VIA: ***Regulations.gov***

June 20, 2023

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Comments to Docket ID ED: 2023-OPE-0089

Dear Secretary Cardona,

As Executive Director of the California Association of Private Postsecondary Schools ("CAPPS"), I write you on behalf of our members to present our public comment submission to the proposed regulations published by the U.S. Department of Education (the "Department" or "USDE") in the May 19, 2023 Notice of Proposed Rulemaking, "Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB)" ("NPRM" or "2023 NPRM"). Our comments on the Financial Value Transparency and Gainful Employment provisions focus on the methodology and the underlying metrics. With regards to the financial responsibility, administrative capabilities, and certification procedure provisions, our comment addresses our concerns about the overreach of the amended language. The ATB provisions are the result of a consensus agreement. Accordingly, we seek only clarification on a discreet issue.

CAPPS is the only California state association that represents all of the diverse range of private postsecondary schools in California. CAPPS has a membership of more than 200 institutions, including for-profit, non-profit, and religious institutions. Our schools are either institutionally accredited or approved by California's Bureau of Private Postsecondary Education ("BPPE") to offer educational services. CAPPS works to ensure that the needs of the entire sector – from small schools to large publicly traded institutions – are met from a policy, educational, and business perspective.

CAPPS appreciates the opportunity to respond to the 2023 NPRM. Further, we acknowledge the time and effort that the Department has untaken to review this comment and all comments submitted as part of this rulemaking. As part of the rulemaking process, we offer our comments and recommendations.

I. General Comments

As a general response to the proposed rule, CAPPS supports the concept and framework of the proposed Financial Value Transparency regulations. Subpart Q would increase the quality and availability of information provided directly to students about the costs, sources of financial aid, and student outcomes by calculating and disclosing debt-to-earnings ("D/E") and earnings premium ("EP") rates for all eligible programs. We support the Department's goal to require Financial Value Transparency disclosures for all eligible programs and institutions to ensure all students have the benefit of access to accurate information on the financial consequences of their education program choices. However, within the proposed framework, we have a number of significant concerns about the underlying data and methodology. We address those concerns in Sections II.C through II.H of this comment.

A. The Abbreviated Public Comment Period Unreasonably Burdens Our Members' Opportunity to Meaningfully Participate in the Rulemaking Process

As an initial matter, we request additional time to submit public comments to the 2023 NPRM. While the 2023 NPRM provides thirty (30) days to submit comments, as explained below, we believe that an extension of that time period is necessary to allow the public and interested parties a sufficient and appropriate opportunity to comment on the proposed rule. Second, considering the recent flurry of regulatory activity, institutions of higher education need additional time to fully consider and draft comments to this significant rulemaking package. Finally, an extension would be consistent with the authorities to which the NPRM cites as well as past practices related to the Gainful Employment rule. As a result, we request thirty (30) additional days for the public comment period.

Since January 1 of this year, the Department has announced or published three significant rulemaking changes that impact institutions of higher education. In addition to 2023 NPRM, the Department published a Title IX rule and guidance on Third Party Servicers and Incentive Compensation. Each of these are of significant importance to our institutions and require adequate time for reflection and response. The 2023 NPRM covers more than 200 pages, includes complex calculations and required significant analysis of underlying data. Despite this, the Department only provided a truncated 30-day comment period. It is unreasonable for the Department to demand that institutions and other interested stakeholders respond to this major regulatory change in this condensed period.

Further, the list of topics included in the 2023 NPRM – Financial Value Transparency and Gainful Employment, Financial Responsibility, Administrative Capability, Certification Procedures, and Ability to Benefit– demands that the public and interested parties be provided a much longer period to submit substantive and comprehensive comments. The changes to the GE section alone and the data variances across multiple sources provide sufficient reason to lengthen the public comment period.

When considered together, past practice indicates that such an extensive package of new regulations demands additional time to respond to the proposal. For background, the changes to the GE regulatory framework included in the 2010 GE NPRM[1] were subject to a comment period of forty-five (45) days and the 2014 GE NPRM[2] were subject to a comment period of sixty (60) days.

In short, we request a total of sixty (60) days for the public comment period to adequately address the complex issues and unintended consequences raised by the 2023 NPRM. The 2023 NPRM was published in the *Federal Register* on May 19, 2023, and the public comment period closes on June 20, 2023. We request that the Department extend the comment period to July 20, 2023 for interested parties and members of the public to draft, review, and submit comments to the 2023 NPRM.

B. The NPRM is Impermissibly Retroactive

The 2023 NPRM will determine a program's Title IV eligibility based, in part, on the amount of student loan debt incurred by the program's completers and earnings data drawn from a period before the proposed rule becomes effective. As drafted, the rule assigns penalties to factors and decisions established well prior to the effective date of the regulatory requirement. The fact that the construction of the rule renders it impossible for institutions to take any corrective actions to change the initial outcomes violates the prohibition against retroactivity.

Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority.[3] In *Bowen v. Georgetown Univ. Hosp.,* the Court held that "[a]n administrative agency's power to promulgate regulations is limited to the authority delegated by Congress…"[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[4]

[1] 75 FR 43615
[2] 79 FR 16426
[3] *See,* 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.")
[4] 488 U.S. 208-209

There is no place in the Higher Education Act of 1965, as amended ("HEA") that expressly grants the Department the authority to create a rule with retroactive effect. In this case, the HEA does not expressly grant the Department authority to create a retroactive rule.

In the 2014 rule, the Department sought to address this issue through a transition period and specifically stated that the transition period would allow institutions to benefit from "any immediate reductions in cost they make," to allow "institutions to make improvements to their programs in order to become passing. Institutions that lower tuition and fees sufficiently at the outset of the transition period could move failing programs into the zone in order to avoid ineligibility."[5] The 2023 NPRM does not provide for a similar transition.

We object to the NPRM on the grounds that it is impermissibly retroactive for these reasons. We further note that the Department's proposed timeline fails to reflect common sense policy as institutions are not provided the opportunity to improve. Fundamental fairness demands that the rule provide a credible opportunity for improvement and use D/E rates and earnings premiums calculated using data from years subsequent to the effective date.

Accordingly, we request that the Department revise the proposed regulations to create an effective data that would apply to academic years beginning on or after July 1, 2025. Alternatively, the Department could reintroduce a transition period.

II. Financial Value Transparency and Gainful Employment

The Department proposes to establish subparts Q and S of part 668 to "address concerns about the rising cost of postsecondary education and training and increased student borrowing by establishing an accountability and transparency framework to encourage eligible postsecondary programs to produce acceptable debt and earnings outcomes, apprise current and prospective students of those outcomes, and provide better information about program price."[6]

In subpart Q, the Department would establish a financial value transparency framework. The framework would measure the earnings premium that typical program graduates experience relative to the earnings of typical high school graduates, as well as the debt service burden for typical graduates. It also establishes performance benchmarks for each measure, denoting a threshold level of performance below which the program may have adverse financial consequences to students.

This information would be made available via a website maintained by the Department, and in some cases students and prospective students would be required to acknowledge viewing these disclosures before receiving Title IV, HEA funds to attend programs with poor outcomes. Further,

[5] 79 Fed. Reg. 16,444
[6] 88 FR 32474

the website would provide the public, taxpayers, and the government with relevant information to better safeguard the Federal investment in these programs.

In subpart S, the Department would establish an accountability framework for career training programs (also referred to as gainful employment, or GE, programs) that uses the same earnings premium and debt-burden measures to determine whether a GE program remains eligible for Title IV, HEA program funds. The GE eligibility criteria tie program eligibility to whether GE programs satisfy the benchmarks. GE programs that fail the same measure in any two out of three consecutive years for which the measure is calculated would lose eligibility for participation in Title IV, HEA programs.

A. The Department Lacks Congressional Authority to Regulate GE

The NPRM fails to address the question regarding the Department's authority to promulgate these proposed rules in light of the Supreme Court's ruling in *West Virginia v. EPA*.[7] In that case, the Court addressed the "major questions" doctrine and found that, given both the separation of powers principles and a practical understanding of legislative intent, an agency must point to "clear congressional authorization" for the authority it claims.[8]

In applying the facts of the *West Virginia* case to the 2023 NPRM, it is clear that the proposed rules are a "major question" that fall under the major questions doctrine. The standard articulated by the Court is that the doctrine is relevant when agencies assume authority to resolve a matter of great "political significance" or are attempting to regulate "a significant portion of the American economy," requiring "billions of dollars in spending."[9] In this instance, the questions at hand are of both political and economic significance. For that reason, the Department must point to "clear congressional authorization" for the rule.

For close to fifty years, Congress has required by statute that certain postsecondary educational programs must "prepare students for gainful employment" in a recognized occupation or profession to be eligible to participate in Title IV financial aid programs. Until the 2010 rulemaking, however, that phrase was never considered ambiguous or understood to mean that a program could only remain eligible for Title IV funding if its recent graduates who received Title IV aid attained a particular level of earnings relative to the amount of debt that they incurred to attend the program and met a certain minimum earnings threshold. The statutory "gainful employment" provision was never intended to authorize a highly complex regulation that applies to only some institutions and establishes a bright line standard for institutional outcomes based on data that cannot be collected, known or predicted in advance.

The entire GE regulatory action rests on the single phrase "prepare students for gainful employment." In the NPRM, the Department points to sections 101 and 102 of the HEA as the primary justification for GE. This is very similar to what the Court described in *West Virginia* as a "wafer thin reed" upon which to base USDE's claim of expansive powers. Consistent with the

[7] *West Virginia v. EPA*, 597 U.S. ___ (2022)
[8] *West Virginia* at pg. 4, quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)
[9] See Justice Gorsuch, concurring opinion

Supreme Court's holding in *West Virginia*, we ask that the Department rescind the NPRM and reconsider the promulgation of any new regulations with respect to these matters until such time as Congress has acted and provided clear authority for the Department to act.

B. The 2023 NPRM Does Not Satisfy the Statutory Requirements for a Permissible Rule Change

The Administrative Procedure Act, 5 USC §551 *et seq.* ("APA") requires that an agency must give adequate reasons for its decisions[10] and permits the setting aside of agency action that is "arbitrary" and "capricious" under the statute.[11] The Supreme Court has held that an agency that seeks to enact a regulatory change must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[12]

In *FCC v. Fox Television Stations, Inc.*, the Supreme Court stated that, in instances that involve the rescission of a prior regulation, "a reasonable analysis for the change" is required.[13] The *FCC* court explained that the requirement is that an agency provide a "reasoned explanation" for its action and show that the new policy is permissible under the statute, good reasons for it exist, and that the agency believes it to be better.[14]

In *FCC*, the court found that it is not that further justification is demanded by the mere fact of policy change, "but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[15] Similarly, in *Encino Motorcars*, the Supreme Court did not apply agency deference to a Department of Labor regulation as the agency "said almost nothing" when explaining the "good reasons for the new policy."[16] The agency stated that its "interpretation [was] reasonable" and "sets forth the appropriate approach."[17] However, the Court found that the agency did not sufficiently justify the policy change and held that "conclusory statements do not suffice to explain its decision."[18]

In analyzing the 2019 rescission of the gainful employment rule, it is clear that the Department does not meet the APA standards for a reasoned decision making. The Department does not "examine the relevant data" nor does it rest its conclusions on "factual findings" or a "reasoned explanation." Further, the Department uses conclusory statements to explain its decision, stating:

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[10] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016)
[11] 5 USC § 706(2)(A)
[12] *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983).
[13] 129 S.Ct. 1800, 1810 (2008)
[14] *Id.*
[15] *FCC* at 1811
[16] *Encino* at 2127
[17] *Id.*
[18] *Id.*

> "The Department rescinded the 2014 Prior Rule in 2019 *based on its judgments and assessments at the time*, citing: the inconsistency of the D/E rates with the requirements of other repayment options; that the D/E rates failed to properly account for factors other than program quality that affect student earnings and other outcomes; a lack of evidence for D/E thresholds used to differentiate between ''passing,'' ''zone,'' and ''failing'' programs; that the disclosures required by the 2014 Prior Rule included some data, such as job placement rates, that were deemed unreliable; that the rule failed to provide transparency regarding debt and earnings outcomes for all programs, leaving students considering enrollment options about both non-profit and proprietary institutions without information; and relatedly, that a high percentage of GE programs did not meet the minimum cohort size threshold and were therefore not included in the debt-to- earnings calculations."[19] (emphasis added)

We note that throughout the 2019 Rescission, the Department methodically reviewed the 2014 GE Rule, and identified areas of procedural concern. The Department also articulated underlying data concerns in the 2019 Rescission, including concerns about the D/E rates and whether those rates account for factors other than program quality that affect student earnings and other outcomes. The Department also expressed concern about the high percentage of GE programs that did not meet the minimum cohort size threshold and were therefore not included in the debt-to-earnings calculations.

The 2023 NPRM fails to examine the relevant data or provide a reasoned explanation to overturn the 2019 determinations. As a result, the 2023 NPRM GE provisions are arbitrary and capricious under the APA and should be set aside.

C. The Proposed Rule Violates Due Process Because it fails to Provide Institutions the Opportunity to Examine and Challenge the Earnings Data

The proposed GE rule violates due process because it fails to provide institutions, or even the Department, the opportunity to examine or challenge the earnings data the Department uses to calculate the median annual earnings of GE program graduates.[20]

When the government's decision to deprive someone of a vested property right or liberty interest depends on evidence that is in dispute, that person is "entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it."[21] The Supreme Court has made clear that the Due Process

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[19] 88 FR 32307
[20] 88 FR 32328
[21] *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974)

Clause prohibits an agency from "us[ing] evidence in a way that forecloses an opportunity to offer a contrary presentation."[22] The GE rule, however, does just that.

At 32303, the NPRM describes the institutional reporting requirements for students who enroll in, complete, or withdraw from a GE program or eligible non-GE program.[23] The Department would use the administrative data that institutions report regarding student completers to identify which students' information should be included when calculating D/E and EP metrics. Institutions would be required to update or otherwise correct any reported data no later than 60 days after the end of an award year, in accordance with procedures established by the Department. The finalized completer lists would be used by the Department to obtain from a "Federal agency with earnings data" the median annual earnings of the students on each list. The Department would then calculate both the D/E rates and the earnings premium measure using earnings data provided by a Federal agency with earnings data. [24]

We note that in this context, the Department highlights the fact that this process will "ensure the accuracy of completers lists." The Department further notes that "providing institutions the opportunity to review and correct completer lists will promote transparency and provide helpful insight from institutions, while ultimately yielding more reliable eligibility determinations."[25] The "opportunity to review and correct" the earnings data, however, is notably absent from the process.

At 32328, the NPRM provides the list of potential sources for the Federal agency match, including the Treasury Department, including the Internal Revenue Service (IRS), the Social Security Administration (SSA), the Department of Health and Human Services (HHS), and the Census Bureau.[26] The only condition described in the rule is that the Federal agency must have earnings data sufficient to match with Title IV, HEA recipients in the program.[27] As we discuss below, in addition to a "sufficient match" the Department also requires the legal authority to access the earnings data.

We further object to the Department's removal of the appeals process. In the 2014 Prior Rule, institutions were provided the opportunity to appeal earnings data through an alternate earnings appeal. At 32335, the Department explains that they have "gained a fresh perspective on earnings appeals in light of our experience, new research, and other considerations" and "have

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[22] Id.

[23] See also §668.408 would establish institutional reporting requirements for students who enroll in, complete, or withdraw from a GE program or eligible non-GE program and to define the timeframe for institutions to report this information

[24] 88 FR 32334 "For each completer list the Department submits to the Federal agency for earnings data, the agency would return to the Department (1) the median annual earnings of the students on the list whom the Federal agency with earnings data matches to earnings data, in aggregate and not in individual form; and (2) the number, but not the identities, of students on the list that the Federal agency with earnings data could not match."

[25] 88 FR 32334

[26] 88 FR 32328

[27] Id.

concluded that it would not be appropriate to include a similar appeal process in this proposed rule."[28]

However, the alternate earnings appeal in the 2014 Prior Rule was a cornerstone for the argument that institutions were afforded due process. Absent the appeals mechanism, the Department is left naked with a rule that is knowingly based on faulty data without any available corrections or challenges. In fact, in the 2014 Prior Rule, the Department explains exactly that "[u]nder these circumstances, the regulations provide institutions sufficient opportunity to understand the evidence on which the Department determines D/E rates and a meaningful opportunity to contest and be heard on a challenge to that determination. No more is required. And, although State earnings databases may not be readily available to some institutions because of their location or the characteristics of the data collected and stored in the database, an institution has the option of conducting a survey of its students and presenting their earnings in an alternate earnings appeal."[29]

The inclusion of the "alternate earnings appeal" was a core tenet of the 2014 Prior Rule's compliance with Due Process requirements. By stripping any meaningful appeal from the review of the earnings data, the Department fails to satisfy the due process requirements.

D. The Proposed Rule Violates the FUTURE Act

The proposed rule violates the FUTURE Act. In December 2019, Congress passed the Fostering Undergraduate Talent by Unlocking Resources for Education Act ("FUTURE Act"), which amended Section 6103 of the Internal Revenue Code ("IRC") to allow the Internal Revenue Service (IRS) to disclose certain federal tax information ("FTI") to Federal Student Aid ("FSA"). The data sharing agreement is limited to activities to "improve the administration of the Free Application for Federal Student Aid ("FAFSA") form, income-driven repayment ("IDR") plans, and the total and permanent disability (TPD discharge) program."[30]

While it is not entirely clear where the Secretary will obtain income data for students, one potential source includes the IRS. If that is the case, then the collection of such data would violate the FUTURE Act amendments to the Internal Revenue Code.[31] Federal law limits the Department's access to IRS data to specific uses, not including the administration of program eligibility or as conceived in the GE Rule. Further to that point, the Department must establish a valid Memorandum of Understanding ("MOU") regarding any data sharing agreement.

Accordingly, the Department should delay the implementation of the rule until they have established a valid MOU regarding the data sharing agreement.

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[28] 88 FR 32335
[29] 79 FR 64957
[30] https://studentaid.gov/sites/default/files/future-act-fact-sheet.pdf
[31] See, 26 U.S.C. § 6103

E. The Department's Analysis is Based on Flawed Data

In reviewing the Regulatory Impact Analysis ("RIA"), the Department describes the general benefits of the proposed GE rule, populates several charts identifying the potential impact of the rule, and curates a large body of research. Despite this effort, the Department fails to actually analyze or evaluate the evidence and provide a rationale for the change from the 2019 Rescission.

Further, the data set produced by the Department, the 2022 Program Performance Data ("PPD"), is based on numerous assumptions and disclaimers that render it invalid as an assessment tool. For example, the Department notes "information contained in the 2022 PPD and used in the analysis necessarily differs from that used to evaluate programs under the proposed rule."[32] Several data scientists have reviewed the data set and have been unable to recreate or identify the source data. One must only look to the GE Data 1*- Description[33] document to realize the fallacy on which the analysis was conducted. The data variances identified by the Department include, but are not limited to the following:

- The 4-digit CIP code is used to define programs in the 2022 PPD, rather than 6-digit CIP code.
- The 2022 PPD uses 2010 CIP codes to align with the completer cohorts used in the analysis, but programs would be defined using the 2020 CIP codes.
- The total loan debt associated with each student is not capped at an amount equivalent to the program's tuition, fees, books, and supplies in the 2022 PPD, nor does debt include institutional and other private debt.
- D/E rates using earnings levels measured in calendar years 2018 and 2019 would ideally use debt levels measured for completers in 2015 and 2016. Since program level enrollment data are more accurate for completers starting in 2016, we use completers in 2016 and 2017 to measure debt. We measure median debt levels and assume completers in the 2015 and 2016 cohorts would have had total borrowing that was the same in real terms (*i.e.,* we use the CPI to adjust their borrowing levels to estimate what the earlier cohort would have borrowed in nominal terms).
- 150 percent of the Federal Poverty Guideline is used to define the ET in the 2022 PPD, rather than a national ET.
- The proposed rule would use a national ET if more than half of a program's students are out-of-state, but the 2022 PPD use an ET determined by the State an institution is located;
- Under the proposed rule, if the two-year completer cohort has too few students to publish debt and earnings outcomes, but the four-year completer cohort has a sufficient number of students, then debt and earnings outcomes would be calculated for the four-year completer cohort. This was not possible for the 2022

[32] 88 FR 32398, 32411

[33] https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/nprm-2022ppd-description.pdf

PPD, so some programs with no data in our analysis would have data to evaluate performance under the proposed rule.

The very fact that the Department utilized a data set that is wholly inaccurate as a tool for evaluating the impact of the rule renders the RIA invalid. As a result, the 2023 NPRM FVT and GE provisions are arbitrary and capricious under the APA and should be set aside.

F. The Proposed Rule Violates the Due Process Clause Because There are Fatal Flaws in the Earnings Data

Beyond the procedural concerns regarding the review of the earnings data, we have several, significant, concerns regarding the accuracy of the data itself. First, the source of the earnings data is not confirmed. In the NPRM, the Department indicated they "will determine the specific source of earnings data in the future."[34] Second, there are concerns about the relative accuracy and noted variances between the possible data sources. Third, the calculation of earning fails to account for instances in which earnings are impacted by issues related to underreporting. Fourth, the earnings data inexplicably fails to address certain graduates with nonconforming occupational outcomes and objectives. Fifth, the NPRM fails to recognize the impact of the global pandemic on earnings.

When an agency makes a decision based on a "predictive judgment" rather than concrete evidence, its decision is not insulated from judicial review.[35] If the agency does not give "sufficient consideration to factors that may be highly relevant" to its determination, its action is "arbitrary and capricious and cannot be upheld."[36] The agency cannot simply rely on its predictive judgments, but rather it must have "actual evidence" or "special knowledge based upon its experience" to support its position.[37]

Further, in accordance with the Data Quality Act ("DQA"),[38] the Department has published the Information Quality Guidelines ("Quality Standards")[39] that set internal policies and procedures for Department decision-making, including the following: "To make sound decisions, the Department intends to accept and use only information that is accurate and reliable."[40] The Quality Standards require that the Department rely on "objective" data, which the Department defines as follows:

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[34] 88 FR 32334

[35] *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821-22 (D.C. Cir. 1983).

[36] *Id.* at 822, 826 (vacating the Secretary's decision because the Secretary failed to consider adequately the relevant factors in making predictive judgments)

[37] *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1190-91 (D.C. Cir. 2004) (agency decision based on its "belie[f]" was arbitrary and capricious because it lacked sufficient supporting evidence).

[38] Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554).

[39] 67 Fed. Reg. 62043-44; see also https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf (as updated in 2019.)

[40] 67 Fed. Reg. 62043-44

> *Objectivity refers to the accuracy, reliability, and unbiased nature of information. It is achieved by using reliable information sources and appropriate techniques to prepare information products.*

According to the Quality Standards, at "minimum," objectivity requires that the content of the data be complete and include the documentation of the source of any information used. Further, objectivity requires that the Department confirm and document the reliability of the data.

For the reasons described below, the earnings data that the Department proposes to utilize is seriously flawed and gives rise to an arbitrary and capricious result.

First, the source of the earnings data is not confirmed and is therefore impermissibly vague. At 32490, the NPRM defines "*Federal agency with earnings data"* as:

> "A Federal agency with which the Department enters into an agreement to access earnings data for the D/E rates and earnings threshold measure. The agency must have individual earnings data sufficient to match with title IV, HEA recipients who completed any title IV-eligible program during the cohort period and may include agencies such as the Treasury Department (including the Internal Revenue Service), the Social Security Administration (SSA), the Department of Health and Human Services (HHS), and the Census Bureau."[41]

The Department indicates that it will determine the source of earnings data in the future, "potentially considering such factors as data availability, quality, and privacy safeguards."[42] This creates an impermissibly vague data source. As required by the Quality Standards, the content of the data must be complete and include the documentation of the source. Without confirmation of the data source, it is premature for the Department to promulgate this regulation.

Second, the possible sources of the earnings data are not consistent and could result in disparate outcomes. The Department cannot create a presumption that earnings data accurately reflects true earnings and base decisions about programs' Title IV eligibility—decisions on which the very existence of the programs are at stake—on that presumption when it knows the earnings data is inaccurate.

The Department has identified four possible Federal agencies from which they may attain a "match" for earnings information. As readily acknowledged,[43] there are often variations in the earnings data compiled by each of these agencies. The Department does nothing to address these income discrepancies, despite the fact that minor increases or decreases could be the difference in programs failing or passing the D/E metric or the EP measure. In a 2021 IRS Report, the authors concluded that when comparing "2010 annual income measures derived from the SOI and the

[41] 88 FR 32490
[42] 88 FR 32335
[43] See 88 FR 32335

CPS, … [t]he differences between the two data sources are substantial, exist across the income distribution, and are too large to be explained by nonfilers."[44]

Third, the calculation of earning fails to account for instances in which earnings are impacted by issues related to underreporting. There are continued issues in earnings data related to the underreporting or unreporting of income. While the Department has focused on certain occupations, such as cosmetology, the significant increase in gig economy workers is also a factor. The Department has suggested that this is a diminishing concern and specifically cited the "changes made in the American Rescue Plan Act lowered to $600 the reporting threshold for when a 1099–K is issued, which will result in more third-party settlement organizations issuing these forms."[45] While we agree that the change in the America Rescue Plan Act ("ARPA")[46] will likely increase the reporting of tips and other income, the Department has failed to recognize that this change will not have any impact on the initial earnings rate under the FVT or GE rules. First, the ARPA provisions were set to go in effect for the 2022 tax year. Secondly, the Department failed to mention that the IRS delayed the implementation of this provision until the 2023 tax year.[47] The first year of cohort earnings that the Department intends to measure would be the 2019 tax year.

Given the Department's acknowledgement of the underreporting and the impact of the ARPA provisions, we recommend that the Department delay the implementation period of the FVT and GE rules until such time as the IRS enacts the ARPA change.

Fourth, the Department fails to address certain graduates with nonconforming occupational outcomes and objectives. For example, students choosing part-time work are included in the earnings calculation without recognition of this choice. Similarly, the rule does not provide for students who are voluntary zero earners. There are many reasons that a person might choose to step out of the workforce or opt for part-time work. This is true even after earning a postsecondary degree.

The Department does not does not directly discuss these concerns. The only acknowledgment that graduates may seek alternative or nonconforming occupational outcomes is the conclusory statement that they "would anticipate that most graduates—especially those graduating from career training programs—are likely employed or looking for work."[48] The Department does not

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[44]Brady, Peter, and Bass, Steven. Comparing the Current Population Survey to Income Tax Data. Statistics of Income Joint Research Program. https://www.irs.gov/pub/irs-soi/21rpcomparingcpstoincometaxdata.pdf. (May 17, 2021).

[45] 88 FR 32335

[46] https://www.govinfo.gov/content/pkg/PLAW-117publ2/html/PLAW-117publ2.htm

[47] See https://www.irs.gov/newsroom/irs-announces-delay-for-implementation-of-600-reporting-threshold-for-third-party-payment-platforms-forms-1099-k "Internal Revenue Service today announced a delay in reporting thresholds for third-party settlement organizations set to take effect for the upcoming tax filing season. As a result of this delay, third-party settlement organizations will not be required to report tax year 2022 transactions on a Form 1099-K to the IRS or the payee for the lower, $600 threshold amount enacted as part of the American Rescue Plan of 2021.

[48] 88 FR 32334

further expound on this "assumption." Nor does it address the issue in the RIA. At 32428, the Department analyzes "the role of student demographics as a factor."[49] This analysis considered the role of race, gender, first generation enrollment, family income, age, dependency status as factors in program performance. Throughout the analysis, the Department did not once mention, discuss, or consider a student graduates' intended outcome or career goal. The rule, as constructed, penalizes institutions with students seeking alternative outcomes or voluntarily stepping out of the workforce.

Fifth, the Department fails to address impact of the global pandemic on earnings. In describing the methodology and process by which the Department will identify the annual median earnings, there is no mention or adjustment to address the impact of the global pandemic on earnings. In fact, the NPRM only mentions the pandemic three times.

It is well documented that the pandemic caused high rates of unemployment and impacted individual earnings. According to the Federal Reserve "[t]he pandemic led to large declines in employment, with many layoffs occurring in March 2020. Four percentage points fewer adults were working in late 2020 compared with 2019, and 14 percent of all adults were laid off over the prior year."[50] In fact, in a 2022 report, the Federal Reserve still found that "[t]wenty-three percent of prime-age adults (ages 25 to 54) were not working in October 2021, down from 26 percent in 2020, but up from 21 percent in 2019, before the pandemic."[51] The pandemic created economic turmoil at all levels. Unfortunately, the earnings metrics used in both the D/E metric and EP measure will fall squarely in the pandemic. Failure to recognize this significant anomaly in earnings would lead to exactly the type of absurd result that the Supreme Court stated "should be avoided."[52]

The use of earnings measured during the pandemic would lead to an absurd result that is arbitrary and capricious. As a result, we recommend that the Department extend the timeframe of the cohort period such that earnings are not measured during the pandemic period. Alternatively, the Department should use these years for information purposes only.

G. The Proposed Rule Violates the Due Process Clause Because There are Fatal Flaws in the Debt Calculations

The Department proposes to calculate the annual loan payment for a program by:

> "(1) Determining the median loan debt of the students who completed the program during the cohort period, based on the lesser of the loan debt incurred by each student, computed as described in § 668.403(d), or the total amount for tuition and fees

[49] 88 FR 32428

[50] https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-employment.htm (June 13, 2022.)

[51] https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-employment.htm (June 2, 2022)

[52] *McNeill* v. *United States,* 563 U.S. 816, 822 (2011) citing *United States* v. *Wilson,* 503 U.S. 329, 334 (1992) ("[A]bsurd results are to be avoided")

and books, equipment, and supplies for each student, less the amount of institutional grant or scholarship funds provided to that student; removing the highest loan debts for a number of students equal to those for whom the Federal agency with earnings data does not provide median earnings data; and calculating the median of the remaining amounts; and

(2) Amortizing the median loan debt. The length of the amortization period would depend upon the credential level of the program, using a 10-year repayment period for a program that leads to an undergraduate certificate, a post-baccalaureate certificate, an associate degree, or a graduate certificate; a 15-year repayment period for a program that leads to a bachelor's degree or a master's degree; or a 20-year repayment period for any other program."[53]

In reviewing the methodology to determine the annual loan payment, we observe that these numbers are a mere proxy for the actual loan payment. It is difficult to understand how the Department plans to hold institutions accountable for debt payments that are loosely based on fact. For example, the amortization rates are assigned to a program based on program length. This does not directly correlate to the actual amortization period for the student loan portfolio. Similarly, the amortization calculation would use an annual interest rate that is the average of the annual statutory interest rates on federal Direct Unsubsidized Loans that were in effect during a period that varies based on the credential level of the program. Again, this does not directly correlate to the actual interest rate for the student loan portfolio.

We are concerned that the loan debt and calculation to determine the annual loan payment are predicated on prescribed assumptions that are de-coupled from any actual student experience. As a result, the evidence upon which the Department relies is based on their "predictive judgment" rather than concrete evidence.

We strongly recommend that the Department revise the annual loan payment calculation to incorporate and account for actual repayment terms of the individual student, including the amortization period and interest rate.

H. The Proposed Earnings Premium Measure is Based on Faulty Data and Does Not Measure What it Purports to Measure

As described in the NPRM, the proposed rule an earnings premium ("EP") to "measure[] the extent to which the typical graduate of a program out-earns the typical individual with only a high school diploma or equivalent in the same State the program is located."[54] The measure would compare the median earnings of student completers against the "median annual earnings among respondents aged 25–34 in the American Community Survey who have a high school

[53] 88 FR 32328
[54] 88 FR 32307

diploma or GED, but no postsecondary education, and who are in the labor force when they are interviewed, indicated by working or looking for and being available to work."[55]

We object to this new metric on several grounds. First, the EP was introduced at the last minute and was only briefly discussed during the negotiated rulemaking. Second, as provided in the NPRM, the data sources may not match. It is possible that the EP measure will compare earning data from the Census Bureau for the comparison cohort and earnings from another Federal agency for the student completers. Third, Department fails to create a comparative cohort that matches completers with respect to age, gender, and race.

As noted above, the Department has not definitively identified the Federal agency that will be the source of the cohort of student completers. Student completer earnings could come from SSA, IRS, HHS, or the Census Bureau. The earnings data for the comparison cohort, however, will be drawn from the Census Bureau.

We are further concerned that the earnings data from the comparison cohort does not match the demographics of the student completers. The Department based the 25-34 year old cohort on an "average estimated age" that is derived from the following estimate:

> "Age at earnings measurement is not contained in the data, so we estimate it with age at FAFSA filing immediately before program enrollment plus typical program length (1 for certificate, 2 for Associate's programs, 4 for Bachelor's programs) plus 3 years. To the extent that students take longer to complete their programs, the average age will be even older than what is reported here. Using this approach, the mean age when earnings are likely to be measured in programs with at least 30 students is 30.34 across all undergraduate programs; the mean for undergraduate certificate students is 30.42."

The fact that this represents the "average estimated age" does not correct the fact that in many instances, this is not representative of the student completer cohort for an individual institution. We are concerned that this could lead to skewed results that once again create an inequitable comparison that is based on the Department's underlying assumption. In fact, it would not be difficult for the Department to verify the age of the student completer list reported by each school and use that as the basis for the comparative cohort.

The comparative cohort of individuals age 25 to 34 fails to account for demographic variances due to race and gender. It is well documented that there are significant income disparities that break on gender lines and race.[56] In fact, a study conducted by the American Association of

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[55] 88 FR 32414

[56] See https://www.dol.gov/agencies/ofccp/about/data/earnings/race-and-ethnicity; see also BLS Reports. Report 1102. https://www.bls.gov/opub/reports/womens-

University Women ("AAUW") found that "[w]omen working full time in the U.S. are paid 83% of what men earn."[57]

In addition to the gender pay gap, several studies show that there are racial disparities in compensation. As described in a report from the St. Louis Federal Reserve "[y]oung Black women are the most likely to have student debt, and their average loan balance is the highest at $11,000. Women are more likely than men to hold debt, and men's higher incomes allow them to pay down their debt faster than women. Black men and Black women both start out with more student debt than their white counterparts, and because of their lower earnings, they pay it down more slowly."[58] A GAO report highlighted that "[o]verall, women earned about $.82 for every dollar men earned; Hispanic or Latina women earned about $.58 and Black women earned about $.63 for every dollar White men earned."[59]

The EP measure is based on faulty data and should be restructured to provide a like comparison. The Department tracks student demographic information and could have incorporated control factors into the calculations.

I. The Required Student Warnings Violate the First Amendment

Under the Financial Value Transparency provisions, for any year the Department notifies an institution that a non-GE program has failed the D/E metric, the institution would have to ensure that students review the Department's website and acknowledge having seen the agency's determination regarding the program's financial value. In addition, an institution would not be permitted to disburse Title IV funds to a student in a non-GE program until the student provided the required acknowledgment. Under the Gainful Employment provisions, programs that fail meet the required thresholds would be required to make student warnings and secure student acknowledgments. The warning would be the only substantive content contained in those written communications, and the Department would mandate the wording of that warning in a future Federal Register publication.

The proposed rule requires an institution to provide warnings to students and prospective students "no later than 30 days after the date of the Secretary's notice under §668.406 and maintain documentation of its efforts to provide that warning." [60]

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earnings/2021/home.htm#:~:text=Women%20ages%2025%20to%2034,See%20tables%201%20and%2012.) (March 2023)

[57] The Gender Pay Gap – AAUW : Empowering Women Since 1881

[58] https://www.stlouisfed.org/en/publications/economic-equity-insights/gender-racial-disparities-student-loan-debt

[59] https://www.gao.gov/products/gao-23-106041#:~:text=Overall%2C%20women%20earned%20about%20%24.,every%20dollar%20White%20men%20earned

[60] 88 FR 32511

The student warnings impermissibly compel institutions to make non-factual statements. The First Amendment protects more than an individual's right to speak freely; it protects the "right to refrain from speaking at all."[61] The protection against compelled speech extends to people and corporations alike[62] and covers all types of lawful speech, even factual disclosures.[63]

Generally, content-based speech regulations, including those that compel speech, are subject to strict scrutiny.[64] To survive strict scrutiny, a regulation must be "narrowly tailored to promote a compelling Government interest."[65] To be narrowly tailored, the regulation must use the least restrictive means available to achieve the compelling interest.[66]

The student warnings and disclosures are compelled speech in violation of the First Amendment. The required warnings demand that an institution draft student warnings that are based on inaccurate data on both the earnings and debt side of the equation. We would suggest that the Department already has in place a narrowly tailored solution to address concerns about transparency through the College Scorecard. The data published to the College Scorecard includes average student debt and average earnings.

III. Financial Responsibility

The proposed amendments to the Financial Responsibility Regulations are not authorized by the HEA, impose new mandatory and discretionary "triggers" that are overly broad terms, lack definitional clarity and, in many instances would cause unintended consequences.

Section 498(c)(1) of the HEA (20 U.S.C. § 1099c), which the Department references as support for its amendments to the financial responsibility regulations, provides that for purposes of qualifying institutions to participate in Title IV program, "the Secretary shall determine [among other things], . . . the financial responsibility of an institution in accordance with the requirements of this section." The statute then directs, under the heading of "Financial responsibility standards," that "[t]he Secretary shall determine whether an institution has the financial responsibility required "on the basis of whether the institution is able to: (A) provide the services described in its official publications and statements; (B) provide the necessary administrative support; and (C) meet all of its financial obligations, including refunds of institutional charges and

[61] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'")
[62] *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986)
[63] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573-74 (1995) ("Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . .")
[64] *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) ("Any attempt by the government either to compel individuals to express certain views or to subsidize speech to which they object is subject to strict scrutiny." (citations omitted))
[65] *United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 813 (2000)
[66] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 581-82 (2001) (Scalia, J., concurring) (citing *Reno v. American Civil Liberties Union*, 521 U. S. 844, 874-75 (1997)

repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.[67]

The proposed financial responsibility regulations would establish additional conditions or events that will be viewed by the Department as indicators of an institution's lack of financial responsibility, and thus, according to the NPRM, enhance the Department's ability to identify events and conditions at institutions of higher education that indicate a significant risk to the financial health, including potential continued operation of the institution, and enable the Department to require financial protection when appropriate. Specifically, as stated in the NPRM, "[t]he indicators of a lack of financial responsibility proposed in this NPRM are events that put an institution at a higher risk of financial instability and sudden closure."

Under current regulations, financial responsibility is based on the following criteria: whether the school has a composite score of at least 1.5; whether the school has sufficient cash reserves to avoid a precipitous close and to make required refunds; whether the school is meeting all of its financial obligations; whether there is an absence of certain "triggering events"; and whether the school is current in its debt payments. The Department also looks for support for these assertions in the school's audited financial statements.

A. Mandatory Triggers

Under the specified "mandatory" triggers, where the institution is deemed not financially or administratively responsible, the Department would either automatically require the institution to obtain financial surety or require that the composite score be recalculated to determine if an institution would have to provide surety because it no longer passes. The proposed mandatory triggers, which are mostly new or significantly enhanced from existing mandatory triggers, are as follows:

- An institution with a composite score of less than 1.5 is required to pay a debt or incurs a liability from a settlement, arbitration proceeding or a final judgment in a judicial or administrative proceeding, and the debt or liability results in a recalculated composite score of less than 1.0.
- An institution is sued to impose an injunction, establish fines or penalties or obtain financial relief such as damages in an action brought on or after July 1, 2024, by a federal or state authority, or through a qui tam lawsuit in which the federal government has intervened and the suit has been pending for at least 120 days.
- The Department has initiated a recoupment action against the institution for claims adjudicated under the Borrower Defense to Repayment (BDR) rule, and including that potential liability in the composite score results in a recalculated composite score of less than 1.0.

[67] 20 U.S.C. § 1099c(c)(1)

- An institution that has submitted a change in ownership application and is required to pay a debt or incurs liabilities (from a settlement, arbitration proceeding, final judgment in a judicial proceeding or a determination arising from an administrative proceeding), at any point through the end of the second full fiscal year after the change in ownership has occurred, would be required to post financial protection in the amount specified by the Department if so directed.
- For a proprietary institution whose composite score is less than 1.5, or for any proprietary institution through the end of the first full fiscal year following a change in ownership, there is a withdrawal of owner's equity, unless the withdrawal is a transfer to an affiliated entity within the group on whose basis the institution's composite score was calculated, or the withdrawal is the equivalent of wages in a sole proprietorship or general partnership, or a required dividend or return of capital and, as a result, the institution's recalculated composite score is less than 1.0.
- The institution received at least 50 percent of its Title IV funding in its most recently completed fiscal year from GE programs that are failing the GE rule.
- The institution is required to submit a teach-out plan or agreement by a state or federal agency, an accrediting agency or other oversight body.
- The institution is cited by a state licensing or authorizing agency for failing to meet that entity's requirements and that entity provides notice that it will withdraw or terminate the institution's licensure or authorization if the institution does not come into compliance with the requirement (currently a discretionary trigger).
- At least 50 percent of the institution is owned directly or indirectly by an entity whose securities are listed on a domestic or foreign exchange and is subject to one or more of the actions or events that are specified in the rule initiated by the U.S. Securities and Exchange Commission, or by the exchange where the entity's securities are listed.
- A proprietary institution, for its most recently completed fiscal year, fails the 90/10 rule.
- The institution's two most recent official cohort default rates are 30 percent or greater, unless the institution has filed a challenge, request for adjustment, or appeal and that action has reduced the rate to below 30 percent or the action remains pending (currently a discretionary trigger).
- The institution has lost eligibility to participate in another federal education assistance program due to an administrative action against the institution.
- The institution's financial statements reflect a contribution in the last quarter of the fiscal year and then the institution made a distribution during the first or second quarter of the next fiscal year and that action results in a recalculated composite score of less than 1.0.
- The institution is subject to a default or other adverse condition under a line of credit, loan agreement, security agreement or other financing arrangement due to an action by the Department.

- The institution makes a declaration of financial exigency to a federal, state, tribal or foreign governmental agency or its accrediting agency.
- The institution, or an owner or affiliate of the institution that has the power, by contract or ownership interest, to direct or cause the direction of the management of policies of the institution, files for a state or federal receivership, or an equivalent proceeding under foreign law, or has entered against it an order appointing a receiver or appointing a person of similar status under foreign law.

For "mandatory" triggering events, the institution is automatically required to post a Letter of Credit ("LOC") of at least 10% of the prior year's Title IV aid *for each* "triggering event" that occurred. The LOCs imposed are cumulative; each event would trigger an additional LOC consideration. The proposed rule does not provide a process by which an institution could challenge the application of one, or multiple, mandatory or discretionary triggers, such as by proving the overall financial responsibility and stability of its operations.

We are concerned that many of the new "triggering events," are based on events, including the actions of third parties, that do not meet the statutory direction that Congress provided to the Secretary and include events that have no bearing on financial responsibility. Further, some of the mandatory triggers, such as those regarding the GE, Cohort Default Rate, and 90/10 rules, do not necessarily impact an institution's financial responsibility and are already considered in determining/limiting an institution's Title IV eligibility under other Title IV regulations.

The Department proposes to add § 668.171(c)(2)(x) to establish a new mandatory trigger for institutions whose financial statements required to be submitted under § 668.23 reflect a contribution in the last quarter of the fiscal year, where the institution then made a distribution during the first two quarters of the next fiscal year and the offset of such distribution against the contribution results in a recalculated composite score of less than 1.0. As support for this change, the Department states that it has seen "examples" of institutions who seek to manipulate their composite score by making a contribution late in the fiscal year so that the composite score passes, then making a distribution early the following fiscal year.

There are a number of legitimate business reasons, beyond "manipulation" of a composite score, that may cause an institution to make a distribution that falls within this proposed mandatory trigger. The Internal Revenue Code, for example, provides for a number of pass-through businesses, such as sole proprietorships, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, and S corporations, that are not subject to corporate income tax but instead report their income on the individual income tax returns of the owners. In addition, the fact that individuals or entities affiliated with an institution have the wherewithal to make a substantial equity contribution into the institution, whether or not it is later withdrawn, is itself a demonstration of the financial resources available to the institution by upper level owners and affiliates. And the audits of these upper level owners and affiliates are also subject to review by the Department.

The Department in the NPRM itself is careful to not describe the data supporting the trigger with certainty, but rather to qualify its statements in recognition of the existence of legitimate business reasons for such distributions that may not impact the financial responsibility of the institution:

- "Institutions engaging in this pattern of behavior *generally do so* to boost the apparent financial strength of the annual audited financial statements to avoid a failing composite score."

- "This removes capital from the school and means that it is operating in a situation that *may not* demonstrate financial responsibility."

- "Obtaining financial protection from institutions in this status is necessary to protect students and taxpayers from the negative consequences *that can appear* at institutions such as these."

- "We propose to make this trigger mandatory due to the negative financial consequences *that can follow* instances when these actions occur."[68] (emphasis added).

Because the Department has not demonstrated that in every, or even most, situations a contribution in the last quarter of the fiscal year, followed by a distribution during the first two quarters of the next fiscal year resulting in a composite score below 1.0 is either manipulative, or results in lack of financial responsibly, we request that the proposed trigger be a discretionary, not mandatory, trigger.

Under proposed § 668.176(b), an institution undergoing a change in ownership would be required, as a part of their materially complete application, to submit audited financial statements of the institution's new owner's two most recently completed fiscal years prior to the change in ownership, or financial protection in the form of a letter of credit or cash escrow equal to 25% of the prior year's Title IV aid (10% if only one such audit is provided). Significantly, as provided in the proposed rule, "these statements must be prepared and audited at the highest level of unfractured ownership (meaning 100 percent direct or indirect ownership of the institution) or at the level required by the Department." It is unclear whether these requirements would also apply to existing ownership structures and whether they will be applied in situations such as upon recertification.

The Department also proposes to amend § 668.14(a)(3) to require an authorized representative of any entity with direct or indirect ownership of a private institution to sign a PPA. The Department's Electronic Announcement ("EA") GENERAL 22-16 updated PPA signature requirements for entities exercising substantial control over non-public institutions of higher education, utilizing a rebuttable presumption with respect to such signatures.

[68] 88 FR 32360-32361

Other than conclusory statements such as that the proposal would "protect taxpayers and students,"[69] or "would make outside investors more cautious in engaging with riskier institutions,"[70] the NPRM provides no analysis, specific examples, or other data to support the imposition of these new mandatory requirements on an institution's upper level ownership. This is significant, because the enabling statute provides that financial guarantees from owners may be required by the Department only "to the extent necessary to protect the financial interest of the United States."[71] This requires a specific finding, which the Department has not done, to support the Department's proposed far reaching mandates.

There are a multitude of structures by which Title IV eligible institutions are owned or controlled, both propriety and nonprofit institutions, too numerous to adequately describe. And each such structure, and concomitant institutional financial situation, must be analyzed to determine what additional protections, if any, are appropriate from upper level ownership. Here, no demonstration has been made by the Department to support a wide sweeping rule that requires a financial guarantee from all owners in all situations, without the need for any further finding or determination from the Department with respect to the specific facts presented.

The Department's proposed regulations would also have several unintended consequences.

First, rather than protect taxpayers and students, a mandatory application of these requirements in every scenario could actually harm them. It would certainly discourage, or even prevent, entities or other institutions looking to assist a failing institution from doing so by pinning the historic liabilities of the troubled school on any potential "white knight" and its upper level ownership. Second, an inability to obtain required signatures or audited financial statements, or post required letters of credit, may also actually cause financial distress or a precipitous close, rather than prevent one. This is troubling if it would occur where the required factual underpinnings and determination by the Department for the requirements were never established.

For these reasons, we propose that the signature and financial audit requirements for upper ownership levels be discretionary, and not mandatory.

Finally, it is noted that a number of institutions have one or more upper level foreign owners. The Department has been requiring that financial statements from foreign owners be prepared in accordance with US GAAP and GAGAS, requiring costly conversion of existing financial statements from their jurisdiction's standards. This is true even when the financial statements are prepared in accordance with International Financial Reporting Standards ("IFRS") and are audited in accordance with the European Union ("EU") Audit Regulations. IFRS is currently used in more than 160 jurisdictions, including the European Union, Canada, India, Russia, South Korea, South Africa, and Chile, making it the most-used accounting standards globally. And since 2018,

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[69] 88 FR 32379

[70] 88 FR 32451

[71] 20 U.S.C. § 1099c(e)(1)(B) ("the Secretary may, to the extend necessary to protect the financial interests of the United States, require ... the assumption of personal liability, by one or more individuals who exercise substantial control over such institution....")

the SEC has accepted from foreign private issuers audited financial statements prepared in accordance with IFRS without reconciliation to U.S. GAAP. [72] We were unable to determine authority for the Department's requiring upper level owners financial statements be prepared in accordance with GAAP/GAGAS, and request that the Department provide in the final rule that IFRS/EU standards are permitted with respect to financials statements of upper level foreign owners.

B. Discretionary Triggers

In addition to the mandatory triggers, the proposed rule provides for a number of discretionary triggers if "the Department determines that a discretionary triggering event is likely to have a significant adverse impact on the financial condition of the institution." Mentioned in the proposed rule as examples, but not exclusive, are: pending borrower defense claims subject to a group process initiated by the Department; accrediting agency and government agency actions that might put accreditation at risk; defaults, delinquencies, creditor events, and judgments of various types; "significant fluctuations" (not otherwise defined) in Direct Loan or Pell Grant volume; "high annual dropout rates"(not otherwise defined); the institution being "cited" by a State licensing or authorizing agency for failing *any* state requirement; loss of eligibility to participate in another federal educational assistance program, regardless of dollar amount, due to an administrative action against the school; a public filing by a publicly enlisted entity that owns the institution stating that it is under investigation for possible violations of State, Federal or foreign law; or the institution closes more than 50% of its locations or closes locations or discontinues programs that effect more than 25% of its students. [73]

These discretionary triggers use ill-defined terms that do not necessarily give rise to issues with significant financial impact. For example, the California Bureau of Private Postsecondary Education has cited and fined institutions for not signing an enrollment agreement, not properly documenting faculty credentials, and using the wrong font size on student disclosures. It also is not uncommon for schools to be cited for minor infractions during their annual compliance audits. In each of these instances, the financial responsibility of the institution is not at risk and the magnitude of the penalty – 10% LOC – far exceeds the materiality of the underlying event. Examples of other instances of immaterial or non-financial circumstances or events that could arise under each of the discretionary triggers are too numerous to mention.

For the foregoing reasons, we respectfully request that USDE rescind the proposal and maintain the current regulations. Alternatively, we request that the proposed rules be amended to require that the Department, with input from the institution and due process that is spelled out in the final rule, review and make a factual determination as to whether or not the claims and other actions asserted to constitute a discretionary trigger are valid and would have the requisite

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[72] *See Final Rule: Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to US GAAP* (Dec. 21, 2007), https://www.sec.gov/rules/final/2007/33-8879.pdf

[73] As noted in Table 4.4 of the NPRM, the Department lacks data to assess the impact of a number of these provisions

financial impact (i.e., "put an institution at a higher risk of financial instability and sudden closure").

Finally, the Department requests comments on whether an investigation described in § 668.171(f)(1)(iii) warrants inclusion as a mandatory or discretionary trigger. Our response is that it does not. A trigger constituting a mere investigation would place the ability to determine financial responsibility of an institution in the hands of a third party, may be meritless, and may not in and of itself indicate that the financial responsibility of the institution is at risk.

IV. Administrative Capability

On 88 FR 32304, the NPRM proposes to amend and augment the administrative capability requirements by broadening the areas of review using vague and ill-defined criteria. Further the areas the Department seeks to include are already addressed by other regulations or accreditation standards. Given the significant consequences of an administrative capability finding, including penalties, fines, placement on HCM2 or even the loss of participation, these proposed changes have a multiplying effect although the Department provides no support or evidence that these areas are in fact of concern.

The proposed rule would revise and expand the requirements for institutions to establish initial and ongoing administrative capability set forth at 34 C.F.R. § 668.16. The changes provide the Department with the unequivocal authority to make an administrative capability finding based on a broader set of issues than it's current authority.

The first area of concern is the amendment to § 668.16(h) to require institutions to provide "adequate" financial aid counseling and financial aid communications to advise students and families to accept the most beneficial types of financial assistance available to enrolled students that includes clear information about the cost of attendance, sources and amounts of each type of aid separated by the type of aid, the net price, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts. The updated requirements align with the current College Financing Plan but do not explicitly mandate the use of that specific format.

Institutions participating in Title IV programs already provide student disclosures relating to cost of attendance and net price, available financial assistance, and award deadlines, among others. The concern with the expanded requirements is that they are anchored to a new and poorly defined standard of "adequacy." Subjecting institutions to the consequences of an administrative capability finding using such a vague definition is unreasonable and unsupported by any evidence that the current mandated disclosures and information provided to students is deficient.

Applying the same broad term, amendment to § 668.16(q) requires that institutions provide "adequate" career services to eligible students who receive Title IV program assistance. Complying with this require reporting of career services staff and analysis of the sufficiency of that staff relative to enrollment levels, the career services promised to the student and whether the institution has relationships with employers or recruiters who regularly hire graduates.

This was strongly contested during negotiated rulemaking, as the offering of meaningful and effective career services is already evaluated by the accrediting agencies which require that institutions provide career services, calculate and disclose placement and employment rates, and satisfy related thresholds. Career schools, in particular, are subject to those rigorous standards and the requirement to publish such data to students. The Department does not possess the expertise to evaluate the "adequacy" of career services and has provided no metrics under which it will determine "adequacy."

In assessing whether an institution has "adequate" career services, the proposed revision, Department would consider: (i) the share of students enrolled in GE programs; (ii) the number of career services staff; (iii) the career services promised to students; and (iv) the presence of institutional partnerships with recruiters and employers who regularly hire graduates. We respectfully observe that the standards articulated by the Department for determining the adequacy of such services are vague and do not represent a clear standard against which institutions could measure their likely compliance. The Department itself explicitly acknowledges that what may be "adequate at one school may be completely insufficient at another." As applied to the proposal to evaluate career services the Department fails to set any thresholds or provide guidance on how varying institutional models of service will be evaluated.

The Department has a statutory obligation to determine whether institutions have the capability to administer the Title IV programs and there is not a sufficient connection between the administration of the Title IV programs and the "adequacy" of an institution's career services to support the assertion that the latter is an element of the former. Absent the substantiation of this connection and the provision of unambiguous definitions for determining "adequacy," we believe the Department should remove this text from the amendment.

Additionally, we believe the Department should eliminate its proposal to tie administrative capability to the number of passing GE programs (or enrollments in GE programs). As the NPRM makes clear, the D/E rates and EP measure are designed to assess financial value of a program, not the administrative capability of the institution offering it. There is no clear basis to conclude that high D/E rates or low EP measure would indicate an inability to successfully administer the Title IV programs.

Another heavily debated issue in negotiated rulemaking was the establishment of § 668.16(u) to require that an institution not engage in misrepresentations or aggressive and deceptive recruitment. Similar to the other amendments in 34 C.F.R. § 668.16 outlined above, the standard includes vague language but more crucially, this requirement necessitates that an institution evaluate each student's individual knowledge level regarding higher education and financial aid without providing any definitions of what threshold establishes competence. This leads the institution to act paternally and supplant its judgement for that of the student in determining when a prospective student is making an informed decision. This is a slippery slope which can lead to the disempowerment of students to control their educational decisions.

Further, this requirement begs the question of whether the institution is responsible for providing education in these subjects and if they do so, is that education and information considered to be unreasonable influence. Significant work is needed to adequately address these concepts, time that was not afforded in the hurried negotiated rulemaking session.

We urge the Department to reconsider the terms used in this amendment and reduce the ambiguity that is created with the use of words such as “unreasonable” when provided without definition. While it can be agreed that no prospective student should be harassed or threatened into enrollment, this amendment goes well beyond establishing a level of civility and pushes into the unique and personal judgement of adults in evaluating information and making decisions for themselves.

The Department’s justification for the 2023 NPRM does not satisfy the statutory requirements for a permissible rule change. As noted repeatedly, there is no substantial evidence provided to support the need for the changes proposed and there is a lack of rational connection between the compliance requirement identified and an institution’s ability to provide the education offered and effectively administer the financial aid program.

V. Certification Procedures

The Department proposes to amend the Certification Procedures to create a more rigorous process for certifying institutions for initial and ongoing participation in the Title IV, HEA programs and better protect students and taxpayers through the Program Participation Agreement (“PPA”). For the reasons set forth below, we object to several of the amended provisions and request that USDE rescind the proposal and maintain the current regulations.

The Department seeks to amend the certification procedures at § 668.13 and the PPA provisions § 668.14 to improve oversight of institutions that may evidence administrative or financial issues that either require the Department to conduct additional monitoring or seek additional financial protection, or that may disqualify participation in Title IV programs. Proposed changes include the following:

At 32314, the Department proposes to “eliminate the provision that automatically grants an institution renewal of certification after 12 months without a decision from the Department.”[74] According to the Department, “[e]liminating this provision would allow us to take additional time to investigate institutions thoroughly prior to deciding whether to grant or deny a certification application and ensure institutions are approved only when we have determined that they are in compliance with Federal rules.”[75] At the time this provision was promulgated the Department agreed that “more must be done at the administrative level to provide more timely responses.”[76] And further noted that the 12-month limitation is “in the best interest of students and taxpayers for the Department to timely identify deficiencies and take appropriate action.”[77] The Department now seeks to rescind that provision on the basis that they “have since determined

[74] 88 FR 32314
[75] 88 FR 32314
[76] 85 FR 54776
[77] 85 FR 54776

that the time constraint established in the final rule for Distance Education and Innovation negatively impacted [their] ability to protect program integrity."

We object to this proposed change on a number of grounds. First, we have observed several instances in which the Department has failed to timely recertify institutions, in some case institutions have been waiting for nearly two years since applying for recertification. Second, this delay creates unwarranted uncertainty for the institution and the students.

The Department proposes new, specific time periods for provisional certification, providing a 2-year period for provisional certification due to "substantial liabilities owed or potentially owed" for borrower defense to repayment, false certification, or consumer protection law claims, and a 3-year period for provisional certification due to "change in ownership, recertification, reinstatement, automatic re-certification, or a failure"[78] to comply with certain programmatic accreditation, licensure, or State authorization laws.

The Department also proposes to establish supplementary performance measures the Secretary may consider in determining whether to certify or condition the participation of an institution. These measures include withdrawal rates, D/E rates, earnings premium measures, applicable program licensure pass rates, and the amounts "spent on instruction and instructional activities, academic support, and support services, and the amounts spent on recruiting activities, advertising, and other pre-enrollment expenditures…"[79]

We have two primary concerns with these measures. First, many of the terms are not sufficiently defined. For example, instructional spend varies significantly across institutions. In order for these terms to serve as valid performance metrics, the Department must provide further clarity. Second, we believe the Department currently has sufficient oversight authority regarding certification and these provisions simply create unnecessary administrative burdens.

The Department also proposes a number of amendments to the PPA. Under the proposed changes, the PPA of a proprietary or private nonprofit institution would have to be signed by an authorized representative of an entity with direct or indirect ownership of the institution if that entity has the power to exercise control over the institution. The Department offers examples of when a parent entity would be deemed to have such power, which includes if the parent entity:

> (A) If the entity has at least 50 percent control over the institution through direct or indirect ownership, by voting rights, by its right to appoint board members to the institution or any other entity, whether by itself or in combination with other entities or natural persons with which it is affiliated or related, or pursuant to a proxy or voting or similar agreement.
> (B) If the entity has the power to block significant actions.
> (C) If the entity is the 100 percent direct or indirect interest holder of the institution.

[78] 88 FR 32491
[79] 34 CFR § 668.13(e)

(D) If the entity provides or will provide the financial statements to meet any of the requirements of 34 CFR 600.20(g) or (h), or subpart L of this part.[80]

Though the regulatory language does not specifically state that the purpose of this signature would be to require such parent entities to assume responsibility for institutional liabilities, the agency makes this plain in the commentary, noting "[t]o protect taxpayers and students, the Department believes that entities that exert control over institutions should assume responsibility for institutional liabilities. Requiring owner entities to sign the PPA and assume such liability provides protection in the event that an institution fails to pay its liabilities, which has been a recurring problem when institutions close, particularly those that close precipitously."[81]

VI. Ability to Benefit

The proposed ATB rule changes reflect the consensus language agreed upon in the rulemaking negotiations. As set forth below, we seek clarification on a single issue.

At 32316 of the NPRM, the Department describes the proposed changes: (1) add a definition of ''eligible career pathway program''; (2) make technical updates to student eligibility; (3) amend the State process to allow for time to collect outcomes data while establishing new safeguards against inadequate State processes; (4) establish documentation requirements for institutions that wish to begin or maintain Title IV, HEA eligible career pathway programs; and (5) establish a verification process for career pathway programs to ensure regulatory compliance.

Because the proposal does not speak specifically to whether current eligible career pathway programs may continue to be offered pending Department review, we seek clarification that current programs may continue to be offered during the period prior to the Department establishing a formal review process.

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[80] 88 FR 32492

[81] 88 FR 32379

VII. Conclusion

In closing, we thank the Department for its review and consideration of our comment. While we support transparency and accountability, CAPPS requests that the regulatory framework is compliant with the underlying statutes and does not exceed the authorities provided by Congress in the HEA.

Thank you for your consideration of these comments.

Dated: June 20, 2023

Respectfully submitted,

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