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Public Interest Comment¹ on
The Department of Education's Proposed Rule

Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Education's (ED) proposed rule to amend the regulations governing the Direct Loan Program does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of ED's proposal on overall consumer welfare.

Introduction

As of April 2016, the total outstanding balance of student loans is estimated to be approximately \$1.35 trillion.³ Throughout the recent period of economic crisis from the late 2000s until 2014,

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

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³ Estimated by the U.S. Federal Reserve. Data available at: <https://www.federalreserve.gov/releases/g19/current/default.htm>

the student loan balance quadrupled, and default rates among student borrowers reached their highest levels in 20 years.⁴

The rule proposed by ED would make several amendments to the regulations governing its Federal Direct Loan Program. Among the most significant changes are 1) an expansion of the conditions wherein ED would forgive borrowers' loan balances, 2) additional provisions that would broaden ED's ability to recover losses directly from institutions resulting from approved borrower defenses, and 3) the addition of automatic triggers for postsecondary schools⁵ that would apply under certain conditions and events. Schools would be required to comply with these provisions to continue being eligible to be paid by borrowers using federal funds appropriated under title IV of the Higher Education Act (HEA).

ED estimates this rule would have annual federal budget impacts of anywhere between \$199 million to an upper-bound estimate of \$4.23 billion. Although the rule is intended to mitigate some of the risks to taxpayers by making schools responsible for paying the cost of loans for which ED approves borrower nonpayment, the upper-bound estimate of its potential annual cost should serve as a cautionary indication that any estimation of positive net benefits may vary considerably given the assumptions underlying the analysis.

Although several of the changes apply to all postsecondary institutions, including ED's new language defining what constitutes "misconduct" by schools—behavior which entitles borrowers to submit claims for nonpayment—the majority of this rule's efforts focus on improvements to outcomes within the for-profit school sector. ED invited public comment and specifically welcomed input regarding 1) "ways [it] could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs" and 2) "complying with the specific requirements of E.O. 12866 and 13563."⁶

⁴ Adam Looney and Constantine Yannelis, "A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attend Contributed to Rising Loan Defaults" Brookings Papers on Economic Activity, Fall 2015. Available at: <http://www.brookings.edu/~media/projects/bpea/fall-2015/pdflooneytextfallbpea.pdf>

⁵ ED's proposed rule contains 12 conditions which would trigger additional requirements of schools including: securing additional financial protections (such as letters of credit) and including ED-approved language concerning the fact that schools were required by ED to obtain the aforementioned financial protections. Another trigger involves the requirement for institutions to include Department-approved language concerning its students' performance in repaying their student loans.

⁶ These executive orders require agencies to "promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." E.O. 12866, "Regulatory Planning and Review," September 30, 1993. Available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf. They also require agencies to evaluate regulatory impacts after they are issued. "Agencies shall consider how best to promote

This comment suggests that this rule might preserve a more effective and efficient administration of the Department’s treatment of borrower defenses by retaining the original language in §668.71 regarding the definition of a “misrepresentation” concerning misconduct by postsecondary schools. Alternatively, ED should modify the language in its current proposal to increase its clarity and narrow its scope so that it clearly reflects intent to hold accountable those institutions attempting to take advantage of information asymmetries and defraud their students. As ED points out in the preamble to the proposed rule, courts have upheld (borrowers’) claims of common law misrepresentation based on false statements in cases where the definition required establishing a case based on the much narrower definition of fraud.⁷

Additionally, although the academic literature⁸ is clear that “non-traditional” borrowers (predominantly those attending for-profit schools) historically experience higher default rates on their loans vs. traditional borrowers, it is less clear what causal mechanisms are responsible for these defaults.⁹ It is important to consider the possibly regressive effects or unintended consequences associated with focusing certain provisions strictly on the for-profit sector. As experts point out: “a challenge for federal regulation of the for-profit sector is to design incentives for improved quality, while still preserving access for students from disadvantaged and nontraditional backgrounds.”¹⁰

In addition to calling on agencies to identify a compelling public need before issuing new regulations and to examine the benefits and costs of alternatives, Executive Orders 12866 and 13563 emphasize the importance of ex post evaluation. Before issuing a final rule, ED should provide details of how it intends to conduct retrospective analysis of the ex post results of this rule. Although it may seem that simply comparing student default rates would indicate the overall effectiveness of this rule, there may be several other confounding factors that result in a lower default rate but also an overall reduction in consumer welfare.¹¹

retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” E.O. 13563, “Improving Regulation and Regulatory Review,” January 18, 2011. Available at:

https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo13563_01182011.pdf

⁷ *Moy v. Adelphi Inst., Inc.*, 866 F. Supp. 696, 706 (E.D.N.Y. 1994). Available at:

<http://law.justia.com/cases/federal/district-courts/FSupp/866/696/1376278/>

⁸ See, for example: Stephanie Riegg Cellini, and Latika Chaudhary “The Labor Market Returns to a Private Two-Year College Education.” Working paper. *George Washington University*, Washington, D.C. (2011).

⁹ Looney and Yannelis (2015), for example, find that under certain assumptions it is likely that as much as 50% of student defaults are likely caused by socio-economic factors typical of “non-traditional” borrowers.

¹⁰ David Deming, Claudia Goldin, and Lawrence Katz, “For-Profit Colleges” *The Future of Children*, Vol. 23, no 1. Postsecondary Education in the United States (Spring 2013).

¹¹ For example, if lower default rates are primarily caused by significant reductions in non-traditional borrowers rather than an improvement in the quality of education provided at postsecondary schools.

Statutory Authority

Section 455(h) of the Higher Education Act of 1965 authorizes the Secretary to “specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan.”¹² Section 487 of HEA provides “that the Secretary can take enforcement action against an institution participating in the title IV, HEA programs that substantially misrepresents the nature of the institution’s education program, its financial charges, or the employability of its graduates.”¹³ Finally, ED cites its delegated authority under 20 U.S.C. 1221-3 and 3474 to “adopt such regulations as needed for the proper administration of programs” as a basis for its regulations requiring institutions to make certain general disclosures of information and as authority to expand its reporting and disclosure requirements for schools within this proposed rule.

Executive Requirements

ED specifically requests comments on “complying with the specific requirements of E.O. 12866 and 13563.” Executive Order 12866, which has guided regulatory development since 1993, directs agencies to:

- identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem. §1(b)(1)
- identify and assess available alternatives to direct regulation §1(b)(3)
- design its regulations in the most cost-effective manner to achieve the regulatory objective... consider[ing] incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity. §1(b)(5)
- assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. §1(b)(6)

Executive Order 13563 reinforces these principles (EO 13563 §1(b)) and also says “agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” (§1(b)) It “recognizes the importance of

¹² Available at: http://legcounsel.house.gov/Comps/HEA65_CMD.pdf

¹³ Ibid.

maintaining a consistent culture of retrospective review and analysis throughout the executive branch.”¹⁴

ED’s proposal does not comply with the requirements of either EO 12866 or 13563, as discussed below.

Limiting Misrepresentation to Fraud

The key regulatory language that ED proposes to change with this rule concerns the definition of school behavior that “substantially misrepresents” to borrowers its education programs or their employability. This defines the scope not only of the circumstances under which ED would approve a borrower’s defense claim for not repaying a loan, but also when ED can “initiate a proceeding against the eligible institution” to recover the costs of the loan. Currently, §668.71(c) currently defines a misrepresentation as:

Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to **deceive**.

ED proposes to broaden the definition of what constitutes a misrepresentation by replacing the word “deceive” with “mislead under the circumstances.” As the Department points out, “the word deceive implies knowledge or intent on the part of the school which it believes is “not a required element in a case of misrepresentation.” Such broad language is likely to create additional uncertainties and unintended consequences. Although ED states that this language “is also reflective of the consumer protection laws of many States,” the proposed modifications to §668.71(c) are not necessary in order for ED to effectively find in favor of borrowers in a borrower defense claim.

The original language is more closely aligned with requiring proof that schools intentionally misrepresented the value of their education to their students. It seems reasonable to protect borrowers in cases where they are being defrauded by their school, and it seems reasonable to assert that sanctioning schools that behave fraudulently will likely improve the performance of the sector as “bad actors” are eliminated or incentives are created for them to cease any deceptive practices. However, ED’s proposal to change the definition of substantial misrepresentation

¹⁴ <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>

creates a lack of clarity for schools regarding how to comply; expanding misrepresentation to include situations that cannot be attributed to institutional intent would also likely reduce the effectiveness and efficiency of ED's program by significantly increasing the amount of borrower defenses that are either 1) later ruled to be unsubstantiated or 2) approved, but where schools may unreasonably bear the burden of discharges in situations where they have made good-faith efforts to comply with ED regulations.

Misrepresentation Currently Strikes an Important Balance

ED has not demonstrated what "compelling public need" necessitates the proposed regulatory change, as required by E.O. 12866 (Section 1). The 2014 collapse of Corinthian Colleges, Inc. demonstrates that fraudulent practices on the part of schools—such as the misrepresentation of job placement rates—have the potential to materially damage borrowers. However, the Department only implicitly mentions that the primary market failure at work here is one of information asymmetry, which would occur in cases where schools withhold information from students that, if known, would likely have caused them to make significantly different decisions about school attendance and loan borrowing.

Furthermore, it is possible that ED's definition of a misrepresentation, as currently worded in its proposed rule, could result in an additional market failure: a moral hazard problem where borrowers do not consider the appropriate level of risk inherent in borrowing money against the expectation of future earnings. The Department's current definition of a substantial misrepresentation strikes a necessary balance that allows borrowers defrauded by schools to seek relief while limiting actions against schools to cases where there is clear evidence of wrongdoing.

ED cites a case in its proposed rule preamble that serves as an example of this balance, based on a claim that fraud had occurred. In *Moy v. Adelphi Inst., Inc.*¹⁵ the court stated that in order to claim fraud under the laws of the state of New York, a plaintiff must allege:

(1) that the defendant made a misrepresentation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity, (8) to his injury.

The fact that the court ruled in favor of the plaintiffs (borrowers) in this case under a narrow construction of what constitutes fraud demonstrates that the current legal language defining a

¹⁵ *Supra*, note 5.

misrepresentation is capable of protecting borrowers from the types of abuses that ED intends to prevent.

The Department states as a justification for its proposed rule that it intends to “protect student loan borrowers from misleading, deceitful, and predatory practices...by institutions participating in the Department’s student aid programs.” Since ED has limited resources to direct towards the investigation of borrower defenses, the investigation of unsubstantiated cases against schools would necessarily shift resources away from borrowers looking for relief in cases where they have legitimately been defrauded. A reasonable burden of proof required to allege fraud is likely to reduce the number of unsubstantiated claims under borrower defenses while providing the education market clear guidance on how to ensure they are complying with ED regulations.

ED’s Estimated Benefits and Costs

As required by E.O. 12866 and 13563,¹⁶ ED estimated the benefits and costs of the proposed rule and stated that it was “issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs.” It is difficult to understand how ED came to this determination. Its regulatory impact analysis lists three possible benefits but fails to quantify or monetize any of them. It estimates an upper-bound federal budget impact (a potential loss to taxpayers in the form of transfers from the federal government to borrowers) of \$4.23 billion a year.

ED’s listed benefits mainly apply to borrowers in the form of 1) an updated borrower defense process and Federal standard, 2) improved awareness and usage of closed school and false certification discharges, and 3) improved consumer information about the performance of institutions and their practices.

The majority of costs contained within ED’s estimates are losses to taxpayers in the form of transfer payments to borrowers. ED calculated a range of scenarios based on different rates of approved borrower defenses and estimates for the Department’s ability to successfully recover its losses from schools. ED estimates this rule would have annual federal budget impacts of anywhere between \$199 million and \$4.23 billion. In addition, it calculated annual costs to schools in the form of compliance with additional paperwork requirements of \$14.95 million.¹⁷

¹⁶ E.O. 13563 states that “to the extent permitted by law, each agency must, among other things: (1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify).

¹⁷ ED estimated these figures using a 3% discount rate.

Finally, ED recognizes that schools will incur a cost due to the need to obtain letters of credit but does not provide an estimate for this cost.¹⁸

Risk Assessment and Requirements Applicable to For-Profit Institutions

Two of the requirements proposed in this rule would apply only to for-profit schools and would be automatically triggered under certain circumstances: additional financial responsibilities and additional disclosure requirements to students. The first requirement is intended to reduce the risk to taxpayers from bearing the burden of student loan discharges by requiring schools deemed by ED to be “not financially responsible” to secure financial protections (such as letters of credit). The second requirement for schools to provide a “Department-issued plain language warning to prospective and enrolled students” would be automatically triggered for institutions whose loan repayment rate¹⁹ falls below the Department’s threshold of 50%.

Although data currently show that the highest rate of student default is observed for borrowers that attended proprietary (for-profit) schools, ED should consider the consequences of proposing regulations that only apply to proprietary schools and, more generally, the assumption that these schools “pose the greatest risk to students and taxpayers.” ED states its intention to target underperforming institutions, not disadvantaged populations, but this distinction is difficult to make—particularly if the two are highly correlated.

It is also worth noting that ED decided to exempt non-proprietary schools from its additional reporting requirements and mandatory triggers, in part, to minimize the administrative burden²⁰ of this rule; with the exception of community colleges, this decision results in a disproportionate share of this rule’s increased costs being borne by schools with relatively fewer financial resources.²¹ A recent submission to ED by the Presidents & CEOs of the United Negro College Fund (UNCF), the Thurgood Marshall College Fund (TMCf) and the National Association for Equal Opportunity in Higher Education (NAFEO) provides a detailed analysis of the potentially regressive effects of ED’s proposed rule, particularly its proposed triggers requiring additional financial requirements under proposed §668.171(c).²²

¹⁸ These financial requirements are likely to be particularly burdensome on schools with nontraditional borrowers. *Infra*, note 22.

¹⁹ A school’s loan repayment rate is a measure of the amount of borrowers who previously attended the school that are now in default on their student loans.

²⁰ It is worth noting that ED estimates the annual costs related to paperwork burdens at \$14.9 million which account for only .4% of its upper-bound estimate of the potential total cost of this proposed rule (\$4.23 billion).

²¹ Larger, well-known, non-profit universities and colleges—for example—are usually funded in part by endowments and other donations in addition to the tuition they charge students.

²² Available at: http://9b83e3ef165f4724a2ca-84b95a0dfce3f3b3606804544b049bc7.r27.cf5.rackcdn.com/production/PDFs/HBCU_Coalition_Letter_Re_Borrower_Defense_NPRM_7.29.16.pdf

In addition, while ED correctly points out that the default rate for students who attended proprietary schools is currently higher than other institutions providing postsecondary education, it does not acknowledge that outstanding loan balances from this sector constitute a disproportionately smaller percentage of U.S. total outstanding student loans.²³ The risk to borrowers and taxpayers from loans issued to attend schools outside the proprietary sector can be equivalent or greater when considering the magnitude of outstanding loans, even at relatively lower rates of default. Finally, the sector within education that produces the greatest risk to borrowers and taxpayers can shift over time; regulations should be written in a way that sets consistent and clear rules for all institutions providing postsecondary education.

The Typical Student at a For-Profit School

The market for proprietary schools exists primarily for two reasons: 1) the requirements for students to attend even nonselective public community colleges often exclude a significant number of students who do not qualify to attend these institutions, and 2) budgetary limits often constrain the ability of community colleges to service the continued demand for higher education.²⁴ “Some students unable to get into desired courses and programs at public institutions may face only two alternatives: attendance at a for-profit or no postsecondary education at all.”²⁵ Students at for-profit schools also tend to come from disadvantaged, “nontraditional” backgrounds:

They tend to be older, often enroll less than full time, and are living independently of their parents...[They are] a particularly high-risk population...from lower-income families, and...live in poorer neighborhoods. They are more likely to be first-generation borrowers...and are more likely to live in or near poverty.²⁶ Additionally, these groups disproportionately consist of minorities relative to those attending non-profit schools; 65% of them are women.²⁷

A Brookings study by Looney and Yannelis (cited by ED in this proposed rule) demonstrates the complexity inherent in determining whether the characteristics of students or schools are the primary causal factor explaining default rates. Their study disaggregates data maintained by the National Student Loan Data System in an attempt to determine the causes of borrower defaults on student loans. The results are mixed, with as much as 50% of default rates explained by

²³ Looney and Yannelis (2015)

²⁴ See Deming et al. (2013)

²⁵ Ibid.

²⁶ Looney and Yannelis (2015) p.4

²⁷ Deming et al. (2013); These socio-economic indicators are well documented in the literature. See: Bailey, Badway, and Gumpert, 2001; Cellini, 2005; Chung, 2009a; Rosenbaum, Deil-Amen, and Person, 2006; Looney and Yannelis (2015); Deming et al. (2013)

socioeconomic factors not caused by the type of institution that students attended. The logic here is fairly intuitive: borrowers with less money and less ability to receive financial help from family members are relatively more likely to face difficulty in paying back their loans regardless of the quality of education they receive—particularly during generally hard economic times—such as the recent economic crisis.

These results are one reason why ED should be cautious in its assumption that focusing regulatory efforts on for-profit schools will lead to net benefits for the students within this sector. Regulation should focus on ensuring that for-profit schools are penalized in cases where they defraud students, while recognizing that these proprietary schools also provide an opportunity for disadvantaged students that might not otherwise exist in their absence. It is also problematic to hold schools accountable for results other than the quality of education they provide, particularly if a significant causal factor explaining those results is outside of their control.

Unintended Consequences

Schools receiving title IV aid are subject to ED regulations regarding the type of information disclosures and loan counseling they must provide their students. These required disclosures are intended to ensure that borrowers receive consistent quality of information when making decisions regarding student loans and to curtail overly aggressive or misleading practices. However, aligning school incentives in a way that too closely centers on their student's ability to repay their student loans might have regressive effects on the aforementioned high-risk populations, particularly where admission is concerned. Currently, one of the advantages of for-profit schools and community colleges is their relatively lower thresholds for admission relative to selective, 4-year nonprofit universities and colleges. ED has not adequately examined how its proposed amendments would affect schools' incentives, including causing them to raise admission standards to avoid admitting students that are statistically less likely to repay their loans due to socio-economic factors outside of the school's control.

Retrospective Review

ED should plan for its requirement to perform retrospective review by including a section within the proposed rule that indicates how it will analyze the program's effects once implemented. Executive Order 13563 states that agencies should:

consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.

Such retrospective analyses, including supporting data, should be released online whenever possible.²⁸

The sizeable range of ED's estimate of the potential costs of this rule (as high as an annual cost of \$4.23 billion) suggest that it could be extremely valuable to compare ex post results with the proposed rule's current cost assumptions. Scholars recommend "internalizing review at the outset of a regulatory program...by writing the rules themselves to better enable ex post measurement."²⁹ E.O. 13563 and The Office of Management and Budget's implementation memo on retrospective review³⁰ both suggest that "it is clear that agencies should incorporate specific plans for retrospective review and ex post evaluation into the text of their final rules."³¹

In particular, it is important that ED include not only the specific outcomes that its proposed rule is meant to accomplish but how "progress towards that goal should be measured." Although it may seem at first blush that simply comparing borrower default rates in the future to current rates would indicate whether the proposed rule was successful in achieving its goals, there could be several confounding factors responsible for changes in default rates.

For example, economic conditions could simply be much better relative to the period before this rule was implemented. Alternatively, lower default rates might be caused by a significant decrease in the number of nontraditional borrowers seeking an education. If the latter scenario is actually the result of students experiencing a lack of access to schools instead of increased information being provided in the market for education, careful attention to analyzing these ex post results would facilitate ED's efforts to repair, replace, or retain its approach regarding the Federal Direct Loan Program.

Conclusion

Expanding and improving borrower protections against fraud and reducing the risk of loan defaults borne by taxpayers are valuable ends but ED has not demonstrated that its proposed regulatory amendments would achieve those ends without inducing negative consequences, including regressive effects towards disadvantaged students. ED should consider several modifications to its existing proposed rule that would balance the policy goals of sanctioning

²⁸ Exec. Order No. 13563, Improving Regulation and Regulatory Review, § 6(a).

²⁹ Sofie E. Miller and Susan E. Dudley, "Regulatory Accretion: Causes and Possible Remedies" *Administrative Law Review Accord*, Vol. 67, Issue 2 (2016)

³⁰ United States. Office of Management and Budget. Office of Information and Regulatory Affairs. MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations. By Cass Sunstein. April 25, 2011.

³¹ Sofie E. Miller "Learning from Experience: Retrospective Review of Regulations in 2014," Working Paper, *The George Washington University Regulatory Studies Center*, November 2015. Available at: https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/Retrospective%20Review%20in%202014%20MillerS_11_3.pdf

costly fraudulent activity while avoiding unintended outcomes that could harm the most vulnerable socioeconomic populations. These recommendations would not only make the rule more consistent with ED's statutory authority, but also with the presidential requirements embodied in EO's 12866 and 13563.

- ED should retain its original language in §668.71 regarding the definition of what conduct “substantially misrepresents” educational outcomes. It has not provided evidence that its current language does not strike the right balance between protecting borrowers defrauded by schools and limiting actions against schools to cases where there is clear evidence of wrongdoing. Alternatively, ED should modify the language currently proposed in this rule to increase its clarity and narrow its scope so that it clearly reflects intent to hold accountable institutions attempting to defraud students. This will also increase the likelihood that schools understand their role in complying with disclosure requirements.
- As detailed in this public comment, ED's regulatory impact analysis does comply with the requirements of either E.O. 12866 or 13563. Not only has it not identified a compelling public need for the rule change, but it is difficult to understand how ED claims it issued the proposed regulations “only on a reasoned determination that their benefits would justify their costs” since it does not quantify or monetize any benefits, yet it estimates the potential upper-bound annual cost to taxpayers at \$4.23 billion.
- The Department should carefully examine its assumption that for-profit schools pose a disproportionate risk to students and taxpayers and its decision to exempt other schools from the reporting requirements in this proposed rule. Although ED's experience with borrower defenses filed by students of Corinthian Colleges, Inc. demonstrates the need for the Department to protect borrowers against fraud, regulation should work to penalize fraudulent practices while being careful not to stifle educational innovation or eliminate learning opportunities for disadvantaged students.³²
- ED should write its plan for conducting retrospective review directly into its proposed rule. This will clarify the specific outcomes and metrics that ED intends to measure. This approach conforms to the requirements to conduct retrospective review under E.O. 13563. Comparing ex post outcomes against current assumptions will inform the Department's efforts to modify, replace, or retain its approach regarding the Federal Direct Loan Program.

³² See Deming et al. (2013)