

Anthony J. Guida Jr.
Senior Vice President,
Strategic Development and Regulatory Affairs

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Robert Gordon
Associate Director for Education,
Income Maintenance and Labor
Executive Office of the President
Office of Management and Budget
New Executive Office Building
1735 17th Street, NW
Washington, D.C. 20503

**Re: Proposed Gainful Employment Rule Provision Requiring Approval of
Additional Programs**

Dear Mr. Gordon:

For the reasons set out below, we strongly urge the Office of Management and Budget to send the rule proposed by the Department of Education (ED) that would require approval of additional programs (34 C.F.R. §668.7(g)) back to ED to complete its review and full consideration of the numerous and substantive public comments that were submitted in response to this proposed rule. To issue the rule without full consideration of these comments would violate the Administrative Procedures Act, 5 U.S.C. § 553(c), which provides that an agency should "give interested persons an **opportunity to participate** in the rule making through submission of written data, views, or arguments" and shall issue a final rule only "[a]fter **consideration of the relevant matter presented.**" Further, the regulatory impact of this proposed rule has not been properly considered under Executive Order 12866 inasmuch as ED has substantially underestimated the number of new program applications that the rule will require it to review.

ED published two Notices of Proposed Rulemaking (NPRM) describing its proposed regulations of the for-profit higher education sector, the first of which was published on June 18, 2010 and described 13 new regulations, as well as graduation and job placement disclosures related to the "gainful employment" (GE) rule. The second NPRM, related exclusively to the GE rule, was issued on July 26, 2010 with a public comment period that closed on September 9, 2010. The approval of additional programs requirement first appeared¹ in the second GE NPRM and was never mentioned in the first NPRM that ED is currently

¹ It was never raised during the negotiated rulemaking sessions that occurred between November 2009 and January 2010.

moving forward with. This second GE NPRM received an unprecedented 91,000 comments, many of which expressly addressed the new program approval procedures.

Expressly recognizing the need to allow further time to fully consider the public comments submitted in response to ED's proposed regulations of the for-profit higher education sector, on September 24, 2010 ED issued a press release announcing that it would publish its rules in two phases. While release of the GE regulations dealing with a program's eligibility to receive federal student aid were postponed until early 2011, ED announced that the 13 regulations plus the graduation rate and job placement provision from the second NPRM, would be released on or around November 1, 2010.

The issue raised concerning additional program approvals by ED are significant and, like the other comments raised in response to the GE NPRM, could not have adequately been addressed by ED prior to November 1. The proposed review process of new programs is a major departure from current practice, which only requires that non degree programs receive approval by ED with a review essentially requiring only confirmation that pertinent state licensing and institutional accrediting agencies have reviewed and approved the program.

The comments concerning the addition program approval requirement raised by Education Management Corporation (EDMC), as well as by entities such as the American Council on Education, the Career Colleges Association, Career Education Corporation, ITT Technical Institute, Kaplan Higher Education, National Association of Student Financial Aid Administrators, National Consumer Law Center, School of Visual Arts, U.S. PIRG, United States Student Association, to name a few, include the following:

- ED lacks the authority under the gainful employment statute to regulate general economic conditions, as contemplated by both the employer verifications and growth restrictions contemplated by the rule. Both of these requirements would regulate job markets, not whether a program prepares its students for gainful employment;
- Employer verification measures that include many complex and interrelated factors and would require ED to perform functions beyond its expertise, including
 - the assessment of job markets up to nine years in the future (i.e., employment opportunities for graduations of 4-year programs projected over a five year period); and
 - analysis of whether a job market is growing, contracting, or otherwise changing over an extended period of time;
- Employers will be put into the position of affirming the curriculum of a program when curriculum design is well outside the knowledge set of many employers;

- The job market, and not ED, should control how many students are trained for a particular profession;
- Requiring prior approval of new programs by ED will stifle innovation and the overall impact will limit access to higher education at a time when budget cutbacks force state institutions to turn away students;
- The requirements are burdensome and make no sense in the context of schools offering online education or other distance learning based programs locations;
- The prior approval requirement is overly proscriptive and duplicative of existing regulations that already require accrediting agencies to have “substantive change” policies that evaluation substantive changes in accredited programs;
- The regulation as written lacks a standard of application and interpretation and thus raises substantial due process and fairness concerns. Among the other matters, the proposed employer verification regulations do not:
 - specify what must be included in the documentation the institution must submit, such as the number of verifications needed or what they must say;
 - provide notice regarding what it means that a program “aligns with recognized occupations at those employers’ businesses” or what data are required to show that “job vacancies or expected demands for those occupations at businesses” exist;
 - specify how ED will determine that the number and locations of the businesses for which affirmation is required is “commensurate with the anticipated size of the program”
 - indicate who will review the verifications or what standards will be applied in evaluating verifications and ensuring consistent evaluation; and
 - Explain the circumstances under which ED will treat an employer as “affiliated” with the institution, including serving as a clinical site or making internships available to students.

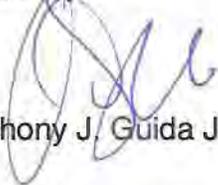
As detailed in its press release, ED appropriately postponed issuance of the proposed GE rule due to the additional time required to consider the voluminous public comments that it received in response to the second GE NPRM and to host meetings and public hearings with those who submitted substantive comments. The potential impact of the additional program approval rule that was part of the second GE NPRM is significant and far reaching, and not surprisingly, generated its own share of significant comments. In fact, under § 668.7(g)(3), certain additional programs will be subject to loan repayment rate and debt-to-

income calculations under the proposed GE rule that was postponed until 2011. For the same reasons that ED delayed issuance of the balance of the second GE NPRM, it should delay issuance of the additional program approval rules. It simply has not had sufficient time to thoroughly review and properly consider the public comments submitted in response to the additional program approval rules in the limited time available since the comment period on the second GE NPRM closed on September 9.

Finally, we believe that ED has substantially underestimated the number of new program approvals that it would be required to address on an annual basis. In its Regulatory Impact Analysis pursuant to Executive Order 12866 (GE NPRM at p. 43636), ED estimated that during the initial three year period there will be 312 new programs submitted by for-profit institutions for review. In publicly available information from four publicly traded companies² operating 107 institutions, these companies reported that for the most recent one year period they collectively added a total of nearly 800 new programs. Accordingly, even if the remaining 1,979 proprietary institutions only added an average of one program per institution per year instead of more than seven, the total number of new programs added over a three year period would exceed 8,300, which is more than 25 times ED's original estimate.

For these reasons, while EDMC maintains for the reasons submitted in its public comments that the program approval regulations should be completely eliminated from the final rules, at a minimum the issuance of any such regulation should be postponed until full review and consideration of the public comments on the rule has been possible.

Sincerely,



Anthony J. Guida Jr.

cc: Georgia Yuan, ED – OGC

² Education Management Corporation (EDMC), Career Education Corporation (CEC), Corinthian Colleges (COCO), and ITT Technical Institute (ESI).