June 20, 2023

SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
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The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Comment on the Department's Notice of Proposed Rulemaking
Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB)
Docket ID: ED–2023–OPE–0089
RINs: 1840–AD51, 1840–AD57, 1840–AD64, 1840–AD65, and 1840–AD80
Document Number: 2023–09647

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education ("Department") appointees who are experts in education law and policy, in particular the areas covered by the Department's proposed regulations.

DFI makes this public submission in response to the Notice of Proposed Rulemaking ("2023 NPRM") for the package of proposed rule changes that includes Financial Value Transparency ("FVT") and Gainful Employment ("GE"), Financial Responsibility, Administrative Capability, Certification Procedures, and Ability to Benefit ("ATB").

As a general framework for our comments, DFI addresses each of the above proposals individually. DFI supports the concept of the FVT proposal but, as detailed herein, has concerns about the underlying debt to earnings ("D/E") metric and earnings premium ("EP") measure. DFI makes several recommendations to improve the process and the regulation. DFI has significant concerns about the Department's legal authority to issue its proposed GE regulation and accordingly requests the Department's rescission of the subpart S provisions from the final rule.

As discussed throughout, DFI has significant concerns about the Financial Responsibility, Administrative Capability, and Certification Procedures as they relate to overly broad and vague conditions and restrictions. With regard to ATB, DFI seeks clarification of the application of the change to existing programs.

I. The Public Comment Period Is Insufficient and Inhibits the Public's Ability to Meaningfully Participate in the Rulemaking Process

At the outset, DFI requests an extension of the public comment period. A public comment period of only 30 days is insufficient for the public and interested parties to appropriately, sufficiently, and meaningfully participate in the rulemaking process. As a result, DFI requests an additional 30 days to provide a full opportunity to respond to the NPRM. Such an extension is consistent with the Department's past practice on the NPRM's topics and with authorities to which the NPRM cites.

Further, the list of topics included in the 2023 NPRM—FVT and GE, Financial Responsibility, Administrative Capability, Certification Procedures, and ATB—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 45 days, and the 2014 GE NPRM[2] was subject to a comment period of 60 days.

In the 2023 NPRM, the Department relies upon authority that suggests a longer time period for public comments. For example, in the "Invitation to Comment" section, the NPRM cites Executive Orders ("EOs") 12866 and 13563. The Department invites the public to assist the Department "in complying with the specific requirements" associated with those two EOs.

EO 13563, "Improving Regulation and Regulatory Review," states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[3]

EO 12866 includes similar language:

[1] 75 Fed. Reg. 43,615.
[2] 79 Fed. Reg. 16,426.
[3] *See* EO 13563, § 2(b).

> [E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.[4]

In considering the above, it is appropriate for the Department to allow a reasonable extension of the comment period—an additional 30 days, for a total of 60 days—for interested parties and members of the public to draft, review, and submit comments on the 2023 NPRM.

Directed Questions Concerning the NPRM's Public Comment Period

DFI asks that the Department answer fully and completely the following questions regarding the 2023 NPRM's public comment period.

> Directed Question No. 1: As described above, prior GE rules of a substantive nature were provided comment periods of 45 and 60 days. What justification has the Department presented to support a 30-day comment period?

> Directed Question No. 2: There are several complex calculations and integrated data sets provided by the Department that institutions and stakeholders must evaluate and analyze to provide meaningful comments. How can the Department reconcile the fact that it has not allowed proper time for this review with its legal obligation to permit the public a meaningful opportunity to comment on the proposed rule?

II. Financial Value Transparency

At page 32,301 of the 2023 NPRM, the Department introduces the FVT regulation as a mechanism 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."

The proposed FVT regulations would establish a framework that would increase the quality and availability of information provided directly to students about the costs, sources of financial aid, and outcomes of students enrolled in all eligible programs. Specifically, the Department proposes to amend subpart Q by requiring FVT 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. Accordingly, the Department proposes to calculate and disclose D/E and EP rates for all programs under proposed subpart Q.

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[4] *See* EO 12866, § 6(a)(1).

The regulations also would require that current and prospective students be provided relevant disclosures and acknowledge when an educational program is associated with a high debt burden. 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 funds provided under Title IV of the Higher Education Act of 1965, as amended ("HEA"), to attend programs with poor outcomes.

The Department cites to Section 431 of the General Education Provisions Act ("GEPA") for authority to establish rules to require institutions to make data available about the performance of their programs and about students enrolled in those programs. As described in the 2023 NPRM, that section "directs the Secretary to collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs" and "lends additional support for the proposed reporting and disclosure requirements."[5] We agree with the Department regarding the authority to pursue FVT through the collection and dissemination of information about higher education programs. Moreover, the D.C. Circuit Court recognized the Department's statutory authority to require institutions to disclose certain information.[6] This authority, however, has its limitations and requires that the Department utilize only data that is legally sufficient.

We also agree that data transparency is an effective means of institutional accountability and appreciate the goal the Department seeks to achieve through the FVT regulation. We highlight the Department's recognition that "providing information on the financial value of college options can have meaningful impacts on college choices."[7]

Notwithstanding our strong support for the regulatory concept, we do have several concerns, as identified below, about the underlying D/E and EP measures. Our concerns are generally targeted to questions about the validity of the underlying data and significant risk for error, the use of flawed data and assumptions to generate the qualitative metrics, and the lack of due process for institutions to review or appeal the results. Therefore, we request, as discussed below, that the Department amend several aspects of the D/E and EP metrics.

Directed Questions Concerning the Department's Financial Value Transparency Proposals

DFI asks that the Department answer fully and completely the following question regarding the 2023 NPRM's FVT proposals.

[5] 20 U.S.C. § 1231a(2)–(3).
[6] *See Ass'n of Priv. Sector Colleges & Universities v. Duncan,* 110 F. Supp. 3d 176, 198–200 (D.D.C. 2015), *aff'd,* 640 F. App'x 5, 6 (D.C. Cir. 2016) (per curiam) (unpublished).
[7] 88 Fed. Reg. 32,323.

Directed Question: In the context of the FVT, the Department has asserted that the posting of program data "can have meaningful impacts on college choices." Why is this rationale insufficient in the context of GE?

III. Gainful Employment

Beginning on page 32,300 of the 2023 NPRM, the Department states that the proposed regulations seek to "promote transparency, competence, stability, and effective outcomes for students in the provision of postsecondary education." In positing that goal, the Department cites to the HEA for broad authority and specifically Sections 102(b) and (c) and Section 101(b)(1) for the proposed GE accountability framework in subpart S.[8] We contend, however, that the GE regulations are unconstitutional, contrary to Title IV of the HEA, arbitrary and capricious, and otherwise in violation of the Administrative Procedure Act ("APA").

A. The 2023 NPRM Is Impermissibly Retroactive

Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority.[9] 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."[10] In this case, the HEA does not expressly grant the Department authority to create a retroactive rule. As discussed below, Congress never authorized the GE rule to begin with and therefore never "'expressly prescribed'" the power to promulgate a retroactive FVT or GE rule.

Under the Master Calendar provision of the HEA,[11] the Department must finalize new rules by November 1 of a given year for them to go into effect by July 1 of the next calendar year.[12] As drafted, the proposed changes to the FVT and GE rule would go into effect on July 1, 2025. The Department, however, has proposed that the new FVT and GE metrics would be measured on the basis of completer cohorts, student debt, and earnings data that predate the effective date of the rule.

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[8] 88 Fed. Reg. 32,307.
[9] *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.").
[10] 488 U.S. 204, 208.
[11] *See* 20 U.S.C. § 1089(c) (Sec. 482(c) of the HEA) (providing that regulations implementing the student aid programs under Title IV of the HEA that are published on or before November 1 of a given year do not take effect until July 1 of the next year).
[12] *See* 20 U.S.C. § 1089(c).

We argue that this impermissibly applies the regulation retroactively in violation of due process requirements. Fundamental fairness would demand that the rule provide a credible opportunity for improvement and use D/E rates and EPs calculated using data from years subsequent to the effective date. As such, the rule should be amended to include a transition period. We note that in the 2014 rule regarding GE ("2014 Prior Rule"), the Department proposed a transition period to provide institutions with "an opportunity to pass the D/E rates measure by taking immediate steps to improve otherwise failing GE programs by reducing the loan debt of currently enrolled students."[13] The Department further suggested 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."[14]

Congress did not expressly grant the Department authority to promulgate a retroactive rule. As a result, the Department should revise the FVT and GE regulations such that the new regulations apply to academic years beginning on or after July 1, 2025.

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

With regard to the relevant statutory framework, one of the most basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.[15] The APA permits the setting aside of agency action that is "arbitrary" and "capricious" under the statute.[16] The APA does not make any distinction between initial agency action and subsequent agency action undoing or revising the previous action.

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."[17] But where an agency has failed to provide even a minimal level of analysis, its actions will be held arbitrary and capricious and so cannot carry the force of law.[18]

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[13] 79 Fed. Reg. 16,428.
[14] 79 Fed. Reg. 16,444.
[15] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[16] 5 USC § 706(2)(A).
[17] *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983).
[18] *Id.* at 42–43.

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.[19] 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.[20]

However, sometimes an agency must provide a more detailed justification when the "new policy rests upon factual findings that contradict those which underlay its prior policy" or when "prior policy has engendered serious reliance interests that must be taken into account."[21] Indeed, the *FCC* Court stated that to ignore such matters would constitute arbitrary and capricious action. In such cases, the *FCC* 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."[22]

In *Encino Motorcars*, the Supreme Court did not apply agency deference to a Department of Labor regulation. In that case, the agency "said almost nothing" when explaining the "good reasons for the new policy."[23] The agency stated that its "interpretation [was] reasonable" and "sets forth the appropriate approach."[24] 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."[25]

Applying this statutory and interpretive framework to the 2023 NPRM demonstrates that the Department's proposed rulemaking does not meet the APA's reasoned decision-making requirements. The Department does not "examine the relevant data," nor does it rest its conclusions on "factual findings" or a "reasoned explanation."

Throughout the 2019 Rescission, the Department methodically reviewed the 2014 Prior Rule, and identified areas of procedural concern. The Department also articulated underlying data concerns in the 2019 Rescission, including the inconsistency of the D/E rates; the fact 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; the fact that the rule failed to provide transparency regarding debt and earnings outcomes for all programs, leaving students considering enrollment options about both nonprofit and proprietary institutions without information; and, relatedly, the fact that a high

[19] 129 S. Ct. 1800, 1810 (2008).
[20] *Id.*
[21] *Id.* at 1811 (quoting *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 742, (1996)).
[22] *FCC* at 1811.
[23] *Encino* at 2127.
[24] *Id.*
[25] *Id.*

percentage of GE programs did not meet the minimum cohort size threshold and were therefore not included in the D/E calculations.

In a detailed and robust discussion, the Department explained that, with regard to modifications of the College Scorecard, "the best way to improve transparency and inform students and parents was through the development of a comprehensive, market-based, accountability framework that provides program-level debt and earnings data for title IV programs."

In the 2023 NPRM, the Department posits that "[i]n light of the Department's reasoning at the time, the 2019 Prior Rule (*i.e.,* the action to rescind the 2014 Prior Rule) eliminated any accountability framework *in favor of* non-regulatory updates to the College Scorecard on the premise that transparency could encourage market forces to bring accountability to bear."[26] The Department now suggests that the reliance on "market forces" is insufficient, explaining that "after-the-fact protections do not address underlying program failures." These are precisely the kind of broad, generalized statements that do not satisfy the Supreme Court standard for an examination of the "relevant data" and a reliance upon "factual findings." Further, not only does the Department not attempt to draw a "connection between the facts found and the choices made," but it adopts that same "insufficient" standard in other parts of the rule. The FVT framework relies on exactly the same market forces premise. The Department provides no justification for its determination that "market forces" are insufficient in the context of GE programs but are adequate for the FVT framework.

At page 32,307 of the 2023 NPRM, the Department references its statutory authority at sections 101 and 102 and relies on the absence of congressional action as evidence that Congress has acquiesced authority to define "gainful employment" to the Department; "[d]espite prior and through multiple reauthorizations of the HEA, *Congress has neither further clarified the concept of gainful employment, nor curtailed the Secretary's authority to further define this requirement through regulation*, including when Congress exempted some liberal arts programs offered by proprietary institutions from the gainful employment requirement in the Higher Education Opportunity Act of 2008."[27]

This interpretation directly contradicts the one expressed by the Department in the 2019 Rescission. At that time, the Department unequivocally stated that "[d]espite previous assertions, the Department now recognizes that it had incorrectly described congressional intent and engaged in regulatory overreach."[28] The Department further noted:

> It should have been clear to the Department that the GE regulations did not comport with congressional intent when a bipartisan group of 113 Members of the House of

[26] *Id.* (emphasis added).
[27] 88 Fed. Reg. 32,307 (emphasis added).
[28] 84 Fed. Reg. 31,402.

> Representatives, led by Congressman Alcee Hastings (D–FL), sent a letter in 2011 to President Obama asking him to withdraw the GE regulations. Further, the Department should have noted that the House of Representatives passed House Amendment 94 to House Resolution 1, the Disaster Relief Appropriations Bill of 2013, with a vote of 289 to 136. This amendment would have prohibited the Department from implementing the 2011 GE rule. Although the amendment was not included in the final bill, the amendment should have given the Department pause before claiming that the GE regulations were consistent with Congress' intent. Despite numerous reauthorizations of the HEA between 1964 and 2008, Congress never attempted to define "gainful employment" based on a mathematical formula nor did it attempt to define the term using threshold debt-to-earnings ratios. Congress never attempted to prohibit students who attended GE programs from participating in IDR programs. In addition, the GE regulations were also identified in 2015 by the bipartisan Senate Task Force on Higher Education Regulation as a glaring example of the Department's "increasing appetite" for regulation.[29]

Not only has the Department now failed to provide any rationale for its changed position regarding congressional intent, it dismissed the 2019 Rescission's position as simply "judgments and assessments at the time."[30] This is not a reasoned explanation.

In its 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. In fact, if the Department had sought to analyze each reference, it would not have relied on decades-old research or research from authors such as Stephanie Cellini, whose work has been previously criticized by the Department for biases, erroneous assumptions, and lack of peer review. The charts in tables 1.1 to 1.9 of the 2023 NPRM provide an illustration of the current higher education landscape, but they do nothing to explain or distinguish the proposed change from the 2019 Rescission. Similarly, and quite strikingly, the 2022 Program Performance Data ("PPD") referenced by the Department is riddled with assumptions and disclaimers that render it nearly inapplicable to the current rule. 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."[31]

The list includes, but is not limited to the following variances:[32]

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[29] 84 Fed. Reg. 31,402 (citations omitted).
[30] 88 Fed. Reg. 32,307.
[31] 88 Fed. Reg. 32,398, 32,411.
[32] 88 Fed. Reg. 32,411–32,412.

- The four-digit CIP code, rather than the six-digit CIP code, is used to define programs in the 2022 PPD.

- 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 used an ET determined by the state in which 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 PPD, so some programs with no data in our analysis would have data to evaluate performance under the proposed rule.

It is remarkable that the Department did not produce a more accurate data set. It is also unfortunate, as many institutions rely on the Department's data to make their own programmatic assessments. Unfortunately, the data concerns extend beyond the PPD. DFI notes for the record that the April 2022 data set produced by the Department and the College Scorecard also have inconsistent and often contrasting information. This has led to additional confusion and obfuscates the impact of the GE rule. For example, the earnings data populated in the College Scorecard uses different assumptions regarding the post-graduation earnings period. Many institutions have erroneously relied on this information to confirm graduate earnings. DFI addresses this misplaced reliance later in this comment.

As a result, the 2023 NPRM's GE provisions are arbitrary and capricious under the APA and should be withdrawn.

C. The Proposed GE Rule Exceeds the Department's Authority Under the HEA

DFI recognizes that the Supreme Court has previously addressed the issue of the Department's authority under the HEA to promulgate a "gainful employment" regulation. However, the jurisprudence related to *Chevron* continues to shift with the recent decision in *West Virginia v. EPA* case and the *Loper Bright Enterprises v. Raimondo*[33] case now before the Supreme Court. The Supreme Court opinion in *West Virginia*[34] and the lower court ruling in *Loper*[35] directly engage with the types of statutory construction issues that DFI raises with regard to the GE NPRM and conclude that an agency "must point to 'clear congressional authorization' for the power it claims."[36] Based on our review, the Department's actions in promulgating the GE rule exceed the grant of statutory authority under the HEA.

i. Statutory Authority Cited by the Department

In the introductory section of the 2023 NPRM Preamble—where statutory authority is listed—the Department describes its overall authority in broad terms:

> The Department's authority to pursue financial value transparency in GE programs and eligible non-GE programs and accountability in GE programs is derived primarily from three categories of statutory enactments: first, the Secretary's generally applicable rulemaking authority, which includes provisions regarding data collection and dissemination, and which applies in part to title IV, HEA; second, authorizations and directives within title IV, HEA regarding the collection and dissemination of potentially useful information about higher education programs, as well as provisions regarding institutional eligibility to benefit from title IV; and third, the further provisions within title IV, HEA that address the limits and responsibilities of gainful employment programs.[37]

With regard to the Department's authority to pursue accountability in GE programs, the 2023 NPRM relies on three categories of statutory enactments:

[33] 544 F. Supp. 3d 82; No. 22-451 (cert. granted)
[34] 597 U.S. __ (2022).
[35] 544 F. Supp. 3d 82; No. 22-451 (cert. granted)
[36] *Id.* at 19.
[37] 88 Fed. Reg. 32,321.

1) the Secretary's generally applicable rulemaking authority in 20 U.S.C. § 1221e–3 (section 410 of the General Education Provisions Act) and 20 U.S.C. § 3474 (section 414 of the Department of Education Organization Act), along with 20 U.S.C. § 1231a, which applies in part to Title IV of the HEA;

2) authorizations and directives within sections 131 and 132 of Title IV of the HEA, regarding the collection and dissemination of potentially useful information about higher education programs, as well as section 498 of the HEA, regarding eligibility and certification standards for institutions that participate in Title IV; and

3) the further provisions within Title IV of the HEA, such as sections 101 and 481, that address the limits and responsibilities of GE programs.[38]

The third category provides the *only* specific statutory authority for the proposed GE framework and relies on sections 101[39] and 481[40] of the HEA as the authority for the limits and responsibilities of GE programs.[41] At page 32,307 of the 2023 NPRM, the Department offers the following interpretation of those provisions: "Sections 102(b) and (c) of the HEA define, in part, a proprietary institution and a postsecondary vocational institution as one that provides an eligible program of training that prepares students for gainful employment in a recognized occupation. Section 101(b)(1) of the HEA defines an institution of higher education, in part, as any institution that provides not less than a one-year program of training that prepares students for gainful employment in a recognized occupation." The Department again relies on the phrase "prepares students for gainful employment" as the sole statutory authority for the GE rule.

ii. Recent Supreme Court Precedent Undermines the Justifications for the NPRM

On June 30, 2022, the Supreme Court issued its decision in *West Virginia.* The Court held that Congress did not grant a federal agency the authority necessary to create a regulatory scheme that the agency had attempted to enact. Under a body of law known as the "major questions doctrine," the Court found that, given both separation of powers principles and a practical understanding of legislative intent, an agency must point to "clear congressional authorization" for the authority it claims.[42]

The Court found that the major questions doctrine was applicable to the facts in *West Virginia*. The agency claimed to discover "unheralded power" that allowed it a "transformative expansion

[38] *Id.* at 32,475.
[39] 20 U.S.C. §§ 1001–1003.
[40] 20 U.S.C. § 1088.
[41] *Id.*
[42] *West Virginia*, slip op. at 4 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

in [its] regulatory authority,"[43] purportedly justifying the agency's adoption of a regulatory program that Congress had declined to enact itself.

The Court found that the authority that the agency relied upon was in the vague language of an "ancillary provision" that was "designed to function as a gap filler" and had rarely been used in the preceding decades.[44] Given the circumstances, the Court found that there was every reason to "hesitate before concluding that Congress" meant to confer on the agency the authority it claimed.[45]

The Court further discussed the relationship between regulatory assertions and textual bases. The Court argued that "common sense as to the manner in which Congress [would have been] likely to delegate" such power made it very unlikely that Congress had actually done so.[46] Further, "extraordinary grants of regulatory authority are *rarely accomplished* through 'modest words,' 'vague terms,' or 'subtle device[s].'"[47]

In *West Virginia,* the Court held that the Clean Power Plan was a major question because it involved a "transformative expansion" of the EPA's regulatory authority, which stemmed from an infrequently used provision of the Clean Air Act, and because the plan had the potential to affect many aspects of national policy involving subjects outside the EPA's traditional realm of expertise. Ultimately, the opinion holds that: "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[48] One can glean that the major questions doctrine might apply where an agency's new policy or rule will have a significant impact on the economy or national policy and springs from an enlargement of an agency's power or growth in a new area of regulation, or if the agency's use of the statute is novel.

Justice Gorsuch, in his concurring opinion, explained that the doctrine is relevant when agencies assume authority to resolve a matter of great "political significance," signs of which can be found in Congress failing to pass similar proposals.[49] Other clues that a question is major, according to Justice Gorsuch, are that the agency is attempting to regulate "a significant portion of the American economy," requiring "billions of dollars in spending," or intruding into an area that is the "particular domain of state law."[50]

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[43] *Id.*
[44] *West Virginia* at 24.
[45] *Id.* (quoting *FDA v. Brown & Williamson, Tobacco Corp.,* 529 U.S. 120, 159–160 (2000).
[46] *Id.* at 18 (quoting *Brown & Williamson* at 133).
[47] *Id.* (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)) (emphasis added).
[48] *Id.* at 31.
[49] *Id.* at 9–10 (Gorsuch, J., concurring).
[50] *Id.* at 10–11.

Justice Gorsuch also provided guidance on what constitutes "clear congressional authorization," recommending an examination of legislative provisions; the age and focus of the statute; the agency's past interpretations of the statute; and, when present, the mismatch between the agency's action and its congressionally assigned mission and expertise.[51]

iii. Analysis of the Cited Statutory Provisions and the Application of *West Virginia* to the 2023 NPRM

As stated above, Congress has not provided to the Department the authority to enact the GE proposals in the 2023 NPRM. As a result, the Department should withdraw the proposed GE regulation and reconsider the proposed regulations in light of *West Virginia*.

In applying the Court's opinion in *West Virginia* to the 2023 NPRM, it becomes clear that what the Department is attempting to do would trigger a major questions doctrine analysis and, therefore, would demand a clear statement of congressional authority before the Supreme Court would assume that the agency has the statutory authority it claims.

In evaluating whether the EPA rule presented a "major question," the Court pointed to issues of "political significance" and areas where the agency is attempting to regulate "a significant portion of the American economy," requiring "billions of dollars in spending." Both are true here.

The Department references high student debt throughout the 2023 NPRM and offers it as one justification for the rule, stating: "[t]he Department recognizes that, given the high cost of education and correspondingly high need for student debt, students, families, institutions, and the public have an acute interest in ensuring that higher education investments are justified through positive repayment and earnings outcomes for graduates."[52]

Student loan debt continues to be both a major political and economic issue. In fact, student loan debt was a pillar of the Biden campaign for the presidency. According to a White House statement, "[t]he skyrocketing cumulative federal student loan debt . . . is a significant burden on America's middle class."[53] As additional evidence, one need look no further than the current cases before the Supreme Court about the Biden administration's proposed student loan cancellation program—*Biden v. Nebraska* and *U.S. Department of Education v. Brown.* While the cases themselves turn on issues related to the legal authority of the Department, the fact that the loan debt cancellation program was challenged in court is evidence by itself of the political significance of student loan debt. In addition, the House of Representatives recently approved a Congressional Review Act

[51] *Id.* at 13–16.
[52] 88 Fed. Reg. 32,307.
[53] White House Fact Sheet, Aug. 24, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

resolution seeking to nullify the administration's student loan debt cancellation plan. Student loan debt is clearly a politically significant issue.

It is also a significant economic issue. According to one report, student loan debt in the United States totals $1.757 trillion, and 43.8 million borrowers have federal student loan debt.[54] The Department confirms that "[a]nnualized transfers between borrowers and the Federal Government are estimated to be $1.1 billion at a 7 percent discount rate and $1.2 billion at a 3 percent discount rate in reduced Pell Grants and loan volume."[55]

Pursuant to *West Virginia,* issues involving "major questions" require that an agency point to a "clear congressional authorization" when claiming authority from a statute.

For close to 50 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. But until the 2010 rulemaking, 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 complex regime of metrics.

In the 2019 Rescission, the Department cited the 1972 National Vocational Student Loan Insurance Act as the clear intent of Congress to "incorporate vocational education programs into the HEA, by allowing their participation in the Educational Opportunity Grants as well as the student loan programs. Here the House conference report is clear that the new legislation 'not only extends existing programs but creates exciting and long needed (sic) new ones. For the first time, the bill commits the Federal Government to the principle that every qualified high school student graduate, regardless of his family income, is entitled to higher education, whether in community colleges, vocational institutes or the traditional 4-year college or university."[56] The Department further emphasized that the inclusion of proprietary schools in the HEA was an important step toward achieving the goals of providing equitable access to postsecondary education, for all students, regardless of whether their interests were in the traditional trades or vocations, or in typical degree programs.[57]

The entire proposed GE regulatory action in the 2023 NPRM rests on the single statutory phrase "prepare students for gainful employment." The main source of "justification" for the GE

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[54] *See* Education and Data Initiative, https://educationdata.org/student-loan-debt-statistics.
[55] 88 Fed. Reg. 32,392.
[56] http://www.govinfo.gov/content/pkg/GPO-CRECB-1972-pt16/pdf/GPO-CRECB-1972-pt16-2-2.pdf.
[57] 84 Fed. Reg. 31,401.

provisions, sections 101 and 102, is very similar to what the Court described in *West Virginia* as a "wafer thin reed" upon which to base the Department's claim of expansive powers to address a $1.7 trillion student loan debt issue and promulgate a rule that would result in $1.1 to $1.2 billion in loan transfers through the GE framework. The Department has argued that "the statute does not further specify this requirement"[58] as justification for the promulgation of the GE rule. That provision, like the statute in *West Virginia,* was relatively obscure when it was enacted and seldom exercised until, 45 years later, it became the centerpiece for major action by the Department. In *West Virginia*, the Court rejected EPA's reliance on a statutory provision that, in the Court's view, was a "previously little-used backwater."[59] Likewise, the Department cannot rely on the statutory authority it cites as the basis to issue the proposed GE provisions.

We further note that the Court in *West Virginia* looked beyond the statutory text in its analysis of EPA's authority, including by considering that Congress "conspicuously and repeatedly declined to enact" a program similar to aspects of the challenged regulation,[60] as has also been the case here.

As a result, there is a legitimate issue of whether, per *West Virginia,* Congress really intended the provision to grant the power that the Department is attempting to wield and expand. Further, there would be little difficulty showing that the proposed GE rule has the broad economy-wide effect that the agency action did in *West Virginia*, especially considering the economic impact of the proposed regulations.[61]

West Virginia is a clear signal that the Supreme Court is restive about federal agencies that justify major regulatory actions with vague grants of statutory authority. The holding rests on the principle that, no matter the wisdom of the agency rule at issue, important matters of policy, with far-reaching consequences, should not be left up to a federal agency under a flimsy delegation of authority. After *West Virginia,* without clear congressional authorization, agencies are no longer free to create regulatory frameworks from wafer thin reeds.

As a result, the Department should rescind and reconsider the 2023 NPRM in light of the *West Virginia* case. To do otherwise would expose the NPRM to significant litigation challenges and risk the entire regulatory framework.

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[58] *Id.*
[59] *West Virginia* at 26.
[60] *Id.* at 20.
[61] Justice Gorsuch's concurrence argues that a major question can arise if the agency action requires billions of dollars in spending by private parties, which the 2023 NPRM may ultimately require. *See West Virginia* at 10 (Gorsuch, J., concurring).

We further note that the Supreme Court has granted certiorari[62] in the case *Loper Bright Enterprises v. Raimondo*.[63] While the Court will not hear oral arguments until the fall, the outcome of this case could significantly impact *Chevron v. Natural Resources Defense Council*[64] and its rule of judicial deference to agencies' interpretations.

Directed Questions Concerning the Department's Gainful Employment Proposals

DFI asks that the Department answer fully and completely the following questions regarding the 2023 NPRM's GE proposals.

> Directed Question No. 1: Pursuant to what statute does the Department have the authority to promulgate a retroactive rule?
>
> Directed Question No. 2: The Department has declined to include a transition period to allow institutions the opportunity to make programmatic and operational changes in pursuance of the D/E and EP metrics. What justification can the Department provide to reconcile the fact that institutions do not have a meaningful opportunity to make changes to come into compliance with legal requirements of due process?
>
> Directed Question No. 3: In the Department's view, how could institutions with current failing rates come into compliance without a transition period?
>
> Directed Question No. 4: In 2019, the Department raised several concerns about the value and accuracy of the underlying earnings data. How can the Department now justify the use of this data?
>
> Directed Question No. 5: The data produced in conjunction with the 2023 NPRM relies on several assumptions that are catalogued throughout the RIA and shown previously in this comment to be faulty. Please explain why, in the opinion of the Department, these data discrepancies do not undermine and invalidate the RIA.
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> Directed Question No. 6: In light of the *West Virginia* holding, to what specific authority does the Department cite as evidence of congressional intent in granting the Department expansive power to issue the proposed GE regulations?

IV. Debt to Earnings Metric and Earnings Premium Measure

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[62] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-451.html.
[63] 544 F. Supp. 3d 82; No. 22-451 (cert. granted).
[64] 467 U.S. 837.

A. The Proposed Earnings Metric in FVT and GE Violates the Due Process Clause Because It Fails to Provide Institutions the Opportunity to Examine or 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.[65] As provided in the NPRM, "[u]nder new § 668.403(c), the Department would obtain program completers' median annual earnings from a Federal agency with earnings data for use in calculating the D/E rates."[66] The federal agency will provide to the Department an aggregated number to protect individuals' identities. The completers' median annual earnings will be used in both the D/E calculation and EP measure to determine program eligibility.

As a federal agency, the Department is required to observe the due process rights of institutions, afforded by the Fifth Amendment of the Constitution, which states that "no person shall be . . . deprived of life, liberty, or property, without due process of law."[67] In interpreting this constitutional protection and applying it to the Title IV program, courts have held that institutions possess both liberty and property interests in continued program eligibility.[68] Additionally, courts have found that institutions have a fundamental property right to funds that they have already received under Title IV of the HEA.[69] The Department, therefore, has a duty to respect the due process rights of institutions and to construct regulatory frameworks that observe that duty. The Department's proposed GE rule, like all federal action, must fall within the bounds of the Constitution.[70] Within this context, due process requires the government to provide adequate notice and a meaningful opportunity to be heard before depriving an institution of its Title IV eligibility.[71]

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[65] 88 Fed. Reg. 32,328.
[66] 88 Fed. Reg. 32,507.
[67] U.S. Const. amend. V, § 3.
[68] *See Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990).
[69] *See Lynch v. Household Fin. Corp.,* 92 S. Ct. 1113, 1122 (1972).
[70] *INS v. Chadha*, 462 U.S. 919, 999 (1983) (Powell, J., concurring) (noting that a court must invalidate government action when the action in question violates a provision of the Constitution).
[71] *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner." (quotations and citations omitted)); *Thompson v. Washington*, 497 F.2d 626, 634–35 (D.C. Cir. 1973) ("Application of due process protection to executive and administrative action has followed from recognition of the basic principle that the constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making." (quotations omitted)).

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."[72] The Supreme Court has made clear that the Due Process Clause prohibits an agency from "us[ing] evidence in a way that forecloses an opportunity to offer a contrary presentation."[73]

But that is exactly what the Department's proposed GE rule would do. Under the proposed rule, the Department calculates a program's annual and discretionary earnings rates based on evidence of earnings that no one but the federal agency can see and review.

<u>i. Summary of the Process to Obtain the Administrative and Earnings Data</u>

At page 32,303, the 2023 NPRM describes the institutional reporting requirements for students who enroll in, complete, or withdraw from a GE program or eligible non-GE program.[74] 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 Department notes 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."[75] In this context, the Department clearly recognizes the need for institutional review of the data "to ensure accuracy" and "promote transparency."

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 EP measure using that earnings data.[76] The federal agency supplying this earnings data could include agencies such as the Treasury Department, including the Internal Revenue Service (IRS); the Social Security Administration (SSA); the Department of

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[72] *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974).
[73] *Id.*
[74] The Department's proposed revision of § 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 define the timeframe for institutions to report this information.
[75] 88 Fed. Reg. 32,334.
[76] *Id.* ("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.").

Health and Human Services (HHS); and the Census Bureau.[77] The only condition described in the rule is that the federal agency must have earnings data sufficient to match with recipients of Title IV funding in the program.[78]

ii. The Proposed Rule Would Deprive Institutions of the Opportunity to Examine or Discern the Accuracy of the Earnings Data

As described in the NPRM, "The proposed rule does not specify a source of data for earnings, but rather allows the Department flexibility."[79] This flexibility comes at the expense of transparency and certainty and creates a rule that impermissibly uses a "black box" for data. The Department defends this process as a mechanism to "protect[] the privacy of individual graduates."[80] We do not dispute the need to protect student data, but would note that in other contexts, including the Free Application for Federal Student Aid ("FAFSA") and student verification process, students and families are required to provide personal information to the school and the Department.[81] The Department further justifies the sufficiency of the aggregated data by explaining that the "Department's goal is to evaluate programs, not individual students."[82] But because the underlying data from which the Department derives the D/E and EP calculations is ultimately based on individual data, it is difficult, if not impossible, to bifurcate these aims. This deprives institutions of their procedural rights to review and evaluate the data.

iii. Institutions Would Be Denied the Opportunity to Challenge the Accuracy of the Earnings Data

In the 2014 Prior Rule, institutions were provided the opportunity to appeal earnings data through an alternate earnings appeal. The 2023 NPRM explains that the Department has "gained a fresh perspective on earnings appeals in light of our experience, new research, and other considerations" and "ha[s] concluded that it would not be appropriate to include a similar appeal process in this proposed rule."[83]

In the 2014 Prior Rule, the Department defended any potential legal infirmities related to data errors or inaccuracies by invoking the availability of the alternate earnings appeal.

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[77] 88 Fed. Reg. 32,328.
[78] *Id.*
[79] 88 Fed. Reg. 32,334.
[80] *Id.*
[81] *See, e.g.*, https://finaid.org/fafsa/verification ("During verification, the college financial aid administrator will ask the applicant to supply copies of documentation, such as income tax returns, W-2 statements and 1099 forms, to verify the data that was submitted on the Free Application for Federal Student Aid (FAFSA).").
[82] 88 Fed. Reg. 32,334.
[83] 88 Fed. Reg. 32,335.

> The regulations establishing the procedure we use to calculate a program's D/E rates provide not merely an opportunity to challenge the accuracy of the list of students who completed the program and the debts attributed to the cohort, but also two separate kinds of "contrary presentations" regarding earnings themselves—a survey of students who completed the program and their earnings, and data on their earnings from State databases. An institution may make either or both such presentations.
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> [I]institutions are free to present, and have us consider, alternative proofs of earnings. As previously discussed in the context of the requirement to provide the 'best available data,' the agency's determination 'cannot be weighed in a vacuum, but must be evaluated by reference to the data available to the agency at the relevant time.' *Baystate*, 545 F.Supp.2d at 41.
>
> Under 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.[84]

The inclusion of the "alternate earnings appeal" was a core tenet of the 2014 Prior Rule's compliance with due process requirements that the Department would now fail to satisfy by stripping any meaningful appeal from the review of the earnings data.

The Department suggests that the alternate earnings appeals could result in "implausibly high" earnings[85] despite the fact that the alternate earnings appeal was strictly constructed and required an institution to survey all students, comply with the NCES standards, conduct a bias analysis, and submit an examination-level attestation engagement report prepared by an independent public accountant or independent governmental auditor:

> The institution will base its appeal on alternate earnings evidence from either a survey conducted in accordance with standards included on an Earnings Survey Form developed by NCES or from State sponsored data systems.

[84] 79 Fed. Reg. 64,957.
[85] 88 Fed. Reg. 32,336.

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> Survey: An institution that wishes to submit an appeal by providing survey data must include in its survey *all the students* who completed the program during the same cohort period that the Secretary used to calculate the final D/ E rates under § 668.404 or a comparable cohort period, provided that the institution may elect to exclude from the survey population all or some of the students excluded from the D/E rates calculation under § 668.404(e).
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> ***
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> Under the regulations, the institution will certify that the survey was conducted in accordance with the standards of the NCES Earnings Survey Form and submit an examination-level attestation engagement report prepared by an independent public accountant or independent governmental auditor, as appropriate. The attestation will be conducted in accordance with the attestation standards contained in the GAO's Government Auditing Standards promulgated by the Comptroller General of the United States and with procedures for attestations contained in guides developed by, and available from, the Department's Office of Inspector General.[86]

The inclusion of the earnings appeal process was an essential element of the 2014 Prior Rule. The proposed regulations, as drafted, deny schools adequate procedural protections, enabling the Department to deprive schools of financial aid eligibility without providing institutions the opportunity to meaningfully challenge the data.[87]

Accordingly, if the Department chooses not to withdraw its 2023 NPRM, then it should reconsider the process by which it proposes to identify earnings in the 2023 NPRM and provide institutions a meaningful opportunity to review and challenge the data, including reinstating a meaningful appeals mechanism.

B. The Proposed FVT and GE 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, DFI has several significant concerns regarding the accuracy of the data itself. First, the source of the earnings data is not confirmed. In the 2023 NPRM, the Department indicates that it "will determine the specific source of earnings data in the future."[88] Second, DFI has concerns about the relative accuracy and noted variances between the possible data sources. Third, the calculation of earnings fails to

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[86] 79 Fed. Reg. 64,995.
[87] 88 Fed. Reg. 32,328.
[88] 88 Fed. Reg. 32,334.

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. For example, students choosing part-time work are included in the earnings calculation without recognition of this choice. Fifth, the data published by the Department and upon which the proposed rule is predicated varies significantly from the construct of the final rule and the prior data published by the Department. In addition, the GE data sets vary from that published in the College Scorecard. Finally, the 2023 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.[89] 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."[90] 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.[91]

Further, in accordance with the Data Quality Act ("DQA"),[92] the Department has published the Information Quality Guidelines ("Quality Standards"),[93] which 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."[94] The Quality Standards require that the Department rely on "objective" data, which the Department defines as follows:

> *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.

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[89] *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821–22 (D.C. Cir. 1983).
[90] *Id.* at 822, 826 (vacating the Secretary's decision because the Secretary failed to consider adequately the relevant factors in making predictive judgments).
[91] *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).
[92] Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554).
[93] 67 Fed. Reg. 62,043–44; *see also* https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf (as updated in 2019).
[94] 67 Fed. Reg. 62,043–44.

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.

i. The Source of the Earnings Data Is Not Confirmed and Is Impermissibly Vague

At page 32,490, the 2023 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.[95]

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."[96] This creates an impermissibly vague data source that is both temporally and substantively inadequate. 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.

Further, the Department must abide by the Master Calendar requirements that "provide that regulatory changes affecting the title IV programs must become effective at the beginning of an award year and does not authorize the Department to make a regulatory change affecting the title IV programs effective in the middle of an award year."[97] At a minimum, the Department must provide institutions specific, advance notice of the relevant federal agency prior to implementing the rule.

ii. 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 is at stake—on that presumption when it knows the earnings data is inaccurate.

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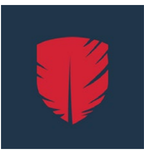
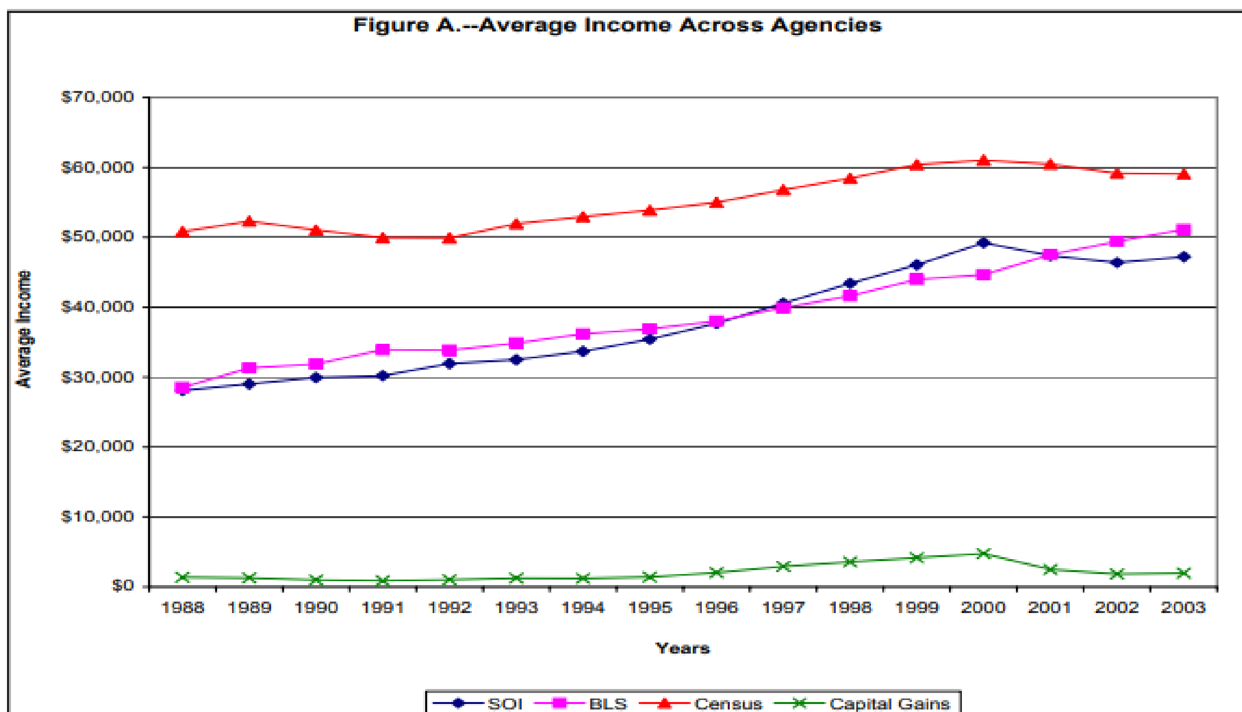
[95] 88 Fed. Reg. 32,490.
[96] 88 Fed. Reg. 32,335.
[97] 20 U.S.C. § 1089(c)(2).



The Department has identified four possible federal agencies from which it may attain a "match" for earnings information. As the Department readily acknowledges,[98] 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 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."[99] Figure A is a chart produced by the IRS in a report[100] illustrating the variation of income data across agencies. The chart includes individual income by the IRS Statistics of Income ("SOI") Division, labeled "SOI" in the chart below, and the Census Bureau, labeled "Census." While the chart does not include data representations from each of the possible agencies, it highlights the significant variance between the IRS data and the Census data.



[98] *See* 88 Fed. Reg. 32,335.
[99] Peter Brady & Steven Bass, 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).
[100] Eric L. Henry & Charles D. Day, A Comparison of Income Concepts: IRS Statistics of Income, Census Current Population Survey, and BLS Consumer Expenditure Survey, Internal Revenue Service, https://www.irs.gov/pub/irs-soi/05henry.pdf (2006).

These data disparities not only raise concerns about the accuracy of the earnings data used in the GE rule, but lead to a related concern about the use of multiple data sources for different components of the rule. In the 2023 NPRM at page 32,332, the Department describes the methodology for the EP measure:

> We propose to add a new § 668.404 to specify the methodology the Department would use to calculate the earnings premium measure. The Department would assess the earnings premium measure for a program by determining whether the median annual earnings of the title IV, HEA recipients who completed the program exceed the earnings threshold.
>
> The Department would obtain from a Federal agency with earnings data the most currently available median annual earnings of the students who completed the program during the cohort period.
>
> Using data from the U.S. Census Bureau, the Department would also calculate an earnings threshold, which would be the median earnings for working adults aged 25 to 34, who either worked during the year or indicated that they were unemployed when they were surveyed.

The proposed EP measure would compare the median earnings of program completers, as "obtained from a Federal agency," to the earnings threshold data "from the U.S. Census Bureau." It is possible that both data sets will be provided by the Census Bureau, but it is also possible that the earnings data for program completers will be provided by another agency and compared against the Census Bureau data for the EP measure. As illustrated in the chart above, the Census Bureau income is consistently and measurably higher than the IRS income data. By comparing income from two different sources, the Department would be creating an inequitable and unbalanced formula that is fatally flawed in its design, resulting in the proverbial comparison of apples to oranges.

<u>iii. The Calculation of Earnings Fails to Account for Instances in Which Earnings Are Impacted by Issues Related to Underreporting</u>

There are ongoing issues in earnings data related to the underreporting or non-reporting 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 [that] 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."[101] While we agree that the change

[101] 88 Fed. Reg. 32,335.

in the American Rescue Plan Act ("ARPA")[102] 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. The Department fails to mention that, while the ARPA provisions were set to go into effect for the 2022 tax year, the IRS delayed the implementation of this provision until the 2023 tax year.[103] 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, if the Department chooses not to withdraw the 2023 NPRM, then we recommend that the Department delay the implementation period of the FVT and GE rules until such time as the IRS implements the ARPA change.

iv. The Calculation of Earnings Data Inexplicably Fails to Address Certain Graduates with Nonconforming Occupational Outcomes and Objectives

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 directly discuss these concerns. The only acknowledgment that graduates may seek alternative or nonconforming occupational outcomes is the conclusory statement that the Department "would anticipate that most graduates—especially those graduating from career training programs—are likely employed or looking for work."[104] The Department does not further expound on this "assumption." Nor does it address the issue in the RIA. At page 32,428 of the 2023 NPRM, the Department analyzes "the role of student demographics as a factor."[105] This analysis considers the role of race, gender, first generation enrollment, family income, age, and dependency status as factors in program performance. Throughout the analysis, the Department does 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.

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[102] https://www.govinfo.gov/content/pkg/PLAW-117publ2/html/PLAW-117publ2.htm.
[103] *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.").
[104] 88 Fed. Reg. 32,334.
[105] 88 Fed. Reg. 32,428.

v. The Data on Which the Department Relies Varies Significantly from the Construct of the Final Rule

The data upon which the proposed rule is predicated and that the Department relies in the current rulemaking process is riddled with assumptions that render it incompatible with the actual data. In addition, the Department continues to put forward data that is mismatched and misleading. For example, the College Scorecard data, the April 2022 data released by the Department, and the May 17, 2023 data released by the Department all contain earnings estimates for programs and institutions. There is not a single matching number across the data sets. In addition, the data sets vary from the construct of the proposed rule.

In the 2023 NPRM, the Department describes its analysis of program performance and the use of the 2022 PPD.[106] At best, and as discussed above, the "information contained in the 2022 PPD and used in the analysis necessarily differs from that used to evaluate programs under the proposed rule."[107] As a result, the use of earnings data in evaluating the impact of the proposed rule is arbitrary and capricious because it lacks sufficient supporting evidence.

As described in the NPRM 2022 Description (2022), "[d]ue to data limitations, the Department calculated the median earnings data for a different cohort of program completers than the one used to calculate median debt. Earnings were measured for Title IV students completing their credential in either award years 2014–2015 or 2015–2016. Students in most programs would thus have their earnings captured in the third calendar year following the end of the award year in which they completed—calendar years 2018 and 2019, respectively."

The earnings components of the rates were calculated for each program using information obtained from Treasury for students who completed between July 1, 2014, and June 30, 2016 (the 15/16 completer cohort), whose earnings were measured in calendar years 2018 and 2019.[108] This data, therefore, only serves as a proxy to evaluate the operation and impact of the rule.

As stated above, it is not sufficient for the Department to rely on a "predictive judgment" rather than actual evidence.

vi. The Department Fails to Adjust the Earnings Data to Account for the Impact of the Global Pandemic

In describing the methodology and process by which the Department will identify the annual median earnings, there is no mention of or adjustment to address the impact of the global pandemic on earnings. In fact, the 2023 NPRM only mentions the pandemic three times.

[106] 88 Fed. Reg. 32,395.
[107] 88 Fed. Reg. 32,398, 32,411.
[108] 88 Fed. Reg. 32,410.

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."[109] 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."[110] The pandemic created economic turmoil at all levels, and 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 has stated "should be avoided."[111]

We observe that the Department does acknowledge the impact of the pandemic in the context of the ATB rule, noting that "[t]his may also account for years in which external circumstances, like those seen during the pandemic, may necessitate a systemwide accommodation."[112]

The use of earnings measured during the pandemic would lead to an absurd result that is arbitrary and capricious. Therefore, if the Department does not withdraw the 2023 NPRM, then 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.

C. The Proposed FVT and GE 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 and books, equipment, and supplies for each student, less the amount of institutional grant or scholarship funds provided to that student."[113]

As described in the 2023 NPRM, the Department proposes to calculate the median loan debt of the Title IV recipients who completed the program during the cohort period, based on the lesser of

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[109] https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-employment.htm (Jun. 13, 2022).
[110] https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-employment.htm (Jun. 2, 2022).
[111] *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").
[112] 88 Fed. Reg. 32,391.
[113] 88 Fed. Reg. 32,328.

the loan debt incurred by each student or the total amount for tuition and fees and books, equipment and supplies for each student, less the amount of institutional grant or scholarship funds provided to that student. The loan amount would be subject to a prescribed amortization period and interest rate as established in the proposed regulation.

i. Amortization Period

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's degree, or a graduate certificate; a 15-year repayment period for a program that leads to a bachelor's or master's degree; and a 20-year repayment period for any other program.

ii. Interest Rate

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:

- For undergraduate certificate programs, post-baccalaureate certificate programs, and associate degree programs, the average interest rate would reflect the three consecutive award years, ending in the final year of the cohort period, using the federal Direct Unsubsidized Loan interest rate applicable to undergraduate students.

- For an undergraduate certificate program, if the two-year cohort period is award years 2024–2025 and 2025–2026, the interest rate would be the average of the interest rates for the years from 2023–2024 through 2025–2026.

- For graduate certificate programs and master's degree programs, the average interest rate would reflect the three consecutive award years, ending in the final year of the cohort period, using the federal Direct Unsubsidized Loan interest rate applicable to graduate students.

- For bachelor's degree programs, the average interest rate would reflect the six consecutive award years, ending in the final year of the cohort period, using the federal Direct Unsubsidized Loan interest rate applicable to undergraduate students.

- For doctoral programs and first professional degree programs, the average interest rate would reflect the six consecutive award years, ending in the final year of the

> cohort period, using the federal Direct Unsubsidized Loan interest rate applicable to graduate students.

The loan debt and calculation to determine the annual loan payment thus appear to be predicated on prescribed assumptions that are decoupled 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.

In 2011, Ben Miller, now a Senior Director in the Office of Postsecondary Education at the Department and a participant in the GE review process,[114] then serving as a negotiator, decried the lack of supporting data and the fact that the Department was asking them to "negotiate on something without data."[115] He further asserted that the "Department is almost grasping at straws, picking numbers and putting gigantic fudge factors" in its proposals.[116] The same process is being utilized here. The Department is relying on "gigantic fudge factors" to render an annual debt calculation. It is impossible to reconcile the difference between actual annual loan payments and the fictional annual loan payments.

If the Department chooses not to withdraw its 2023 NPRM, then DFI strongly recommends 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.

D. The Proposed FVT and GE Rule Violates the Due Process Clause Because There Are Fatal Flaws in the Earnings Premium Measure

As described in the 2023 NPRM, the proposed rule would create a new accountability metric—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."[117] The methodology employed by the Department is flawed and creates an inequitable comparison.

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

[114] *See* https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=&rin=1840-AD57&viewRule=true (Mr. Miller represented the Department in OIRA meetings regarding RIN 1840-AD51).
[115] *See* Ben Miller, Gainful Employment Liveblog Session 2: Day 1, Educ. Central (Nov. 18, 2013), *available at* http://www.edcentral.org/gainful-employment-liveblog-session-2-day-1.
[116] *Id.*
[117] 88 Fed. Reg. 32,307.

high school 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."[118]

DFI has several concerns with the Department's methodology. First, the data sources may be different. Second, the use of a comparative cohort of individuals age 25 to 34 is inequitable and arbitrary. Third, the cohort of student completers includes zero earners, but the comparison cohort excludes zero earners.

First, the Department has not yet definitively identified the federal agency that will be the source of the cohort of student completers. As described above, 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. This raises several concerns as there are noted differences in the earnings data reported by each agency.

Second, the Department based the 25-to-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 for the fact that, in many instances, it is not representative of the student completer cohort for an individual institution. This could lead to skewed results that once again create an inequitable comparison 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.

Third, the comparative cohort of individuals age 25 to 34 fails to account for demographic variances due to race and gender. The Department tracks this information and could have incorporated control factors into the calculations.

Fourth, the Department proposes to exclude zero earners from the comparison cohort but include them in the cohort of student completers. The rationale set forth by the Department is that zero earners are likely not looking for work. It is unclear why this same logic is not applied to both

[118] 88 Fed. Reg. 32,414.

sides of the equation. Excluding zero earners from the student completer list would account for students that were not actively seeking employment at the time.

The EP measure is fatally flawed and should be withdrawn. In addition to our concerns about the methodology, we also have concerns that the new metric was not the subject of proper consideration and deliberation during the negotiated rulemaking. Several negotiators raised concerns that the new measure was introduced at the last minute and only afforded 15 minutes of discussion. For this reason alone, the Department should rescind this part of the rule.

Directed Questions Concerning the Department's Debt to Earnings Metric and Earnings Premium Proposals

DFI asks that the Department answer fully and completely the following questions regarding the 2023 NPRM's D/E metric and EP proposals.

> Directed Question No. 1: Please clarify how the Department justifies the provision declining to allow institutions the opportunity to review or examine the relevant earnings data.
>
> Directed Question No. 2: In the 2014 Prior Rule, the Department identified a number of inadequacies with federal agency earnings data and resolved this problem by providing an opportunity to appeal the data. With the proposed removal of the appeal process, how does the Department plan to reconcile the data discrepancies?
>
> Directed Question No. 3: The Information Quality Guidelines set internal policies and procedures for Department decision-making that require the Department to accept and use only information that is accurate and reliable. Given the identified earnings data concerns, please describe how the Department intends to ensure accuracy and reliability.
>
> Directed Question No. 4: Through the data collection and calculations, the Department fails to address graduates who may seek nonconforming occupational outcomes, including temporarily opting out of the workforce. This failure appears to discriminate against individuals with family obligations. Please explain why the Department failed to address graduates who opt for such nonconforming outcomes.

V. The Department Did Not Adequately Evaluate the Impact of the Proposed Rule

Under the APA, an agency's decision-making is not reasoned unless it adequately considers a rule's likely effects.[119] Here, the metrics proposed by the Department will have a significant effect upon hundreds of thousands of current students. By the Department's own admission, nearly one-fourth of all federally supported students enrolled in GE programs are in programs that fail either the D/E or EP metrics.[120]

As the 2023 NPRM notes, "programs that fail at least one GE metric have a higher share of students that are female, higher share of students that are Black or Hispanic, lower student and family income, and higher share of students that have ever received the Pell Grant."[121]

Many of these students come from traditionally underserved and underprivileged communities. Thus, the individuals perhaps most in need of these higher education programs will be deprived of the chance to matriculate and graduate, and in turn deprived of the opportunity for social mobility that postsecondary education provides. That is because most of these students may not find alternatives at community colleges or at public or private nonprofit colleges; and even those who do may not be served as well by those programs.

The earnings data used in the GE measure thus contributes to more program failures where student bodies are female, low-income, or minority. The failure of the Department to provide a reasoned explanation addressing the far-reaching and devastating economic consequences of its proposed GE rule renders the Department's 2023 NPRM arbitrary and capricious.

Directed Question Concerning the Department's Evaluation of the Impacts of the Proposed Rule

DFI asks that the Department answer fully and completely the following question regarding the 2023 NPRM's evaluation of the impacts of the proposed rule.

> Directed Question: Please explain the Department's rationale for ignoring the demographic disparities discussed above in measuring D/E and EP outcomes.

VI. Financial Responsibility

A. Introduction

On page 32,303, the 2023 NPRM begins its discussion of the proposed changes to the regulations regarding the financial responsibility provisions set forth at §§ 668.15, 668.23, and 668, subpart L

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[119] *See, e.g., Timpinaro v. SEC*, 2 F.3d 453, 457–460 (D.C. Cir. 1993).
[120] 88 Fed. Reg. 32,343.
[121] 88 Fed. Reg. 32,429.

§§ 171, 174, 175, 176, and 177. For the reasons set forth below, DFI requests that the Department rescind the proposed changes and maintain the current regulations.

The proposed amendments to the Financial Responsibility Regulations imposing new mandatory and discretionary "triggers" are written in overbroad terms; lack definitional clarity; and, by going well beyond seeking to safeguard Title IV funds by ensuring institutional financial responsibility, in many instances would create financial instability themselves, as well as cause many other unintended consequences.

If the Department decides not to rescind the 2023 NPRM, then DFI recommends that the rule clarify the triggers as described herein; omit those triggering events that have no bearing on financial responsibility; eliminate the concept of mandatory triggers whereby the Secretary has predetermined whether broad categories of activities would disqualify an institution due to financial concerns; and thoroughly analyze the financial implications and other unintended consequences of the imposition of triggers, including multiple triggers that may cover the same conduct or risks, on schools and the students attending them.

The Department's proposal does not sufficiently explain the reasoned analysis required for this regulatory change, and several changes as currently drafted require clarification.

B. Summary of the Financial Responsibility Provisions

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 2023 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 2023 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."

When one of the factors occurs, the Department may seek financial protection from the institution, most commonly through a letter of credit ("LOC"). For "mandatory" triggering events, the institution is automatically required to post an LOC of at least 10 percent 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.

i. The HEA Does Not Authorize the Proposed New Financial Responsibility Regulations

Section 498(c)(1) of the HEA,[122] which the Department references as support for its amendments to the financial responsibility regulations, provides that for purposes of qualifying institutions to participate in a 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 repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.[123]

Quite appropriately, under current regulations, the Department determines whether a proprietary or private nonprofit school is financially responsible 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 closure 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 seeks support for these factors in the school's audited financial statements.

Contrary to the statutory direction, as discussed in more detail below, many of the new "triggering events" in the proposed rule 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. For these reasons, the introduction of such "triggering events" is beyond the Department's statutory authority.

ii. Final Publication of the Proposed Regulations on Financial Responsibility Should Be Delayed Pending Review of Data and Analysis to Understand the Impact of Such Changes on Schools and Students Attending Them

An institution that trips a mandatory trigger must post, for each triggering event, an irrevocable LOC to the Department for at least 10 percent of the Title IV funds received by the institution for the prior year. For each LOC, the institution's bank will take it through the bank's lending underwriting process. Even though the issuing bank is not advancing funds at the time the LOC is issued, it is extending credit on behalf of the institution in the event that the alleged contingent liability being insured against occurs. If the institution qualifies from a creditworthiness standpoint for an LOC in the amount requested, the LOC is issued in exchange for a not-insubstantial fee.

Importantly, for each LOC issued on behalf of an institution, the amount of the LOC reduces the credit that will be available for that institution for school operations. Further, it is very common

[122] 20 U.S.C. § 1099c.
[123] 20 U.S.C. § 1099c(c)(1).

for lenders serving the proprietary sector to require 100 percent cash collateral in order to issue an LOC. In both cases, the issuance of the LOC has the effect of harming the financial stability of the institution by reducing the working capital it has available to serve the students that it has enrolled.

The NPRM contains no data or analysis of the financial implications and other unintended consequences of imposition of triggers, including multiple triggers that may cover the same conduct or risks, or financially immaterial events, on schools and the students attending them.

DFI requests that the publication of the proposed financial responsibility rules be delayed until such sufficient data is gathered and analysis completed to ensure that the unintended consequences of the proposed rules have been identified and addressed.

iii. The Mandatory Triggers Impermissibly Delegate Authority to Determine Financial Responsibility to Third Parties, Including State-Level Actors

The proposed amendments to the financial responsibility regulations make the bold, conclusory determination that if an institution is subject to one or more of the enumerated actions or triggering events (the "mandatory triggers"), then, ipso facto, the institution "is not able to meet its financial or administrative obligations."[124] An even cursory examination of the mandatory triggers reveals that it is simply not true.

As a threshold matter, the fact that the triggers are a mandatory finding of a lack of financial responsibility is an abrogation of the congressional mandate that "[t]he Secretary shall determine whether an institution has the financial responsibility required."[125] Most of the triggers enumerated in the proposed regulation would require a detailed factual analysis to determine the financial impact, if any, and the financial magnitude of the actions or activities that constitute the trigger. With respect to a pending claim or lawsuit, for example, litigation risk analysis often involves an analysis of multiple variables using complex decision trees to properly determine the risk and dollar value of a claim.[126] And a number of mandatory triggers are initiated by actions taken by third parties. Yet the proposed rule, without any analysis or "determination" required by the Secretary of the rationale or merits of the action, or the financial impact of those actions, would impose possibly multiple LOCs on institutions due to their mere existence.

For the foregoing reasons, the concept of a "mandatory" trigger should be removed from the proposed rule, and all triggers must be discretionary and require a specific determination by the

[124] 34 C.F.R. § 668.171(c). The requisite standard is whether the institution can provide the "administrative *resources*" necessary to comply with Title IV program standards. 34 C.F.R. § 668.171(b)(3) (emphasis added).
[125] 20 U.S.C. § 1099c(c)(1).
[126] *See, e.g.*, Issacharoff and Loewestein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 97 (1990).

Secretary that the condition or events enumerated in fact would have a material impact on the financial responsibility of the institution.

iv. Many of the Mandatory Triggers Are Written Too Broadly, Lack Definitional Clarity, and Do Not Demand the Kind of Evidentiary Threshold Required to Justify the Imposition of a Significant and Mandatory LOC

In addition to lacking the required affirmative determination by the Secretary that an action or activity has disqualifying financial consequences, many of the triggers, due to their overbreadth and vagueness, raise significant fairness and due process concerns.

Many of the triggers do not appear to be the result of a thoughtful or complete analysis, and many, in an unprecedented fashion, appear to completely ignore whether the actions or claims asserted against institutions are valid. In effect, they rely on other state and federal agencies to make that assessment. Thus, while amounts claimed in lawsuits or other actions often bear no relationship to the value, if any, of the claim asserted and could be frivolous, the proposed regulation does not allow for any interim or final decision. In the meantime, the institution is required to post an LOC until the claim or regulatory assertion is dismissed. Further, the magnitude of the sanction (a 10 percent LOC) could be far greater in many cases than the amount at risk in the underlying cause of the trigger, especially in instances where multiple triggers are involved.

The proposed rules also provide claimants with substantial leverage, even with frivolous claims, in that they allow claimants to use the threat of asserting large-dollar-value claims that would constitute a mandatory trigger as a negotiating tactic to force a settlement, which likely could constitute a mandatory trigger itself.

Finally, 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 or limiting an institution's Title IV eligibility under other Title IV regulations.

Some specific examples of "mandatory triggers" that give rise to these concerns include:

- *Debts, liabilities, and losses—§ 668.171(c)(2)(i):*
    - *(A) 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.[127]

- *(B) 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.*

- *(C) 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.*

- *(D) 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.*[128]

Comments: These provisions lack any materiality threshold and, where triggered by mere claims, are blind as to whether the claims are meritorious. Rather than being evidence of financial distress, the payment of claims owed are proof of a wherewithal to pay and in fact eliminate the claim from the school's balance sheet. Further, a rule that makes a settlement of a suit or claim a mandatory trigger would discourage settlements and is against public policy.

These provisions also impose immediate, draconian LOC requirements. As written, for example, for most of these provisions a claim or payment of $1 for an institution with $100 million in Title revenues could require a mandatory 10 percent (or $10 million) LOC. Multiple claims or payments of that $1 could trigger multiple $10 million LOCs. Similarly, under subsection (B), a suit by a federal or state agency, or a qui tam lawsuit in which the federal government has intervened, no

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[127] The Department specifically notes in Table 4.4 of the NPRM that it does not have data on non-Department liabilities that might meet this trigger and could not assess the impact of the proposed rule.

[128] The Department specifically notes in Table 4.4 of the NPRM that it does not currently have data on how many of the 188 institutions that underwent a change of ownership over the past five years had a debt or liability that would meet this trigger and could not assess the impact of the proposed rule.

matter the dollar amount, and before it is determined whether the suit has any merit, would trigger a mandatory LOC requirement.

- *Gainful employment, Non-Federal educational assistance funds, and Cohort default rates—§§ 668.171(c)(2)(iii), (vii) and (viii):*
    - *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.*
    - *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).*

Comments: The consequences of these triggering events are already covered by other Title IV provisions that address institutional and programmatic eligibility and limitations thereon. The imposition of a potentially debilitating mandatory LOC in these situations, without a determination by the Secretary either (1) that the institution is not able to rectify the triggering event, or (2) that the triggering event in fact will have an immediate impact on the institution's financial responsibility, could serve to *cause* a precipitous financial crisis at the institution.

- *Teach-out plans—§ 668.171(c)(2)(iv): 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.*[129]

Comments: A voluntary action by an institution to teach-out a program or location would require a teach-out plan by most accreditors even though such actions are routinely taken without financial risk to the institution. Further, this trigger does not require that the action be related to the accreditor's or state or federal agency's financial standards. Many accrediting and other federal or state agency actions are taken for non-financial reasons, such as those related to governance, student outcomes, faculty credentials, and institutional effectiveness.

[129] As noted in Table 4.4 of the NPRM, the Department lacks data to assess the impact of this provision.

- *Loss of eligibility—§ 668.171(c)(2)(ix): The institution has lost eligibility to participate in another federal education assistance program due to an administrative action against the institution.*

Comments: The loss of eligibility may be unrelated to administrative or financial capabilities issues or may be financially immaterial to the institution.

- *Creditor events—§ 668.171(c)(2)(xi): 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.*[130]

Comments: This trigger is so broadly written that it would encompass technical violations having little or no financial impact on the institution.

v. The Discretionary Triggers Are Ill Defined and Provide Too Much Discretion in the Hands of the Secretary

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." Specifically mentioned in the proposed rule as examples 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; a "significant fluctuation" (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 listed entity that owns the institution stating that it is under investigation for possible violations of state, federal, or foreign law; or closure of more than 50 percent of the institution's locations or closure of locations or discontinuation of programs that affects more than 25 percent of the institution's students.[131]

These discretionary triggers use terms that are ill defined and 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.

[130] As noted in Table 4.4 of the NPRM, the Department lacks data to assess the impact of this provision.
[131] As noted in Table 4.4 of the NPRM, the Department lacks data to assess the impact of a number of these provisions.

In each of these instances, the financial responsibility of the institution is not at risk and the magnitude of the penalty—a 10 percent 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, if the Department chooses not to withdraw its 2023 NPRM, DFI requests that the proposed rules be amended to require that the Department, with input from the institution and subject to due process requirements 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 financial impact (*i.e.*, "put an institution at a higher risk of financial instability and sudden closure").

vi. The Mere Existence of an Investigation Should Not Constitute Either a Mandatory or a Discretionary Trigger

The Department in the NPRM specifically invites comments as to 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 by itself indicate that the financial responsibility of the institution is at risk.

Directed Questions Concerning the Department's Financial Responsibility Proposals

DFI asks that the Department answer fully and completely the following questions regarding the 2023 NPRM's financial responsibility proposals.

> Directed Question No. 1: For each mandatory trigger, provide the Department's analysis leading to its conclusion the mere existence of the condition or event would "put an institution at a higher risk of financial instability and sudden closure." Please indicate where data can be found that the Department used in its analysis.

> Directed Question No. 2: For each discretionary trigger, provide the Department's analysis leading to its conclusion that the mere existence of the condition or event would likely "put an institution at a higher risk of financial instability and sudden closure." Please indicate where data can be found that the Department used in its analysis.

> Directed Question No. 3: Please describe how the proposed required footnote disclosure in an institution's financial statement audit regarding amounts spent in the preceding fiscal year on recruiting activities, advertising and other reenrollment activities is authorized under the financial responsibility provisions of the HEA,

relates to an institution's financial responsibility, and the research and data conducted by the Department related to such authority and relationship.

VII. Administrative Capability

A. Introduction

On page 32,304, the 2023 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 multiplier effect, although the Department provides no support or evidence that these areas are in fact of concern.

B. Summary of the Administrative Capability Provisions

The 2023 NPRM 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 has used historically.

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. Our 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, the proposed amendment to § 668.16(q) would require that institutions provide "adequate" career services to eligible students who receive Title IV program assistance. Complying with this requirement would entail 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 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 for 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 whether that factor has been fulfilled.

In assessing whether an institution has "adequate" career services under the proposed revision, the 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. 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 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's statutory obligation is to determine whether institutions have the capability to administer the Title IV programs, and there is not a sufficient connection between the administration of these 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," the Department should remove this text from the proposed amendment.

Additionally, 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 a low EP 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 does 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 judgment for that of the student in determining when

a prospective student is making an informed decision. This is a slippery slope that can lead to the disempowerment of students in controlling their educational decisions.

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

If the Department chooses not to withdraw the 2023 NPRM, then DFI urges 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. No prospective student should be harassed or threatened into enrollment, but 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 their own decisions.

The Department's justification for the 2023 NPRM does not satisfy the statutory requirements for a permissible rule change. As noted repeatedly, the Department does not provide substantial evidence 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.

Directed Questions Concerning the Department's Administrative Capability Proposals

DFI asks that the Department answer fully and completely the following questions regarding the 2023 NPRM's administrative capability proposals.

> Directed Question No. 1: The term "adequate" is used repeatedly in reference to the offering of services within this amendment without explicit definition or assigning metrics to how "adequacy" will be determined. Can the Department provide a definition of "adequate" and establish the thresholds for "adequacy" of a given service?
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> Directed Question No. 2: Please provide the analysis used to determine that the adequacy of career services has a sufficient nexus to the management of an institution's financial program to justify the addition of this requirement to the administrative capability requirements.
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> Directed Question No. 3: Please provide examples of compliant ways to ascertain a prospective student's knowledge of higher education, programs, and financial aid in determining when they have sufficient understanding of those areas to be judged to have made decisions without unreasonable influence.

VIII. Certification Procedures

A. Introduction

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 programs and, according to the Department, better protect students and taxpayers through the Program Participation Agreement ("PPA"). For the reasons set forth below, DFI objects to several of the amended provisions and requests that the Department rescind the proposal and maintain the current regulations.

B. Summary of the Proposed Certification Procedures

The Department seeks to amend the certification procedures at § 668.13 and the PPA provisions at § 668.14 to extend its 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 page 32,314 of the 2023 NPRM, the Department proposes to "eliminate the provision that automatically grants an institution renewal of certification after 12 months without a decision from the Department."[132] 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."[133] At the time this provision was promulgated, the Department agreed that "more must be done at the administrative level to provide more timely responses."[134] And the Department 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."[135] The Department now seeks to rescind that provision on the basis that it has "since determined that the time constraint established in the final rule for Distance Education and Innovation negatively impacted [its] ability to protect program integrity."

DFI objects to this proposed change on a number of grounds. First, DFI has observed several instances in which the Department has failed to timely recertify institutions; in some cases, institutions have been waiting nearly two years since applying for recertification. Second, this delay creates unwarranted uncertainty for the institutions and their students. Third, there is no

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[132] 88 Fed. Reg. 32,314.
[133] *Id.*
[134] 85 Fed. Reg. 54,776.
[135] *Id.*

evidence that the Department has in fact found that the provision "negatively impacted their ability to protect program integrity" because the Department has not granted a single automatic recertification.

The Department proposes new, specific time periods for provisional certification, providing a two-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 three-year period for provisional certification due to "change in ownership, recertification, reinstatement, automatic re-certification, or a failure"[136] 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 in Title IV programs. These measures include withdrawal rates, D/E rates, EP 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 . . . ."[137]

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

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

> (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;
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> (B) if the entity has the power to block significant actions;

[136] 88 Fed. Reg. 32,491.
[137] 34 C.F.R. § 668.13(e).

> (C) if the entity is the 100-percent direct or indirect interest holder of the institution; or
>
> (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 that part.[138]

Though the regulatory language does not specifically state that the purpose of this signature requirement would be to force such parent entities to assume responsibility for institutional liabilities, the agency makes this plain in the commentary, noting that "[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."[139]

The proposed certification amendments would limit Title IV eligibility for clock hour programs (or those required to do a clock to credit conversion) to 100 percent of the state's minimum hours where the school is located, or *under limited circumstances*, 100 percent of a state's minimum hours for a state within the metropolitan statistical area of the institution. The current regulation permits institutions to offer Title IV aid up to 150 percent of the state minimum clock hour requirement for the program where the state has established such a minimum.

DFI opposes this amendment and reminds the Department that many programmatic changes, such as program hours, must be approved by accreditors and state agencies. For this reason, if the Department does choose to proceed with the proposed amendment, then DFI recommends that it "grandfather" all current programs and develop a transition period.

The proposed rule would require all programs that are designed to lead to employment in occupations requiring completion of a program that is programmatically accredited as a condition of state licensure to meet those requirements.[140] This requirement undermines the integrity of the state reciprocity agreement, a concern also raised by NC-SARA in its comment letter.[141]

Directed Questions Concerning the Department's Proposals Relating to Certification Procedures

DFI asks that the Department answer fully and completely the following questions regarding the 2023 NPRM's proposals relating to certification procedures.

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[138] 88 Fed. Reg. 32,492.
[139] 88 Fed. Reg. 32,379.
[140] 88 Fed. Reg. 32,304.
[141] *See* https://nc-sara.org/sites/default/files/files/2023-06/NCSARA%20Letter%20to%20Department.Final_.6.12.23_0.pdf.

Directed Question No. 1: In light of the Department's assertion that the automatic recertification provision "negatively impacted [its] ability to protect program integrity," DFI asks the Department to provide evidence of any instances in which automatic recertification was granted and, if such instances exist, further identify any instances in which the grant of recertification negatively impacted the Department's ability to protect program integrity.

Directed Question No. 2: What justification has the Department provided to establish the need to create supplementary performance measures?

Directed Question No. 3: Has the Department evaluated the potential impact of the amendment to § 668.14(b)(32) to students and online programs?

IX. Ability to Benefit

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

The HEA establishes several ATB options that a student without a high school diploma may pursue in order to gain eligibility to access federal financial aid, including participating in a state process approved by the Department. ATB students, unless grandfathered under a limited provision, are required to enroll in an eligible career pathway program to access federal student aid.

At page 32,316 of the 2023 NPRM, the Department describes the proposed changes: (1) adding a definition of "eligible career pathway program"; (2) making technical updates to student eligibility; (3) amending the state process to allow for time to collect outcomes data while establishing new safeguards against inadequate state processes; (4) establishing documentation requirements for institutions that wish to begin or maintain Title IV-eligible career pathway programs; and (5) establish a verification process for career pathway programs to ensure regulatory compliance.

Request for Clarification Concerning the Department's Ability to Benefit Proposals

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

X. Conclusion

DFI requests from the Department a complete review of its arguments, criticisms, suggestions, and directed questions. For the reasons set forth above, we urge the Department to withdraw the 2023 NPRM. While DFI supports the concept of the FVT provisions, the Department must correct the underlying data flaws. With regard to GE, we urge the Department to withdraw subsection S in its entirety. We further urge the Department to respond to and address our concerns related to Financial Responsibility, Administrative Capability, and Certification Procedures. A proper application of the controlling legal authorities dictates nothing less.

Sincerely,

/s/ *Paul F. Zimmerman*

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