



July 1, 2021

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U.S. Department of Education
400 Maryland Ave., SW
Room 2C179
Washington, D.C. 20202

RE: Comments to the Department of Education Regarding Proposed Negotiated Rulemaking Committees [ED-2021-OPE-0077]

To Whom It May Concern:

Thank you for the opportunity to comment on the Department’s recent notice articulating its intent to establish negotiated rulemaking committees. After years of deregulation at the expense of students and taxpayers, New America is happy to see the Department take on the important task of improving regulations by ensuring they are consumer-focused and address higher education affordability and accountability.

Higher education is a critical and proven pathway toward upward economic mobility for many students. But too often they do not receive a return on their investments because they do not graduate, have poor labor market outcomes, and struggle to repay their loans — often leading to high rates of student loan default. Poor student outcomes should be unacceptable. With \$120 billion in federal financial aid going to higher education every year—and the crucial role higher education plays in people’s ability to succeed economically—the federal government must do more to make sure students are able to graduate, get a good job, and comfortably pay off their student loans.

The COVID-19 pandemic has exacerbated and exposed existing inequities in higher education, making the need for accountability even more pressing. Enrollment has fallen at community colleges, while it has increased at for-profit colleges, which are more expensive and often have

worse student outcomes.¹ Plus, surveys show that students report the quality of their online instruction post-national-emergency to be worse quality than their in-person instruction.²

The topics proposed outline an ambitious agenda. Our comments encourage the Department to tackle a host of pressing and urgent issues, including several not included on its original list, through the negotiated rulemaking process while also using non-regulatory avenues where possible and appropriate. We are available to discuss these comments in greater detail if you have questions or concerns (contact information below). We look forward to continuing to engage the Department on ways to strengthen quality, accountability, and consumer protection in the higher education system to ensure colleges and the federal student loan system serve students and borrowers well.

Sincerely,

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<https://www.studentclearinghouse.org/blog/fall-2020-undergraduate-enrollment-down-4-compared-to-same-time-last-year/>

² Scott Jaschik, "Will Students Show Up?," Inside Higher Ed, April 13, 2020, <https://www.insidehighered.com/admissions/article/2020/04/13/survey-shows-potential-impact-coronavirus-enrollment>

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Process

The Department of Education is required by the Higher Education Act (HEA) to use negotiated rulemaking when regulating issues related to Title IV programs. The process is meant to be consensus-based, bringing together all of the parties that will be affected by the regulation to form a balanced committee to negotiate the rule. However, balance has not been achieved historically, often at the expense of students and taxpayers. Instead of bringing all of the critical stakeholders to the table, schools and accreditors have dominated the makeup of the committee, marginalizing student and consumer protection voices. For instance, when the Department recently regulated on distance education under the previous administration, it filled the committee almost exclusively with representatives of colleges, but failed to include a consumer protection representative or a state attorney general representative. The Department even initially failed to include a state authorization representative, until it was petitioned and pressured by other committee members to do so (but it still did not assign an alternate member).³

The Department has the opportunity to change that and to ensure that voices focused on equity and representing students, borrowers, other consumers, and states (including authorizers and attorneys general) are given equal or greater weight at the table. We must stop thinking of industry as the primary stakeholder. Additionally, the panel should understand and represent the diversity of America and today's students and borrowers, including women, students of color, low-income students, students with disabilities, first-generation college students, veteran students, LGBTQ students, student parents, and more. Any regulation that is made will likely have disparate effects across these communities, and those effects should be considered.

The Need for Accountability

Accountability-related issues should be prioritized in the negotiated rulemaking process. New America has long championed quality and affordability in higher education, particularly for the students whom higher education has not served well. We know that proper accountability is essential to guarantee that students receive an education worthy of the investment that students, families, and taxpayers make. Accountability is also critical for closing the equity gaps that exist across America's higher education system for Black, brown, and low-income students. With sufficient guardrails in place, the federal government can help to ensure that students enroll in schools that set them up to graduate with minimal student debt and find a job that puts them on the path to upward economic mobility.

Borrowers Need Protection Against Low-Quality Programs

³ Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings -- Accreditation and Innovation, U.S. Department of Education, October 15, 2018, <https://www.federalregister.gov/documents/2018/10/15/2018-22506/negotiated-rulemaking-committee-negotiator-nominations-and-schedule-of-committee>.

There is overwhelming evidence that students need protection against low-quality programs. Since the beginning of federal student aid programs, the federal government has struggled to ward against programs that leave students with poor labor market outcomes, subpar earnings, and high debt loads and/or high rates of default.⁴ Today, the federal government spends \$120 billion annually in student grants and loans, but doesn't do enough to get a return on its investment. Last year, \$3.6 billion went to institutions that left three-fourths of their students without a credential.⁵ Recent data shows that just 46 percent of students who enrolled in a four-year institution, and only 26 percent of those who enrolled at a two-year institution, graduated within 6 years.⁶

These problems are particularly concentrated in the for-profit higher education sector. Students at four-year, for-profit colleges graduated at a rate 17 percentage points lower than at a public college or university.⁷ When researchers looked at students who began college in 2004, they found that while for-profit colleges helped expand the supply of skilled workers, their students are also more likely to end up unemployed and with substantial amounts of debt.⁸ More recent data indicate broader problems in higher education. One study in 2015 found "a notable rise in student loan default and delinquency," a problem that was driven by for-profit schools, two-year institutions, and other nonselective institutions.⁹ In fact, those schools accounted for 70 percent of all student loan defaults. Two years after leaving school, nearly three-quarters of for-profit borrowers owed more than they did when repayment began due to interest accrual and fees. Almost half (47 percent) of for-profit borrowers leaving school in 2009 defaulted on a federal student loan within five years.

Accountability is Needed to Address Equity and Racial Justice

Addressing accountability is critical to improve equity and racial justice in higher education. All too often, the students who stand to gain the most from a higher education degree are the ones left behind by the system, including, but not limited to, low-income students, students with a disability, students of color, and students who are the first in their family to attend higher education.. Currently, less than 15 percent of low-income students earn a degree from a four-year college or university even though more than 60 percent of wealthy students do.¹⁰ Graduation rates for Pell Grant recipients are lower at every sector of four-year colleges compared to students who don't receive Pell Grants.¹¹ Black and Latinx adults are only half as likely to receive a postsecondary

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<https://www.newamerica.org/education-policy/reports/short-memories-lead-long-term-consequences-higher-education-policy/>

⁵ <https://www.thirdway.org/memo/a-risky-bet>

⁶ https://nces.ed.gov/programs/digest/d18/tables/dt18_326.27.asp?current=yes

⁷ https://nces.ed.gov/programs/digest/d18/tables/dt18_326.27.asp?current=yes

⁸ <https://www.nber.org/papers/w17710>

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<https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/>

¹⁰ https://nces.ed.gov/programs/coe/indicator_tva.asp

¹¹ https://nces.ed.gov/programs/digest/d18/tables/dt18_326.27.asp?current=yes

degree compared to their white peers, which exacerbates existing racial wealth gaps.¹² Black and low-income students borrow for higher education at a higher rate and borrow more when they do. Black students leave higher education with \$7,400 more on average than white students.¹³ Worse, that gap more than triples just four years after graduation to \$25,000. High debt loads, low-quality schools, and systemic racism in the labor market cause Black students to be more likely to default on their student loans within six years of graduating than their white peers.¹⁴

Accountability Improves Student Outcomes

There is strong evidence that accountability improves student outcomes, protecting both students and taxpayers. Cellini, Darolia, and Turner (2016) examined what happened after colleges closed in the 1990s after sanctions due to high loan default rates in order to determine whether students enroll in other colleges or forgo college, and what the effect was on student borrowing and loan default.¹⁵ They found that when for-profit colleges with high rates of default closed, their enrollment losses were entirely offset by enrollment gains in local community colleges. Additionally, student borrowing decreased and as did the number of student borrowers who defaulted, resulting in savings for students and taxpayers. When the gainful employment rule was implemented, schools closed many of the programs that failed the debt-to-earnings ratio on their own, and others worked to improve (see the gainful employment section below for more information).

Accountability is Important for College Affordability

Improving accountability in higher education is a critical step to making higher education more affordable. Important measures of affordability should not only focus on the cumulative debt a student takes on for their education but should also include a student's ability to pay back those loans. For example, when students cannot afford their monthly student loan payments, they enroll in income-driven repayment plans, pause their payments, or miss payments (and potentially default). The resulting balance growth—due to interest accrual and capitalization—means that those who can least afford it often pay more over the life of their loans. In essence, this increases the price they pay for an education.

Too many schools saddle students with debt but fail to provide a return on investment, due to a low-quality education, noncompletion, extremely high costs, poor labor market outcomes—or a combination of those issues. For example, a number of colleges and universities fail to graduate

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<https://www.americanprogress.org/issues/education-postsecondary/reports/2018/05/23/451186/neglect-ed-college-race-gap-racial-disparities-among-college-completers/>

¹³

<https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/>

¹⁴

<https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continuing-ed-student-loan-crisis-black-borrowers/>

¹⁵ <https://www.nber.org/papers/w22967>

large shares of their students. Those students take on debt to attend but leave without a credential that yields an earnings boost to help them repay their debt. A report from the Obama Administration—among other research—showed that non-completers were nearly three times more likely to default on their loans than those who completed their degree programs, even though they had smaller balances, often as a result of spending less time in school.¹⁶ In fact, the report showed that approximately 66 percent of borrowers who defaulted within three years had loan debts of \$10,000 or less.

I. Gainful employment

One of the first regulatory priorities for the Department should be reviving the gainful employment rule. The Higher Education Act requires that vocational-oriented higher education programs, defined as career education programs at colleges of all sectors and programs at for-profit colleges, lead to gainful employment in a recognized occupation. Given the focus on career and vocational training, Congress specified that these programs should help someone find a job that pays enough given the investment of time and money in these programs. Originally, vocational programs participated in a vocational loan program separate from the student loan program of traditional higher education programs.¹⁷ Extensive discussion at the creation of the program shows concern that students in these programs should “be in a position to repay loans following their training.”¹⁸ However, there was no actual definition for “gainful employment” until the Obama Administration put one in place that created a measure comparing debt and earnings of graduates. The Department’s proposed rule said it was concerned about the number of programs that failed to train students with the skills needed to obtain and main employment in the jobs the programs purported to train for, trained students for occupations with low wages that didn’t justify the cost, and the high number of students withdrawing from the programs.¹⁹

Before its repeal in 2019, the gainful employment rule was a critical safeguard that prevented students from taking on debt they were unlikely to be able to repay. It drove career colleges and trade schools to strengthen the value of their programs to students and would have ended federal funding to the worst programs that could not be improved. However, the Trump Administration refused to enforce the regulations and ultimately rescinded them in 2019. In order to protect students and taxpayers from predatory and low-quality career colleges that fail to provide education and training worthy of the investment, the Department of Education must act to restore this much needed rule.

Disclosures are Important, but Insufficient Alone

¹⁶ https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160718_cea_student_debt.pdf

¹⁷

<https://www.newamerica.org/education-policy/reports/short-memories-lead-long-term-consequences-higher-education-policy/>

¹⁸ <https://www.govinfo.gov/content/pkg/FR-2014-03-25/pdf/2014-06000.pdf>

¹⁹ <https://www.govinfo.gov/content/pkg/FR-2014-03-25/pdf/2014-06000.pdf>

Past gainful employment rules merely required public disclosure of information. Under specific conditions, well-designed and faithfully implemented disclosures can improve consumer decisions. Attention and resources should be dedicated to ensuring that disclosures to students have a clearly identified goal, are specifically designed with robust consumer-testing to achieve that end, are reliably delivered to students, and are easy to understand and use in comparing alternatives. Additionally, more work should be done to better isolate those factors that may contribute to significant and positive effects of different types of disclosures on decision-making. However, numerous barriers prevent disclosures from realizing their intended impact, including consumers' persistent cognitive biases and financial and structural constraints. While certain conditions may increase the ability of information disclosure to alter consumer behavior, disclosures alone are an insufficient strategy for preventing abuse or exploitative practices.²⁰

Gainful Employment is a Needed Safeguard

The need for this rule is rooted on a solid foundation of evidence and is stronger now than it was when it was written. As mentioned above, there is a significant need to protect students from the programs that are supposed to set them up to find a job, but instead saddle them with debt and without a salary that enables them to afford their student loan payments. One 2013 study looking at certificate programs at both for-profit and non-profit schools found that most certificate programs do not raise the earnings of their graduates.²¹ An analysis of more recent data from the Department's College Scorecard showed that the average certificate program across all sectors reported a median salary below \$25,000, with a total of more than 4,900 programs with median earnings below that level.²² Another recent analysis showed that only 43 percent of certificate-granting institutions report earnings that exceed the average high school graduate, even after ten years.²³ The results of the Department's first-year earnings data substantiated widespread problems and highlighted the need for the rule: 32 percent of for-profit certificate graduates and 14 percent of public college graduates in certificate programs had median wages less than a full time minimum-wage worker (\$14,500).²⁴

These poor outcomes are especially acute at for-profit colleges, which are often more expensive, therefore leading to higher debt loads. According to Armona, Chakrabarti, and Lovenheim, students who attend for-profit institutions are more likely to borrow for their educations, take on more in student loans when they do, have worse labor market outcomes, and are more likely to default than students attending similarly selective public schools.²⁵ Using administrative data from the Department of Education and the Internal Revenue Service, Cellini and Turner found that

²⁰ <https://www.cmu.edu/dietrich/sds/docs/loewenstein/DisclosureChgsEverything.pdf>

²¹ <https://www.sciencedirect.com/science/article/pii/S0927537113001000>

²²

<https://www.forbes.com/sites/wesleywhistle/2020/02/27/the-certificates-that-pay-and-the-many-more-th-at-dont/>

²³

<https://www.thirdway.org/memo/providing-low-income-students-the-best-bang-for-their-educational-buck>

²⁴ <https://www2.ed.gov/documents/press-releases/ge-fact-sheet-online.pdf>

²⁵ <https://www.nber.org/papers/w25042>

certificate-seeking students in for-profit institutions are 1.5 percentage points less likely to be employed and, conditional on employment, have 11 percent lower earnings after attendance than students in public institutions.²⁶

A growing evidence base shows that many programs at for-profit institutions may not be preparing students as well as comparable programs at public institutions. A 2011 GAO report looked at the results of licensing exams for ten occupations that account for the largest fields of study, by enrollment, and found that for “9 out of 10 licensing exams, graduates of for-profit institutions had lower rates of passing than graduates of public institutions.”²⁷ Other bodies of research identify problems in the for-profit sector related to high debts and low earnings.²⁸ Although student loan default rates have increased in all sectors of higher education in recent years, they are highest among students attending for-profit institutions.²⁹ Approximately 19 percent of borrowers who attended for-profit institutions default on their Federal student loans within the first three years of repayment as compared to about 13 percent of borrowers who attended public institutions.³⁰

Analysis of data collected on the outcomes of 2003–2004 first-time beginning postsecondary students as a part of the Beginning Postsecondary Students Longitudinal Study shows that students who attend for-profit institutions are more likely to be idle—not working or in school—six years after starting their programs of study in comparison to students who attend other types of institutions.³¹ Additionally, six years after enrollment, students who attend for-profit institutions have lower earnings than students who attend other types of institutions.³² This is concerning for several reasons. First, some students may not have sufficient earnings to repay the debt they incurred to enroll in these programs. Next, because there are lifetime limits on the amounts of Federal grants and loans students may receive, their options to transfer to higher quality and affordable programs may be constrained. This emphasizes the need for programs to prepare students for employment that provides adequate earnings and does not result in excessive debt.

Black, Latinx, and low-income students are overrepresented in gainful employment programs, underscoring that accountability policies are equity policies.³³ Certificates are disproportionately earned by low-income students and students whose parents do not have a college degree.³⁴ And they are more concentrated among Black and Latinx Americans.³⁵ Black and Latinx students

²⁶ <https://www.nber.org/papers/w22287>

²⁷ <https://www.gao.gov/products/GAO-12-143>

²⁸ <https://www2.ed.gov/documents/press-releases/ge-fact-sheet-online.pdf>

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<https://www.phil.frb.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2013/D-2013-December-Darolia-Student-Loan-Repayment.pdf> see also

<https://www.nber.org/papers/w17710>

³⁰ https://ticas.org/wp-content/uploads/legacy-files/pub_files/tcf_ticas_state_forprofit_toolkit.pdf see also

<https://www2.ed.gov/offices/OSFAP/defaultmanagement/lga.html>

³¹ <https://www.nber.org/papers/w17710>

³² <https://www.nber.org/papers/w17710>

³³ <https://nces.ed.gov/pubs2017/2017416.pdf>

³⁴ <https://cew.georgetown.edu/cew-reports/certificates/>

³⁵ <https://cew.georgetown.edu/cew-reports/certificates/>

together make up 28 percent of all students enrolled in undergraduate or graduate study, but they represent 41 percent of students at for-profit colleges. For-profit colleges also enroll significantly larger shares of low-income students, with 54 percent of students receiving a Pell Grant, compared to 33 percent of students at a public college and 32 percent of students at non-profit colleges.³⁶ Black and Latinx graduates of undergraduate degree programs at for-profit colleges are far more likely to have borrowed, and at significantly higher amounts, than graduates of public colleges. All of this matters when looking at outcomes for students, particularly for students of color and low-income students. One recent analysis showed that 60 percent of for-profit colleges left their low-income students making more than the average high school graduate within 10 years of entering their institution.³⁷ In fact, 63 percent of for-profit colleges failed to yield their low-income students with an earnings premium sufficient to recoup the cost to attend the institution *ever*, only 25 percent did in 10 years or fewer.

The Previous Gainful Employment Rule was an Effective Tool

As mentioned above, accountability can improve student outcomes and the gainful employment rule provides its own evidence of that. Experience has also shown that the rule improved the value of higher education offered to students. When the gainful employment rule was implemented, it was extremely effective. The rule easily identified the programs that were loading up students with debt, but leading to incomes insufficient to repay. Had the rule remained, it would have shut a number of low-quality programs down. But it was also very effective at changing colleges' behaviors: Some programs responded in a way to improve. For example, one study found that for-profit college leaders planned to take steps that would ultimately help students in response to the rule, including reducing debt loads and hiring staff to support job placement.³⁸ Many failing programs closed before the accountability measures went into effect. As New America's Kevin Carey explained in *The New York Times*, "a close analysis of the more than 500 failing programs that haven't appealed their status reveals something interesting: A substantial majority of them, 300 or so, have already been shut down."³⁹ At the time, New America analyzed the websites of those institutions with failing gainful employment programs that did not appeal their earnings data and found that the majority were already shut down, less than a year after the first debt-to-earnings rates had been published.

Examining 5,000 undergraduate programs across 1,500 colleges, Kelchen and Liu (2019) found that colleges closed lower-performing programs and focused their resources on their best-performing programs, suggesting that the rule encouraged colleges "to examine with more intention the

³⁶ <https://nces.ed.gov/ipeds/TrendGenerator/app/build-table/8/35?rid=4>

³⁷

<https://www.thirdway.org/memo/providing-low-income-students-the-best-bang-for-their-educational-buck>

³⁸ Hentschke, Guilbert & Parry, Shirley. (2014). Innovation in Times of Regulatory Uncertainty: Responses to the Threat of "Gainful Employment". *Innovative Higher Education*. 40. 10.1007/s10755-014-9298-z.

³⁹

<https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html>

financial return of their programs for students.”⁴⁰ The Institute for College Access and Success (TICAS) documented specific examples of how colleges sought to improve student outcomes.⁴¹

Revive, but also Strengthen, the Gainful Employment Rule

While the gainful employment rule was effective at protecting students and taxpayers from low-quality and high-cost programs, it didn’t do enough to root out poor performing programs. Too many colleges and programs leave their graduates with low earnings, but because their debts are also low, the programs were able to pass gainful employment. In fact, there were more than 1,700 programs that had reported earnings that fell below the federal poverty line, though only four percent of them failed gainful employment.⁴² More recent earnings data from the Department’s College Scorecard showed that there are 800 certificate programs with median earnings below the federal minimum wage, and the average program reports earnings below that of a high school graduate.⁴³ Protecting students from high debt loads is important, but if graduates aren’t earning a living wage, they will be unable to live a financially secure life no matter how much they owe in student loans. Higher education is supposed to provide economic security and no graduate should leave making less than they would have if they just graduated high school, let alone the minimum wage. Any rulemaking should not simply revive the rule. Instead, the Department must also strengthen the rule to guard against programs with poor outcomes, including setting an earnings threshold to ensure that graduates of higher education programs leave earning more than high school graduates.

II. Borrower defense to repayment

The borrower defense to repayment regulation is a critical tool for the Department to protect borrowers from having to repay debt that should be forgiven because of actions from predatory colleges, while also deterring future misconduct by the schools. The regulation directs the Secretary of Education to discharge federal loan debt in instances of college misconduct. Though the regulation has existed since 1994 and the right to borrower defense has been written into every federal Direct Loan borrower’s promissory note since, its increased use was catalyzed by a single catastrophic event: the 2015 collapse of Corinthian Colleges, Inc., a large for-profit college chain with a history of fraud and misconduct toward its students.⁴⁴ ED’s findings of widespread misconduct by Corinthian led them to create more structure and an easier process for borrowers it had reason to believe were misled, and encouraged those borrowers to apply through an easier process. As a result, ED began receiving an unprecedented influx of claims from borrowers seeking

⁴⁰ Robert Kelchen, Zhuoyao Liu; Did Gainful Employment Regulations Result in College and Program Closures?. Education Finance and Policy 2021; doi: https://doi.org/10.1162/edfp_a_00340.

⁴¹ https://ticas.org/files/pub_files/ticas_comments_on_ge_nprm.pdf

⁴² <https://www.thirdway.org/infographic/how-low-does-the-gainful-employment-bar-go>

⁴³

<https://www.forbes.com/sites/wesleywhistle/2020/02/27/the-certificates-that-pay-and-the-many-more-th-at-dont/>

⁴⁴ <https://www.govinfo.gov/content/pkg/FR-1994-08-18/pdf/FR-1994-08-18.pdf#page=187>

borrower defense relief.⁴⁵ ED, having never been presented with the need to adjudicate such a large volume of claims before, sought to provide clarity for itself and the public by commencing a new rulemaking in the fall of 2015 to update its regulation.⁴⁶

The Trump Administration, upon taking office in 2017, attempted to delay the 2016 regulation's effective date, and initiated a new regulatory process. A new regulation was published in September 2019 and took effect on July 1, 2020. The new regulation creates an evidence standard so unreasonable that it makes it nearly impossible for borrowers to provide evidence sufficient to have their claims approved and their loans discharged, leading to the denial of meritorious claims.⁴⁷ At the same time, the Trump Administration implemented at least two versions of a partial relief formula that compared the earnings of programs that claimants attended with the earnings of similar programs at other institutions and provided partial (or no) relief based on the difference. One economist referred to this as a "nonsensical" formula, "which misunderstands and misapplies fairly basic statistical techniques in a way that makes it materially harder for defrauded students to find relief."⁴⁸ The Trump Administration significantly slow-walked approval of existing claims and minimized the amount of relief provided to borrowers on existing claims in the backlog.

New regulations are needed to restore this important protection for student borrowers and prevent more predatory schools from defrauding students. The 2019 rule offers no real path to debt relief for the vast majority of borrowers who were defrauded by their school, and it provides no disincentive to misconduct for those schools. The Department should ensure that a new process is understandable and accessible for borrowers, while facilitating collection and review of evidence for resolving borrower defense claims. Additionally, it must make it easier for ED to provide relief to groups of borrowers where appropriate. Lastly, it must deter institutions from future misconduct and put in place strong financial responsibility safeguards to mitigate sudden institutional collapses, like that of Corinthian Colleges.

But because new regulations are not backward looking, the majority of any new provisions would apply to all new loans issued after July 1, 2023 at the earliest. These efforts are separate from addressing the existing backlog of borrower defense applications, which should be a high priority separate from new regulatory efforts. As of April 2021, more than 362,000 applications had been received since the initial influx in 2015.⁴⁹ As of that month, more than 137,000 of those have been

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<https://www.usnews.com/news/articles/2015/06/08/corinthian-colleges-students-get-expanded-debt-relief-options>

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<https://www.federalregister.gov/documents/2015/08/20/2015-20669/negotiated-rulemaking-committee-public-hearings>

47

<https://ticas.org/accountability/defrauded-students-left-holding-the-bag-under-final-borrower-defense-rule/>

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<https://medium.com/@repmarktakano/education-expert-devos-new-borrower-defense-scheme-is-nonsensical-b232a096c1a2>

⁴⁹ <https://studentaid.gov/data-center/student/loan-forgiveness/borrower-defense-data>

denied or deemed ineligible; almost 95,000 were approved; 11,700 were closed by other means; and nearly 108,000 were pending adjudication. The Department's announcement in March that it would rescind the partial relief formula and streamline the application process was a welcomed and appropriate action, one that is reflected in the increased number of application approvals.⁵⁰ We are thankful for the Department's actions to address this backlog and the relief that has been withheld from deserving student borrowers. We hope that the Department will continue its work on this in tandem with new regulation.

III. Closed school discharges and discharges for borrowers with a total and permanent disability

In addition to the borrower defense rule, the Secretary also has the ability to provide loan discharges to students whose schools suddenly close. When students are unable to complete their education because their institution permanently closes, they are eligible for a discharge on their loans provided they do not choose to use their credits by transferring them to another institution or completing a teach-out. However, data produced by the Education Department indicate that nearly half of borrowers who are eligible for a discharge have neither applied for one nor reenrolled in higher education within three years after leaving school.

Prior to 2016, a provision similar to the borrower defense to repayment rule allowing the Secretary to discharge loans without an application with evidence that the borrower was eligible for a closed school discharge had only rarely been used. Exceedingly low take-up of the application process by borrowers suggested that thousands of borrowers whose schools had closed while they were enrolled were entirely missing the benefit of having their loans discharged granted to them by Congress. The 2016 rule added a provision that, if an otherwise-eligible borrower had not reenrolled at another financial aid-eligible institution within three years of his school closing, the Department would automatically discharge his loans.

However, in the 2019 rewrite of the borrower defense rule, the Trump Administration eliminated both the Secretary's ability to discharge loans without an application from borrowers, and the automatic discharges for borrowers who did not subsequently re-enroll. The Department also extended the window for closed school discharge eligibility from enrollment within 120 days of closure to 180 days. This has meant that thousands of students have been waiting for relief that they deserve and are entitled to under the law.

The Department has rightfully acted to provide relief to the 18,000 student borrowers who attended ITT Technical Institute (ITT).⁵¹ We agree that a rulemaking on this important issue is

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<https://www.ed.gov/news/press-releases/department-education-announces-action-streamline-borrower-defense-relief-process>

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<https://www.ed.gov/news/press-releases/department-education-announces-approval-new-categories-borrower-defense-claims-totaling-500-million-loan-relief-18000-borrowers>

needed to ensure that these borrowers are able to access the benefit they are entitled to and receive timely relief.

Another discharge authority available to the Secretary is the total and permanent disability (TPD) discharge. This is a critical relief mechanism provided under federal law that makes student borrowers who become totally and permanently disabled eligible to have their federal loans cancelled. Currently, federal regulations require that disabled borrowers apply for the discharge, provide documentation proving their disability, and follow income monitoring requirements for an extended period of time. In many cases, these steps are very burdensome while a borrower is likely struggling with their health, and often financially. We agree with the Department's waiver announced earlier this year to provide relief during the pandemic.⁵² But regulating is necessary in order to make this process less burdensome and more streamlined going forward. The Department should work to automate this process as much as possible given that data required is already in the hands of the federal government.

IV. Financial responsibility, administrative capacity, and certification procedures for participation in title IV programs

It is critical that institutions have sufficient resources—financial or otherwise—to provide an education and administer federal student aid programs on their campuses. That is why we agree with the Department that financial responsibility (31 CFR subpart 1), administrative capability (34 CFR 668.16), and certification procedures (34 CFR 668.13) are important issues to address in negotiated rulemaking.

Financial Responsibility and Administrative Capability

Regulations regarding administrative capability required institutions to demonstrate their ability to adequately administer federal student aid programs. It requires colleges and universities to implement proper policies and procedures, maintain records, and importantly, have the financial resources to hire adequate personnel, among other requirements. Relatedly, financial responsibility rules require the Department to review the financial resources of schools participating in Title IV programs to prevent waste of Title IV funds at low-quality or fiscally unsustainable schools.

Title IV funds that go to schools that burn through cash, abruptly close, and leave students without a path to graduation would be a waste of student, family, and taxpayer dollars. The greatest risk to taxpayers of underwriting low-quality and fiscally unsustainable schools lies with extremely large for-profit schools that rapidly cycle through “boom” and “bust” periods. Risky growth, marked by sharp rise in a school's intake of Title IV revenue, sets the stage for declining quality (when schools cannot scale educational services), consumer fraud (when schools invest in marketing but not

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<https://www.ed.gov/news/press-releases/education-department-announces-relief-student-loan-borrowers-total-and-permanent-disabilities-during-covid-19-emergency>

learning), and sudden closures (when over-leveraged schools can no longer enroll enough students to cover expenses).

Since the previous rulemaking on financial responsibility occurred in 1996-97, four changes in higher education require updates to financial oversight. First, an increased reliance on Title IV funds and student debt across higher education complicates the analysis and makes termination of Title IV eligibility tricky. Second, growth among for-profit conglomerates (often publicly traded or backed by private equity) poses a unique set of risks. Third, declining enrollment has challenged the nonprofit sector with long-established schools facing financial decline. Fourth and finally mergers, acquisitions and new combinations will continue to reshape higher education, requiring regulators to be nimble with review of structural changes.

Financial oversight reform was overdue even before the pandemic. After decades in which institutional closures were few, far-between, and well-managed, the 2008 financial crisis led to rapid growth by for-profit schools, which were seen as countercyclical investments. Waves of closures followed as supersized schools like ITT Tech, Virginia College, and Art Institutes were shown to be fraudulent, low-quality institutions, and ran out of money. Now, financial shocks from the pandemic have heightened both the need for improved accountability, especially among rapidly growing online programs, and the pressure to avoid closures by using Title IV as a bail-out fund.

A financially struggling school may cut corners, and provide services inferior to what the students and taxpayers paid for (and what regulators approved). Those schools might also lack the administrative capability to administer the students aid programs properly. However, the current system of monitoring financial stability falls short of monitoring all categories of financial obligations identified in statute. Critically, this inadequate system has too many blind spots, with taxpayers bearing the costs of multiple precipitous closures that evaded regulatory oversight. The Department should initiate some actions in tandem with a rulemaking process under existing authority. However, under current regulations, most actions are limited to a subset of schools (e.g. schools that have been sorted into the “fail” range based on the current, flawed composite score system).

Certification Procedures for Participation

The process by which institutions of higher education apply to participate in title IV federal financial aid programs is an important tool for the Department. Each participating institution signs a program participation agreement (PPA) that commits them to complying with federal laws and regulations that govern these programs, including financial responsibility and administrative capacity. That agreement between the Department and institutions provides the Department broad enforcement authority. However, the Department has not yet fully used this authority to enforce the provisions of these agreements and address issues of non-compliance. Instead, the Department has allowed institutions to remain in provisional status, while institutions have remained out of compliance. We agree with the Department that this authority is one that should be looked at in order to improve quality and provide consumer protection in higher education. PPAs could be a tool

for the Department to address equity gaps for students of color, low-income students, first-generation college students, and other underrepresented and marginalized students. As the Department considers rulemaking on this issue, it should also use its existing authority when making these agreements, and it should enforce these agreements to ensure that colleges are in compliance with law and regulation.

V. Change of ownership and change in control of institutions of higher education

We are pleased to see that the Department recognizes that there is a need to address issues with for-profit colleges that convert to nonprofit status to evade regulation, even though they still act as for-profit institutions in many ways. The distinction between these schools is more than just tax-status, as some contend. Nonprofit colleges lack the same profit-seeking motives and therefore behave very differently from for-profit colleges. The difference is evident in far lower incidence of fraud complaints, stronger completion and labor market outcomes, and better student loan repayment outcomes.⁵³ The independence of American colleges—from both government control and the predatory impulses of profiteers—is somewhat unique and has been critical to the country’s leadership in quality higher education. In recent years, however, the integrity of our strong nonprofit and public sectors has been threatened by school operators affixing the labels without adopting the policies and practices that protect students and taxpayers. A decline in oversight by the IRS is largely to blame for this problem.⁵⁴

Current Department regulations prohibit private inurement at colleges seeking nonprofit status, a prohibition that has provided enough clarity to allow ED to successfully push back against some tainted schools.⁵⁵ We advise against attempting to strengthen, define, or clarify the definition of nonprofit because there is too high a risk that a regulatory effort will unintentionally create loopholes to exploit. Instead, we believe the emphasis should be on enforcing the existing regulations in a way that keeps schools from entering even a gray area of excessive private gain at nonprofit colleges or conflicts of interest in their governance.

However, events in recent years make it worth considering clarifying the definition of a “public” institution of higher education by regulation. Under the Purdue Global umbrella, the for-profit Kaplan Higher Education has managed to find a space to operate that allows it to claim to be nonprofit and public without the public transparency, oversight, and financial backing that typically comes with either of those monikers.⁵⁶

⁵³ <https://tcf.org/content/report/college-complaints-unmasked/>, <https://www.gao.gov/products/GAO-12-143>, <https://www.nber.org/papers/w17710>

⁵⁴ <https://tcf.org/content/report/how-for-profits-masquerade-as-nonprofit-colleges/>

⁵⁵ Note that Department regulations require schools to be approved as nonprofit entities in all states in which they operate. To our knowledge that requirement has not been enforced.

⁵⁶ IRS policies with regard to public entities is a “crazy quilt of inconsistent rules,” according to nonprofit law expert [Ellen April](#).

VI. Mandatory pre-dispute arbitration and prohibition of class action lawsuits provisions in institutions' enrollment agreements and associated counseling about such arrangements

In 2016, the Department added a prohibition on predispute arbitration agreements—fine-print in students' enrollment contracts requiring them to enter into closed-door arbitration proceedings with a school in the event they have a borrower defense-related complaint.⁵⁷ Where those cases might relate to more widespread instances of misconduct that could wind up as borrower defense liabilities for the school, more time hidden from public view means those liabilities pile up while the Department and other law enforcement bodies remain unaware and unable to take action.

In 2019, the arbitration ban was wholly removed from the regulation, and replaced with a disclosure to students about any applicable arbitration clauses. In the final rule, the Department cited the litigation landscape and Congress' disapproval of a CFPB arbitration rule in arguing that the arbitration clauses were not aligned with federal policy favoring arbitration. Reinstating the arbitration ban is an important priority that should be included in rulemaking to ensure that students are protected from predatory colleges.

Loan Repayment Plans and Public Service Loan Forgiveness

Congress and the Department have authorized various student loan repayment plans—in addition to the standard 10-year repayment plan—in order to provide relief and more manageable payments to student borrowers whose monthly payments are unaffordable due to high balances and/or insufficient income. Among these are income-driven repayment (IDR) plans, which base monthly payment amounts on borrowers' adjusted gross income and family size. Any remaining balance is forgiven after a borrower makes 20 or 25 years' worth of qualifying payments, depending on the specific plan and types of loans held. While these plans provide critical protections for those struggling to repay their loans—research has shown that they reduce student loan delinquency and default—they can lengthen the repayment period and increase the amount that borrowers repay over time.⁵⁸

Though income-driven repayment provides many borrowers with relief, New America recognizes that borrowers face significant challenges when using current plans. Reforms are needed to ensure these plans are accessible and affordable, especially to those who need them most. Research has shown that the numerous plans can create “choice overload,” making it confusing for borrowers to know which plan might be best for them.⁵⁹ Worse, the administrative requirements to enroll in an income-driven repayment plan can be confusing and complex, causing many borrowers to struggle

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<https://www.federalregister.gov/documents/2016/11/01/2016-25448/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>; See also: <https://www.newamerica.org/education-policy/edcentral/education-dept-delays-provision-protects-students-right-trial-jury/>

⁵⁸ <https://faculty.chicagobooth.edu/constantine.yannelis/IBR.pdf>

⁵⁹ <https://www.sciencedirect.com/science/article/abs/pii/S0047272720301626>

to ever enroll in one and delaying loan forgiveness for others. Beyond difficulties experienced attempting to enroll, many borrowers still find their payments to be unaffordable. Others experience frustration and anxiety due to growing balances from interest accrual and capitalization.

Any regulatory effort should ensure that payments are affordable for struggling borrowers, including taking into account borrowers' larger financial circumstances; remove administrative barriers to enrollment in and recertification for such plans; prevent, or do more to address, growing balances; address the amount of time borrowers spend in repayment; and streamline the program to ensure it is less complex and confusing for borrowers.

While fixes to IDR would also benefit the Public Service Loan Forgiveness (PSLF) program, the design and implementation of PSLF has faced additional, critical challenges causing confusion and affecting eligibility for forgiveness for borrowers. While many changes to PSLF require Congressional action, the Department can use the negotiated rulemaking process, and executive authority outside of negotiated rulemaking when possible, to make important and meaningful reforms. These include but are not limited to: ensuring effective communication with borrowers about their potential eligibility and about the reasons for denials of employment certification, any payment ineligibility, and denials for forgiveness; the establishment of an appeals process; ensuring the expedited and accurate processing of IDR and employment certification forms and loan transfers; ensuring the definition of qualifying employers is inclusive and consistent; and aligning similar, yet disparate provisions of the PSLF and IDR programs. This last item could include, for example, ensuring economic hardship deferments count toward both PSLF and IDR qualifying payments and that the timing requirements of submitted payments match between the programs.

The Department should also pursue other, non-regulatory options to make the student loan system work better for borrowers and promote evidence-based policymaking. It should continue and expedite, to the extent possible, its work implementing the FUTURE Act. Importantly, the Department should, as part of FUTURE Act implementation, provide multiple opportunities for borrowers to consent to having their data shared (with the Department from the IRS) throughout the life of their loans and should separate this consent from enrollment into an IDR plan.⁶⁰ This would allow the Department and servicers to proactively identify borrowers who might be eligible for lower or \$0 IDR payments but who are not enrolled and also facilitate the process of auto-enrolling borrowers into IDR plans when they are delinquent on their loans. In addition, the Department should expand the options for alternative documentation of income (for enrollment in IDR plans) to include proof of receipt of other means-tested programs.⁶¹

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<https://www.brookings.edu/research/three-ways-the-biden-administration-can-help-families-and-student-loan-borrowers-affected-by-the-pandemic/>

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<https://www.brookings.edu/research/three-ways-the-biden-administration-can-help-families-and-student-loan-borrowers-affected-by-the-pandemic/>

The Department must also, through its Next Gen process and other initiatives, provide clear standards for and strong oversight of its contractors, including student loan servicers, and assess and incentivize metrics, activities, and compensation structures that lead to positive borrower outcomes. And finally, the Department should make more data available on student loans and income-driven repayment, including the pathways borrowers take through repayment, changes in enrollment over time, and insight into how and which borrowers use existing repayment plans.

Other Issues to Address

The issues proposed by the Department are significant and create an ambitious agenda for rulemaking. However, there are additional issues that the Department should include or consider in its final agenda. Those issues include accreditation and state authorization, short-term Pell, student loan default, and closing the 90/10 loophole.

I. Accreditation and State Authorization

The absence of accreditation and state authorization on the suggested topics is a significant oversight. While the Department has proposed a number of issues of importance for accountability, leaving out the other two legs of the regulatory triad fails to take a comprehensive approach for truly reforming higher education. The triad's system of shared accountability is meant to provide consumer protection, but it currently does an inadequate job. As we've written before, all too often it has become a game of hot potato, with no leg of the triad willing to take meaningful action against failing institutions.⁶²

Accreditation and state authorization are supposed to provide a stamp of approval for an institution, signaling quality to students and allowing taxpayer money to flow in the form of title IV federal student aid money. Unfortunately, both have long been too weak, doing little to account for student outcomes in the quality evaluation. The DeVos Administration's deregulatory efforts further diminished the strength of accreditation to effectively provide quality assurance and failed to strengthen state authorization.

The Department has taken the appropriate action to end the recognition of the troubled accreditor, the Accrediting Commission of Career Schools and Colleges (ACICS), but much more is needed to improve quality in higher education and protect students and taxpayers.⁶³ As New America's Alejandra Acosta wrote last week about the need for including accreditation, "This year's neg reg is an opportunity to reverse the damage done by the last administration, make higher education less risky for students, and increase racial equity in our higher education system. That opportunity can

⁶² <https://www.newamerica.org/education-policy/reports/bermuda-triad>

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<https://www.ed.gov/news/press-releases/statement-us-department-education-status-recognition-nine-accrediting-agencies-and-withdrawal-recognition-accrediting-council-independent-colleges-and-schools>

only happen if accreditation makes it onto the final neg reg agenda.”⁶⁴ The same is true for state authorization. If the Biden Administration is going to truly address the significant challenges in American higher education, it must address the entire program integrity triad.

II. Short-Term Pell

Currently, there are efforts in Congress to extend Pell Grants to extremely short job training programs, commonly referred to as “short-term Pell” or “workforce Pell.”⁶⁵ Though those efforts have stalled temporarily, the Department should be ready to include this issue in its rulemaking should the legislation pass. These legislative proposals would dramatically reduce the number of weeks (from 15 to 8) and clock hours of training (from 600 to 150) required for a program to access Pell Grants. The legislation would require the Secretary to approve individual programs, which is not how most programs in higher education are approved. This shift in policy around federal student aid is a significant departure from how higher education dollars and programs function today which necessitates regulating.

As we’ve laid out at length in these comments, there already aren’t enough guardrails to protect students and taxpayers from low-quality education programs. Opening up Pell to these very-short-term programs could divert low-income students into different types of programs, ones that may not pay off. The Pell Grant program is the primary source of federal grant aid for low-income students to earn a postsecondary degree or credential. Pell recipients are more likely to be Black and Latinx and are economically vulnerable.⁶⁶ In fact, 68 percent of them come from families earning less than \$30,000 annually.⁶⁷ That is why it is imperative that the Department regulate on this issue because these programs come with significant risks, risks with serious equity and racial justice implications.

Existing short-term programs already eligible for federal student aid show questionable outcomes. Recent data from the Department’s College Scorecard showed that more than three-quarters of certificate programs that are already eligible for student aid today leave their median graduate earning less than \$30,000 annually, which is below the federal poverty line for a household of four.⁶⁸

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<https://www.newamerica.org/education-policy/edcentral/accreditation-should-be-on-the-departments-neg-reg-agenda/>

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<https://www.highereddive.com/news/senate-adds-short-term-pell-expansion-to-innovation-and-competition-act/601075/>

⁶⁶ https://nces.ed.gov/programs/raceindicators/indicator_rec.asp

⁶⁷ See Table 002 for the 2017-2018 award year:

<https://www2.ed.gov/finaid/prof/resources/data/pell-data.html>

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<https://www.forbes.com/sites/wesleywhistle/2020/02/27/the-certificates-that-pay-and-the-many-more-that-dont/>. See also: <https://aspe.hhs.gov/poverty-guidelines>

Another analysis showed that 10 of the 15 certificate programs with the most graduates have typical earnings of \$18,000 or less — hardly a family sustaining wage.⁶⁹

The current length requirement for Pell Grant eligibility for programs has been in place in some way since the beginning of the program due to poor job placement rates and high defaults among short-term programs.⁷⁰ Congress allowed some very-short-term programs—as short as 10 weeks and as few as 300 clock hours—to access loans, but placed additional requirements on those programs, including requiring that programs have both completion and job placement rates of 70 percent. However, forthcoming research at the Brookings Institution shows that even with those additional requirements those programs show poor labor market outcomes for students.⁷¹ In fact, the average program leaves its graduates earnings just \$24,000 annually. The researchers found that there is only a “minuscule” correlation between earnings and job placement rates, and in the opposite direction of what it should be if job placement rates indicated program quality.

On average, the longer the credential and training, the more skills a student gains — making them more employable and more likely to earn higher wages. But even shorter programs could have worse outcomes. New America’s Monique Ositelu, PhD used data from a nationally representative survey to examine the outcomes of adult workers with certificates from programs that would be eligible for short-term Pell. She found that approximately 40 percent of adults with a short-term certificate reported that they were unemployed.⁷² Half of those who were working earned less than \$30,000 annually, and a third earned less than \$20,000. Worse, the data showed that Black and Latinx adults earn far less than white adults, and women earn less than men. With the growing “white flight to the Bachelor’s degree,” and influx of low-quality, very-short-term programs from short-term Pell could divert students of color from the longer credentials and degree programs that yield a larger pay off and therefore widen gaps in educational attainment and economic mobility.⁷³

The desire by those in Congress to funnel Pell dollars—and the low-income students that stand to gain the most from higher education—into these programs is questionable given these poor outcomes. But should Congress choose to enact such a proposal, the Department must act and regulate expediently. Otherwise, we risk tracking low-income students—students who are disproportionately Black and Latinx—into programs that don’t lead to the economic security that the Pell program, and higher education more broadly, is supposed to provide.

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https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/LaborMarketReturns_0.pdf?ga=2.1566517.540227492.1551120080-1178237755.1551120080

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<https://www.newamerica.org/education-policy/reports/short-memories-lead-long-term-consequences-higher-education-policy/>

⁷¹ See the working paper, “Quick College Credentials: Student Outcomes and Accountability Policy for Short-Term Programs” here: <https://sites.google.com/view/stephaniecellini/research>

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<https://www.newamerica.org/education-policy/reports/five-things-policymakers-should-know-about-short-term-credentials/>

⁷³ <https://medium.com/georgetown-cew/white-flight-to-the-ba-e604ee4e3967>

III. Student Loan Default

As of March 2021, close to 20 percent of borrowers with federally managed student loans were in default.⁷⁴ As New America’s Sarah Sattelmeyer noted in a recent Brookings essay, “borrowers of color, those with low incomes, those who don’t complete a degree, student parents, and first generation students, among others, have particularly high rates of default. At the same time, these groups are more likely to have struggled during the pandemic.”⁷⁵

Reforming IDR is only one piece of the student loan repayment puzzle. To the extent possible, the Department should address student loan default in its negotiated rulemaking process. The consequences of default are severe and punitive—including wage garnishment, high collection fees, and garnishment or withholding of a host of federal benefits. And rates of re-default are high.⁷⁶ Traditionally, less attention has been paid to the default system than to the repayment system, but as Sattelmeyer notes, a diverse group of stakeholders “have identified and promoted the creation of a simpler pathway out of default, creating consistent terms for all borrowers who exit, forgiving debt for those who have been in default for an extended period of time, limiting collections, and eliminating the default system,” among a host of solutions.⁷⁷ While not all default-related reforms can be addressed through the negotiated rulemaking process, progress could be made on some of these goals, which would provide assistance to and relief for the most vulnerable borrowers.

IV. Closing the 90/10 Loophole

In the Department’s press release announcing the proposed rulemaking, it acknowledged the recent change to the federal law aimed at closing the 90/10 loophole.⁷⁸ As mentioned in the release, the law prohibits the Department from beginning regulatory activity until October 1, 2021. We believe the Department should immediately begin regulating on this issue on that date in order to ensure that the changes go into effect as soon as possible. This will be an important step at protecting student veterans and servicemembers from predatory for-profit colleges that seek to be fully subsidized by the federal government.

⁷⁴ <https://studentaid.gov/data-center/student/portfolio>

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<https://www.brookings.edu/research/three-ways-the-biden-administration-can-help-families-and-student-loan-borrowers-affected-by-the-pandemic/>

⁷⁶ <https://studentaid.gov/manage-loans/default/>

<https://www.aei.org/research-products/report/federal-student-loan-defaults-what-happens-after-borrowers-default-and-why/>

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<https://www.brookings.edu/research/three-ways-the-biden-administration-can-help-families-and-student-loan-borrowers-affected-by-the-pandemic/>

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<https://www.ed.gov/news/press-releases/department-educations-office-postsecondary-education-announces-public-hearings-protections-students-loan-repayment-targeted-loan-cancellation-programs-and-other-higher-education-regulations>