recent evidence is plentiful that colleges make operational changes such as combining OPEIDs to remain in compliance with CDR and 90/10 rules,[24] and the risk of such gaming to create the appearance of low debt burdens is very high.

[24] For examples, see pages 14-19 of TICAS official comments on preventing cohort default rate and 90/10 rule manipulation at http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf.