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U.S. Department of Education
400 Maryland Ave., SW
5th Floor
Washington, D.C. 20202

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To Whom It May Concern:

Thank you for the opportunity to submit comments on the Department of Education’s proposed regulations related to gainful employment, financial value transparency, financial responsibility, administrative capability, certification procedures, and ability to benefit. Arnold Ventures is a philanthropy dedicated to tackling some of the most pressing problems in the United States. For the past seven years, we have invested in research, policy development, litigation, and advocacy to end predatory behavior in higher education and increase the return on investment of higher education for both students — especially students who have been historically marginalized — and taxpayers. Should you have further questions regarding these comments, we welcome the opportunity to discuss them further.

We write to express our strong support for the Department’s proposed regulations. The gainful employment rules, which apply to all programs at for-profit colleges and nondegree (i.e., undergraduate or graduate certificate) programs at public and private nonprofit colleges, would establish common-sense, baseline standards to ensure those programs meet the legislative mandate that they lead to gainful employment in a recognized occupation. As the sociologist and writer Tressie McMillan Cottom wrote in her book *Lower Ed*, “as it turns out, there is such a thing as ‘bad’ education. It is an educational option that, by design, cannot increase students’ odds of beating the circumstances of their birth.”¹ The Department’s proposed regulations seek to promote programs that provide real economic mobility, particularly for the low-income students and students of color disproportionately enrolled into these gainful employment programs, by ensuring federal dollars no longer go to persistently low-performing programs that fail to help students achieve the success they are seeking through higher education. Once implemented, these regulations will help to ensure that institutions fulfill the promise of higher education as a ladder to well-paying careers.

The need for stronger regulations is especially stark in the sectors subject to gainful employment. Research has shown higher rates of unemployment and lower wages, as well as higher default

¹ McMillan Cottom, T. (2017). *Lower Ed: The Troubling Rise of For-Profit Colleges in the New Economy*. The New Press. Available at: <https://books.google.com/books?hl=en&lr=&id=m3QADAAAQBAJ&oi=fnd&pg=PA1&dq=for-profit+colleges&ots=tJGBttVJTU&sig=pnfew8Nq-CpV8EPJ97pXIE1Cg5k#v=onepage&q=for-profit%20colleges&f=false>. Page 67.

rates, for students who attend for-profit colleges as compared with nonprofit or public institutions.² As the Leadership Conference on Civil and Human Rights explained in a 2019 report, for-profit colleges leave students with debt at higher rates and levels – particularly concerning given that for-profit colleges also disproportionately enroll Black and Latino students.³ Borrowers at for-profit colleges represent just 18 percent of those entering repayment, but 25 percent of those who default.⁴

Similarly, many nondegree programs yield too low a return, both absolutely and relative to the amount of debt students are required to take on. Higher education can offer true economic mobility; but too often, the lowest-performing of these programs serve only as an expensive path to low-wage jobs. Students frequently find themselves leaving school without the credential they sought; among those who enrolled at two-year institutions in 2011-12 expecting to earn a certificate, fewer than three in five (55 percent with a certificate, and 3 percent with an associate degree) had by Spring 2017, while one-third (34 percent) had left school without earning any credential.⁵ Even among those who do earn the credentials they sought, the reality of these higher education programs often falls short of expectations. Nearly 200 undergraduate certificate programs leave most of their graduates still earning below the poverty level three years after leaving school; more than 1,500 leave most earning so little that they would owe nothing under the Department’s recently proposed income-driven repayment plan.⁶ This is not what our higher education system should be about – and these lagging results should not be subsidized by taxpayers.

The opportunity that higher education can provide to its graduates is life-changing: College graduates earn far more, and have lower unemployment rates, than those with only a high school diploma.⁷ Nowhere was this dichotomy clearer than in the early days of the Covid-19 pandemic; while nearly 60 percent of workers aged 25 and over with a bachelor’s degree had more stable jobs

² Deming, David J., Claudia Goldin, and Lawrence F. Katz, “The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?” *Journal of Economic Perspectives*, Vol. 26: No. 1, Winter 2012, <https://www.aeaweb.org/articles?id=10.1257/jep.26.1.139>; and Looney, Adam and Constantine Yannelis, “A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Student Loan Defaults,” Brookings Institution, Fall 2015, <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/>.

³ “Gainful Employment: A Civil Rights Perspective,” The Leadership Conference Education Fund, October 2019, <https://www.nclc.org/wp-content/uploads/2022/08/report-gainful-employment-civil-rights-oct2019-1.pdf>.

⁴ “National Student Loan Cohort Default Rate,” U.S. Department of Education, Fiscal Year 2019, <https://fsapartners.ed.gov/sites/default/files/2022-09/NationalCDR.PYComparisonCharts.pdf>.

⁵ “Table 326.40: Percentage Distribution of First-Time Postsecondary Students Starting at 2- and 4-Year Institutions During the 2011-12 Academic Year,” National Center for Education Statistics, U.S. Department of Education, May 2021, https://nces.ed.gov/programs/digest/d21/tables/dt21_326.40.asp?current=yes.

⁶ Department of Education data released alongside the gainful employment rules show 193 undergraduate certificate programs with median earnings data available and below \$12,490, the federal poverty level for an individual in 2019 (the year in which earnings data are reported). Of undergraduate certificate programs, 1,565 report median earnings data of less than \$28,102, or 225% of the federal poverty level for an individual (proposed as the discretionary income threshold for income-driven repayment) in 2019.

⁷ “Education Pays,” Bureau of Labor Statistics, U.S. Department of Labor, September 2022, <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>.

that pivoted to telework because of the pandemic, enabling them to keep their jobs during a public health emergency, just 15 percent of those with only a high school diploma did.⁸ As the Federal Reserve Bank of San Francisco wrote, “a college degree has provided a form of insurance against job loss during the pandemic,” with workers with a high school diploma or less more likely to experience job loss or to find themselves in frontline-worker jobs.⁹

Even among those who receive a college education, where they go to school and what they study matters greatly. The quality of postsecondary education programs, as measured by the value it provides to its students, varies considerably across institutions, and even within them.¹⁰ Programs may cost far more at some schools than others, or yield better-paying jobs for graduates, affecting the return on students’ investments. For example, a bachelor’s degree in education may lead the typical graduates of one program to jobs that pay as little as \$25,000 three years after completing the program, or in another program, to earn as much as \$52,000 over the same timeframe.¹¹ A master’s in social work program may lead graduates to owe just \$20,000 in debt or less, or to owe \$80,000 or more, despite earning similar salaries of around \$55,000.¹² An associate degree in mechanic and repair technologies, even within a single state, could lead graduates to jobs where they typically earn \$26,000 per year or \$37,000 per year, depending on the institution where they completed the program.¹³ The vast majority of programs in postsecondary education are well worth the time and money spent on them, both for students and for taxpayers; but too many are not.

This variation in program quality warrants much greater attention, both from Congress and from the Department of Education. We must hold institutions to a minimum bar for the value they provide to students and to taxpayers. Fortunately, past evidence shows how effective these efforts can be. For instance, research shows that – even without ever actually stripping a program of eligibility for Title IV aid – failing gainful employment programs were associated with a higher

⁸ “Effects of the Coronavirus COVID-19 Pandemic,” Table 1: Employed Persons Who Teleworked or Worked at Home for Pay..., Bureau of Labor Statistics, U.S. Department of Labor, May 2020: <https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm#table1>.

⁹ Daly, Mary C., Shelby R. Buckman, and Lily M. Seitelman, “The Unequal Impact of COVID-19: Why Education Matters,” Economic Letter, Federal Reserve Bank of San Francisco, June 29, 2020, <https://www.frbsf.org/economic-research/publications/economic-letter/2020/june/unequal-impact-covid-19-why-education-matters/>.

¹⁰ Carnevale, Anthony P., Ban Cheah, Martin Van Der Werf, and Artem Gulish, “Buyer Beware: First-Year Earnings and Debt for 37,000 College Majors at 4,400 Institutions,” Georgetown Center on Education and the Workforce, 2020, <https://cew.georgetown.edu/wp-content/uploads/CEW-Buyer-Beware.pdf>; and Cooper, Preston, “ROI in Higher Education,” FREOPP, resources from 2021 – 2023, <https://freopp.org/roi/home>.

¹¹ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines programs offered at credential level: bachelor’s; and at 4-digit CIP code 13.01.

¹² Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines programs offered at credential level: master’s; and at 4-digit CIP code 44.07. Among such programs with a median debt of \$20,000 or less, median earnings are \$54,637; among programs with a median debt level of \$80,000 or more, median earnings are \$55,400.

¹³ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines programs offered at credential level: associate’s; and at 4-digit CIP code 47.06 in the state of Georgia.

rate of program and college closures than passing ones.¹⁴ In some cases, colleges were operating low-value programs partly on the backs of predatory practices that led to investigations, lawsuits, and eventually, to closures; in other cases, colleges shut down low-performing programs voluntarily, anticipating the rule's effects, saving both students and taxpayers from continued investment in failing programs.¹⁵ Even Harvard University shuttered a graduate certificate program in theater that left graduates with over \$78,000 in debt, despite earning only about \$36,000 per year, on average.¹⁶ For many of the students who enrolled in low-value programs, accountability requirements lead them to higher-quality, more affordable options for their postsecondary education.¹⁷

We support the Department's efforts to sharpen its focus on student outcomes, providing students in all sectors with actionable information about their programs and offering students in career-training programs, and the taxpayers who finance those programs, real protections from low-performing, low-value programs.

We also support the other protections the Education Department has proposed to strengthen accountability. College closures that happen precipitously, without advance planning or because of irresponsible behavior, have proven devastating both to students and to the taxpayers who cover the cost of discharging borrowers' loans after a closure; key improvements to financial responsibility rules would better protect against the most troubling of those closures: unplanned or precipitous ones.¹⁸ In some cases, institutions' actions have resulted in waste and fraud within the federal financial aid programs; upgrades to the administrative capability regulations would better ensure institutions follow the rules and protect the integrity of the programs, while the proposed certification procedures changes would address institutions with a track record of predatory practices and systemic noncompliance. These improvements would greatly improve the management of the Title IV programs, preserving them for the long run.

Still, we recognize that the Education Department cannot solve the depth and breadth of challenges in higher education on its own. We urge Congress to implement broad-based, sector-neutral accountability standards across the postsecondary education system, to ensure that all

¹⁴ Kelchen, Robert and Zhuoyao Liu, "Did Gainful Employment Regulations Result in College and Program Closures?," *Education Finance and Policy* 17:3, 2022, <https://direct.mit.edu/edfp/article-abstract/17/3/454/97144/Did-Gainful-Employment-Regulations-Result-in?redirectedFrom=fulltext>.

¹⁵ Carey, Kevin, "DeVos Is Discarding College Policies That New Evidence Shows Are Effective," *The New York Times*, June 30, 2017, <https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html>.

¹⁶ Carey, Kevin, "Programs That Are Predatory: It's Not Just at For-Profit Colleges," *The New York Times*, January 13, 2017, https://www.nytimes.com/2017/01/13/upshot/harvard-too-obamas-final-push-to-catch-predatory-colleges-is-revealing.html?_r=0.

¹⁷ Cellini, Stephanie R., Rajeev Darolia, and Lesley J. Turner, "Where Do Students Go When For-Profit Colleges Lose Federal Aid," *American Economic Journal*, 12:2, May 2020, <https://www.aeaweb.org/articles?id=10.1257/pol.20180265&&from=f>.

¹⁸ Burns, Rachel, Lynneah Brown, Kelsey Heckert, Dustin Weeden, Hee Sun Kim, Beatrix Randolph, Aaron Pevitz, Sarah Karamarkovich, Jennifer Causey, "A Dream Derailed? Investigating the Impacts of College Closures on Student Outcomes," State Higher Education Executive Officers Association and National Student Clearinghouse Research Center, 2022, <https://sheeo.org/project/college-closures/>; and Table 4.7, 88 Fed. Reg. 32450.

programs are required to demonstrate value in exchange for federal dollars. While we should not delay solving the problems and making progress on the areas within our control — as the gainful employment rules would — we also believe it is essential to build momentum for long-term improvement across higher education. We encourage the Department to work urgently with Congress to improve the availability and coverage of data, develop policy recommendations, and build bipartisan support for a more permanent, wider-reaching accountability system. Widespread agreement¹⁹ that graduate student lending has driven prices up,²⁰ even among low-value programs, provides a promising starting point for this work.

Below, we offer detailed comments on the proposed gainful employment, certification procedures, financial responsibility, and administrative capability regulations. We urge the Department to finalize these regulations quickly, and to implement them as soon as permissible; these provisions are important, and students are deserving of their protections today.

Should you have questions about the content of these comments, please do not hesitate to reach out at kmcmanus@arnoldventures.org. Thank you for your time and consideration.

Sincerely,
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Vice President of Higher Education
Arnold Ventures

¹⁹ For instance, the Education Department noted earlier this year that “the lack of specific dollar limits on the amount of PLUS loans for graduate students means borrowers can take on significantly more debt for those programs than they can for graduate programs,” and raised concerns that lowering payments on graduate loans “could result in borrowers taking on significant additional debt that they will not be able to repay.” 88 Fed. Reg. 1903. Similarly, Republican members of Congress have noted that “uncapped borrowing for graduate students through the higher interest Grad PLUS program... enables colleges to charge exorbitant prices, [and] buries students in unaffordable debt...” “Foxy, Stefanik, Banks Announce Responsible Alternative to Biden’s Blanket Student Loan Scheme,” Press Release, U.S. House of Representatives, August 4, 2022,

<https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408476>.

²⁰ Black, Sandra E., Lesley J. Turner, and Jeffrey T. Denning, “PLUS or Minus? The Effect of Graduate School Loans on Access, Attainment, and Prices,” National Bureau of Economic Research, Working Paper # 31291, May 2023, <https://www.nber.org/papers/w31291>.

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Gainful Employment and Financial Value Transparency

History of Gainful Employment Suggests Continued Need for Regulation

Subpart S

The gainful employment requirements in the Higher Education Act apply to non-degree programs in all sectors, and to all degree programs in the for-profit sector. That has been the case since the earliest days of providing those programs and institutions access to Title IV federal financial aid dollars, and the requirement has continued to apply only to those sectors ever since, including through multiple reauthorizations of the Higher Education Act.

The requirement that for-profit and nondegree programs lead to gainful employment is rooted in a long history of waste, fraud, and abuse in those sectors. Beginning with the GI Bill, when veterans became eligible for educational benefits with few restrictions on the institutions where they could use those dollars, the for-profit industry grew rapidly and left significant abuse of both students and taxpayers in its wake.²¹ And while the gainful employment requirement in the statute was intended to ensure that federal aid went only to GE programs that would provide labor-market value to students, the requirement was effectively unenforced for decades – and waste, fraud, and abuse proliferated as a result, with for-profit colleges racked by scandal and their students often left holding worthless degrees and mountains of debt.²² The Great Recession brought a new wave of abuse as out-of-work adults flooded back into classrooms; institutions like ITT Technical Institutes and Corinthian Colleges, among many others, lied about their value and cheated their students.²³ Aside from the costs to students' time, money, and well-being, the Department reports that it has assessed more than \$1.6 billion in liabilities against institutions between 2013 and 2022, many from closed school discharges provided to borrowers whose schools shuttered before they could graduate.²⁴ Only a fraction of that has been collected from schools over the same timeframe.²⁵

Even today, the differences in outcomes are stark, indicating the threat to students and taxpayers persists. Among degree-seeking students, more than one in three students enrolled as first-time undergraduates in 2020 at for-profit institutions failed to return for the second year of their program, while three in four and four in five students at public and nonprofit institutions,

²¹ Shireman, Robert, “The For-Profit College Story: Scandal, Regulate, Forget, Repeat,” The Century Foundation, January 24, 2017, <https://tcf.org/content/report/profit-college-story-scandal-regulate-forget-repeat/>.

²² *Ibid.*

²³ Friedrich, Michael, “How a Legal Organization is Defending Defrauded Student Borrowers,” Arnold Ventures, May 13, 2021, <https://www.arnoldventures.org/stories/how-a-legal-organization-is-defending-defrauded-student-borrowers>; and “Dreams Destroyed: How ITT Technical Institute Defrauded a Generation of Students,” Project on Predatory Student Lending, February 2022, <https://www.ppsl.org/itt>.

²⁴ Table 4.7, 88 Fed. Reg. 32450.

²⁵ *Ibid.*

respectively, return.²⁶ Among bachelor’s degree-seeking students who enrolled in 2018 (the most recent year available), 42 percent of public college students completed a four-year degree on time and 57 percent of nonprofit students did, compared with an abysmal 23 percent of for-profit college degree-seekers.²⁷ Labor market outcomes are also worse for GE programs. The typical median earnings of for-profit undergraduate degree programs are around \$34,000, compared with nearly \$42,000 for public and nonprofit undergraduate degree programs.²⁸ Non-degree programs also provide much lower labor market returns than degree-granting programs, including nearly 200 certificate programs – 160 of them at for-profit institutions – where most graduates earn below the poverty level.²⁹ These differential labor market returns are also clear in federal employment statistics; unemployment rates for those with some college but no degree (including those who earned certificates) reached 5.5 percent in 2021, while associate degree-holders had unemployment rates of 4.6 percent and bachelor’s degree-graduates 3.5 percent.³⁰

As the Department’s mechanisms for assessing the outcomes of individual programs have improved dramatically – the names and levels of students’ programs of study weren’t even systematically reported to the Department until the 2014-15 award year³¹ – so has its ability to enforce the gainful employment requirement in the statute. The gainful employment authority in the Higher Education Act is clear as to which programs it applies, and specific as to Congress’s intent that such programs produce value for graduates in the labor market.

Importantly, this authority applies to *all* degree programs in the for-profit sector, and to *all* nondegree programs in all sectors – including graduate programs. Congress has never excepted graduate programs from the gainful employment requirement, and the Education Department has never suggested it believes Congress intended otherwise. Research into graduate education highlights some of the particular risks that these programs present. Graduate school borrowers typically bear much more debt, on average, than undergraduate borrowers (\$75,000 just for their

²⁶ “Table 326.30: Retention of First-Time Degree-Seeking Undergraduates at Degree-Granting Postsecondary Institutions,” National Center for Education Statistics, U.S. Department of Education, January 2023, https://nces.ed.gov/programs/digest/d22/tables/dt22_326.30.asp?current=yes. The retention rate of first-time, full-time students at four-year for-profit institutions is 62.3 percent; at public institutions, 74.6 percent; and at nonprofit institutions, 80.9 percent.

²⁷ “Table 326.10: Graduation Rate from First Institution Attended for First-Time, Full-Time Bachelor’s Degree-Seeking Students at 4-Year Postsecondary Institutions,” National Center for Education Statistics, U.S. Department of Education, October 2021, https://nces.ed.gov/programs/digest/d21/tables/dt21_326.10.asp?current=yes.

²⁸ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines associate and bachelor’s degree programs at for-profit institutions compared with programs at those credential levels in public and nonprofit institutions. The median earnings across for-profit programs are \$34,014, compared with \$41,870 in public and nonprofit programs.

²⁹ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines programs at the undergraduate certificate level with earnings less than \$12,490 and earnings data not missing, by control. (\$12,490 was the HHS poverty level for an individual in 2019.)

³⁰ “Education Pays,” Bureau of Labor Statistics, U.S. Department of Labor, September 2022, <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>.

³¹ “Technical Documentation: College Scorecard Data by Field of Study,” U.S. Department of Education, April 2023, <https://collegescorecard.ed.gov/assets/FieldOfStudyDataDocumentation.pdf>.

graduate education).³² Often, those debt levels are mismatched relative to the typical labor market outcomes of graduates. For instance, the typical borrower graduating from a master’s of social work (MSW) program takes on \$60,000 in debt; at one school, tuition for that program totals \$115,000.³³ Yet MSW graduates in the U.S., according to the Department’s data, earned just \$32,000 - \$78,000.³⁴ Recent research provides evidence that institutions increased prices for graduate education in response to increases in federal student loan generosity, with each additional \$1 in Grad PLUS loans resulting in net price increases of \$0.64.³⁵ The highest-price, highest-debt programs in the postsecondary education system should not be exempt from a requirement that they demonstrate value; on the contrary, we would urge Congress to expand federal return-on-investment requirements so they apply to the nonprofit and public graduate degree programs that are not currently covered by GE.

While we support the need to ensure accountability for low-performing programs, whatever sector they’re found in, the concentration of problems in the for-profit sector lends further credence to the urgent need to regulate on *these* programs — for-profit and nondegree programs — immediately. The Department should work with Congress to develop further solutions for accountability, especially among graduate degree programs, in the coming months.

Proposed Accountability and Transparency Provisions Would Protect Students and Taxpayers

Subpart S, Subpart Q

These proposed regulations would make essential improvements to the higher education system to better protect both students and taxpayers. Importantly, research indicates that accountability is effective in changing institutional behavior. Strengthened cohort default rate requirements, for instance, led high-risk for-profit institutions to reduce defaults by 4 to 8 percentage points.³⁶ Past

³² U.S. Department of Education, National Center for Education Statistics, National Postsecondary Student Aid Study: 2016 Graduate Students (NPSAS:GR), table # ikrvix. Also used in Comments to U.S. Department of Education, Arnold Ventures, Docket ID # ED-2023-OPE-0004, February 10, 2023, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-IDR-Comment-FINAL.pdf>.

³³ U.S. Department of Education, National Center for Education Statistics, National Postsecondary Student Aid Study: 2016 Graduate Students (NPSAS:GR), table # xsqeev. 43 Bannon, Lisa and Andrea Fuller, “USC Pushed a \$115,000 Online Degree. Graduates Got Low Salaries, Huge Debts,” *The Wall Street Journal*, November 9, 2021, <https://www.wsj.com/articles/usonline-social-work-masters-11636435900>. Also used in Comments to U.S. Department of Education, Arnold Ventures, Docket ID # ED-2023-OPE-0004, February 10, 2023, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-IDR-Comment-FINAL.pdf>.

³⁴ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines master’s degree-level programs in CIP code 44.07 (social work) at institutions in the U.S., excluding U.S. territories. These MSW programs range in post-graduation earnings from \$32,000 at Mississippi Valley State University (median debt \$38,400); to \$78,480 at San Jose State University (median debt of \$30,400). At University of Southern California, the institution that charges tuition of \$115,000 for its MSW program, median earnings are \$55,400 and median debt is \$111,900.

³⁵ Black, Sandra E., Lesley J. Turner, and Jeffrey T. Denning, “PLUS or Minus? The Effect of Graduate School Loans on Access, Attainment, and Prices,” National Bureau of Economic Research, Working Paper # 31291, May 2023, <https://www.nber.org/papers/w31291>.

³⁶ Lau, Christopher V., “Are Federal Student Loan Accountability Regulations Effective?,” *Economics of Education Review*, 75, April 2020, <https://www.sciencedirect.com/science/article/abs/pii/S0272775719303796?via%3Dihub>.

iterations of the gainful employment rule were also effective; even without fully taking effect, gainful employment programs that failed the debt-to-earnings tests in the first year in which data were produced were associated with a higher rate of program and college closures than passing ones.³⁷ Some colleges offering failing gainful employment programs faced investigations, lawsuits, and settlements into predatory practices and shut down completely, while others voluntarily closed down poor-performing programs in anticipation of the rule’s effects – even Harvard University.³⁸ Lifting the floor for this demonstration of value will improve both students’ and taxpayers’ return on investment.

While true accountability is needed to ensure institutions respond with such seriousness, we nonetheless appreciate and support the Department’s efforts to bring a degree of public accountability to institutions and programs (including those not covered under the gainful employment authority) via disclosures to consumers. While making information available has not been shown to improve consumer decision-making on its own, the Department’s efforts to ensure the disclosures take advantage of the best practices in maximizing the utility of consumer information. For instance, the proposed rule uses straightforward warning labels for programs that are “high debt-burden” or “low-earnings,” as applicable; ensures that the disclosure is delivered by institutions themselves to their students and prospective students; and that it is offered via a Departmental website (so the Department can ensure institutions have complied) and accompanied by an acknowledgement requirement (at least for high-debt programs outside the gainful employment sectors) to ensure students received the information.³⁹ We urge the Department to retain these provisions in the final rule as part of its continued commitment to ensure students take on affordable levels of debt for their higher education.⁴⁰

Debt-to-Earnings and Earnings Premium Measures are Appropriate and Needed

34 CFR 668.402

In particular, the measures the Department has proposed to use — the debt-to-earnings ratios and the earnings premium metric — are critical both to ensuring institutions meet their statutory

³⁷ Kelchen, Robert and Zhuoyao Liu, “Did Gainful Employment Regulations Result in College and Program Closures?,” *Education Finance and Policy* 17:3, 2022, <https://direct.mit.edu/edfp/article-abstract/17/3/454/97144/Did-Gainful-Employment-Regulations-Result-in?redirectedFrom=fulltext>.

³⁸ Carey, Kevin, “DeVos Is Discarding College Policies That New Evidence Shows Are Effective,” *The New York Times*, June 30, 2017, <https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html>; and Carey, Kevin, “Programs That Are Predatory: It’s Not Just at For-Profit Colleges,” *The New York Times*, January 13, 2017, https://www.nytimes.com/2017/01/13/upshot/harvard-too-obamas-final-push-to-catch-predatory-colleges-is-revealing.html?_r=0.

³⁹ Robertson, Brett, and Beth Stein, “Consumer Information in Higher Education,” *The Institute for College Access and Success*, April 2019, https://ticas.org/files/pub_files/consumer_information_in_higher_education.pdf.

⁴⁰ “New Proposed Regulations Would Transform Income-Driven Repayment by Cutting Undergraduate Loan Payments in Half and Preventing Unpaid Interest Accumulation,” Press Release, U.S. Department of Education, January 10, 2023, <https://www.ed.gov/news/press-releases/new-proposed-regulations-would-transform-income-driven-repayment-cutting-undergraduate-loan-payments-half-and-preventing-unpaid-interest-accumulation>.

obligations with respect to gainful employment, and to protecting students from the kinds of low-value programs about which they are most concerned. According to a national online survey, around nine in 10 prospective or recently enrolled students are pursuing higher education to improve employment opportunities, make more money, and/or get a good job; and among students' top concerns in selecting a specific institution (with at least seven in 10 indicating as important factors) are the costs, job placement rates, starting salaries, and debt loads for students at the school.⁴¹ A more recent survey confirms these results; three in four respondents said that making more money was an extremely or very important reason they pursued their highest level of education, while just 6 percent said that making more money was not at all, or not very, important to their decision.⁴² Yet a higher proportion, 17 percent, said they disagreed or strongly disagreed that their education had, in fact, helped them to make more money.⁴³ While some have suggested that earnings data are simply a reflection of the demographics of the students they serve, a robust body of research has demonstrated that, in fact, earnings can effectively assess the quality of programs. While some programs provide economic opportunity to low-income students and students of color, others may hold them back by wasting their time and money and leaving them deeply indebted with only a low-value credential to show for it; and institutions have not only the capability, but the responsibility, to help students succeed.⁴⁴ These measures are also supported by a plain read of the statute, which calls for requiring for-profit and nondegree programs to lead to “gainful employment” in a recognized occupation.

Debt-to-Earnings Thresholds Are Appropriate and Supported by the Evidence
34 CFR 668.402(c)

The debt-to-earnings ratios that the Department proposes to use would effectively assess the value of these programs, reflecting the returns that students are seeing in exchange for their investment. As the Department indicated, the debt-to-earnings ratios are backed by independent research, which suggest the Department's thresholds are, at worst, a too-conservative estimate of the

⁴¹ Fishman, Rachel, “2015 College Decisions Survey: Deciding to Go to College,” New America, May 2015, https://static.newamerica.org/attachments/3248-deciding-to-go-to-college/CollegeDecisions_PartL148dcab30a0e414ea2a52fod8fb04e7b.pdf.

⁴² “Strada-Gallup Education Survey (2020-2021),” Strada Education Foundation, <https://stradaeducation.org/research-education-survey/>.

⁴³ *Ibid.*

⁴⁴ Cellini, Stephanie Riegg, and Nicholas Turner, “Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data,” *The Journal of Human Resources*, February 1, 2018, <https://jhr.uwpress.org/content/early/2018/01/31/jhr.54.2.1016.8302R1.abstract>; “Gainful Employment: A Civil Rights Perspective,” The Leadership Conference Education Fund, October 1, 2019, <https://www.nclc.org/resources/gainful-employment-a-civil-rights-perspective/>; Chetty, Raj, John Friedman, Emmanuel Saez, Nicholas Turner, and Danny Yagan, “Mobility Report Cards: The Role of Colleges in Intergenerational Mobility,” National Bureau of Economic Research, Working Paper # 23618, December 2017, <https://opportunityinsights.org/paper/mobilityreportcards/>; 79 Fed. Reg. 65039 – 65057; and 88 Fed. Reg. 32430 – 32433. The Department also highlighted the fact that, while programs failing the earnings premium measure have a higher share of women graduates and people of color, other programs with similar race and gender breakdowns have much higher passing rates. 88 Fed. Reg. 32432.

maximum acceptable debt load for graduates.⁴⁵ Programs failing an annual debt-to-earnings ratio (i.e., greater than 8 percent) are at the upper bounds of allowable debt levels according to standard mortgage underwriting standards.⁴⁶ Other research suggests a similar level corresponds to showing the success of a graduate at least matches the success of the average high school graduate.⁴⁷ An analysis of a nationally representative survey by New America found that borrowers who are paying more than 8 percent of their income on their student loans are also more likely to have fallen behind on their bills (including their loans), to have inadequate retirement savings, and to require food assistance, in addition to having higher rates of regret about attending college.⁴⁸ Programs failing a discretionary debt-to-earnings ratio (i.e., greater than 20 percent) exceed studied levels of manageable student debt levels once accounting for income needed to support basic necessities. As a well-respected researcher who authored one of these studies noted in response to a past effort to rescind the gainful employment rule, “the GE rules are, if anything, too permissive,” because they utilize *median* debt and earnings levels – meaning a program could pass even if half of the program’s graduates, and more of its non-completers, are struggling with unaffordable levels of debt.⁴⁹ These standards have also been well-explained in past rules upheld by the courts.⁵⁰

These standards will be especially important in light of a recent expansion in the use and generosity of income-driven repayment plans. While such repayment options can provide important protections for borrowers, their growing importance in the landscape of student loan repayment means taxpayers do, and will increasingly, bear the brunt of the costs of unaffordable student loan debt. This is especially true as they render other accountability mechanisms less useful; for instance, the Department’s proposed new income-driven repayment plan will allow borrowers who have provided consent to be automatically enrolled in IDR when they fall behind in their loan payments, avoiding default – a critical benefit to borrowers, who will avoid the

⁴⁵ Nguyen, Sophie, “Why the Department Shouldn’t Weaken the Gainful Employment Metrics,” New America, December 6, 2017, <https://www.newamerica.org/education-policy/edcentral/why-department-shouldnt-weaken-gainful-employment-metrics/>.

⁴⁶ Greiner, Keith, “How Much Student Loan Debt Is Too Much?,” *Journal of Student Financial Aid*, 26:1, pages 7-16, 1996, <https://files.eric.ed.gov/fulltext/EJ527952.pdf>; Harrast, Steven A., “Undergraduate Borrowing: A Study of Debtor Students and Their Ability to Retire Undergraduate Loans,” *Journal of Student Financial Aid*, 34:1, pages 21-37, 2004, <https://files.eric.ed.gov/fulltext/EJ965770.pdf>; Baum, Sandy and Saul Schwartz, “How Much Debt Is Too Much? Defining Benchmarks for Manageable Student Debt,” The College Board, 2006, pages 2-4, <https://files.eric.ed.gov/fulltext/ED562688.pdf>.

⁴⁷ Webber, Douglas, “When Do Students and Taxpayers See a Return? Optimal Accountability Thresholds in Higher Education,” Postsecondary Equity & Economics Research Project, December 2021, <https://peerresearchproject.org/peer/research/body/2022.1.12-Webber-Paper.pdf>. Despite differences between this paper and other research in the construction of the measures, objectives of the studies, and data and methods used, the thresholds determined to be appropriate or optimal were similar.

⁴⁸ Caldwell, Tia, “Six Ways to Strengthen Gainful Employment Regulations,” New America, May 30, 2023, pages 6-7, https://d1y8sb8igg2f8e.cloudfront.net/documents/Strengthen_Gainful_Employment_Regulations.pdf.

⁴⁹ Baum, Sandy, “DeVos Misrepresents the Evidence in Seeking Gainful Employment Deregulation,” Urban Institute, August 22, 2018, <https://www.urban.org/urban-wire/devos-misrepresents-evidence-seeking-gainful-employment-deregulation>.

⁵⁰ 79 Fed. Reg. 64919; and APSCU v. Duncan, Case 1:14-cv-01870-JDB, opinion filed June 23, 2015, available at: <https://www.citizen.org/wp-content/uploads/association-private-sector-colleges-universities-v-duncan-district-court-opinion.pdf>.

negative consequences of default, but an unintentional boon to schools that might otherwise fail the cohort default rate measure and lose access to federal financial aid.⁵¹ Front-end accountability is essential to protecting students and taxpayers, but especially because of the generosity of benefits provided to borrowers that will enable institutions to charge high prices without any ability to ensure disciplined pricing by the institution.

*Earnings Premium Measure Is Clear, Communicable, and Backed by Research
34 CFR 668.402(d) and (e)*

The earnings premium metric is also a valuable, and highly supportable, measure for ensuring greater accountability for the value that programs provide.⁵² First and foremost, it is indicated by a plain reading of the statutory requirement that for-profit and nondegree programs lead to gainful employment, providing a reasonable counterfactual to attending postsecondary education of instead seeking work as a young adult with only a high school diploma. It will also be a meaningful metric to students and consumers; with so many students indicating economic reasons for pursuing a college education, whether they are better off than they might have been without earning a college degree is a metric likely to resonate.⁵³ Moreover, it may be viewed as part of a broader “Good Jobs” agenda by “shutting down a publicly subsidized pipeline to low-wage, precarious jobs with low returns on investment.”⁵⁴

While the earnings threshold for those with only a high school diploma includes workers in various fields who may earn at different levels, the Department has taken an appropriately conservative approach to ensure the measure is valid and appropriate as a counterfactual to those with postsecondary education. GE programs are offered in fields that generally require higher levels of education in order to work in the field, and measuring earnings in those fields should inherently provide a significant advantage to those programs as compared with workers who can only access the subset of relatively lower-paying jobs available to those with only a high school diploma.⁵⁵ As the Department noted, the earnings premium measure is a conservative measure in

⁵¹ Comment to U.S. Department of Education from Arnold Ventures, Docket ID # ED-2023-OPE-0004, February 10, 2023, pages 16-21, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-IDR-Comment-FINAL.pdf>.

⁵² Cellini, Stephanie Riegg, and Kathryn J. Blanchard, “Using a High School Earnings Benchmark to Measure College Student Success: Implications for Accountability and Equity,” Postsecondary Equity & Economics Research Project, February 2022, https://peerresearchproject.org/peer/research/body/2022.3.3-PEER_HSEarnings-Updated.pdf.

⁵³ Fishman, Rachel, “2015 College Decisions Survey Part I: Deciding to Go to College,” New America, May 2015, https://static.newamerica.org/attachments/3248-deciding-to-go-to-college/CollegeDecisions_PartI.148dcab30a0e414ea2a52fod8fb04e7b.pdf; and “Strada-Gallup Education Survey (2020-2021),” Strada Education Foundation, <https://stradaeducation.org/research-education-survey/>.

⁵⁴ McCarthy, Mary Alice and Rachel Fishman, “Gainful Employment Provides the Biden Administration an Opportunity to Advance the ‘Good Jobs’ Agenda,” Higher Ed Dive, April 17, 2023, <https://www.highereddive.com/news/gainful-employment-provides-the-biden-administration-an-opportunity-to-adva/647723/>.

⁵⁵ Data from the Bureau of Labor Statistics confirm that unemployment rates are higher, and earnings are lower, for workers with only a high school diploma than for those with a college education. See: “Education

other ways, as well. It equates roughly to the earnings of a full-time worker earning about \$12.50 – below minimum wage in many states.⁵⁶ Additionally, the median earnings measure proposed to assess against the earnings threshold would include only graduates – excluding the likely much lower-earning non-completers from those programs – and would compare them to adults with a high school diploma, without even accounting for either the opportunity costs (in years of foregone earnings during which they instead or additionally pursued a credential) or the financial costs (in which students paid tuition, either out of pocket and/or using their limited Pell Grant dollars) of receiving that education. A stricter assessment would incorporate an assessment of the costs of receiving a credential.⁵⁷

Earnings Threshold for Graduate Programs Should Be Raised *34 CFR 668.402(e)*

As described above, we agree that the earnings threshold – the typical earnings of a young adult with only a high school diploma or equivalent in the state where the institution is located – is appropriate, particularly for undergraduate programs. However, for graduate programs, where the prerequisite education level is not a high school diploma but a bachelor’s degree, the threshold should be set higher.

Graduate program offerings, and graduate student debt, have increased considerably in recent years. Nearly half (47 percent) of student loan volume in fiscal year 2024 is projected to be for graduate education, despite making up fewer than one in five (19 percent) loans.⁵⁸ Particularly given the growing generosity of federal repayment benefits, the graduate loan programs are now subsidized by taxpayers in much the same way undergraduate federal student loan programs

Pays,” Bureau of Labor Statistics, U.S. Department of Labor, September 2022, <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>. Additionally, as the Department noted (88 Fed. Reg. 32327), the Higher Education Act generally considers attaining a high school diploma or equivalent to be the “baseline” for those seeking a postsecondary education; a diploma is generally required to receive federal financial aid to enroll in college, and so “it is reasonable to expect graduates of [postsecondary] programs to earn more than someone who never attended postsecondary education in the first place.”

⁵⁶ The Department notes that “The median earnings of high school graduates is about \$25,000 nationally, which corresponds to the earnings level of a full-time worker at an hourly wage of about \$12.50 (lower than the State minimum wage in 15 States).” 88 Fed. Reg. 32308.

⁵⁷ Matsudaira, Jordan and Lesley J. Turner, “Towards a Framework for Accountability for Federal Financial Assistance Programs in Postsecondary Education,” Brookings Institution, November 23, 2020, <https://www.brookings.edu/research/towards-a-framework-for-accountability-for-federal-financial-assistance-programs-in-postsecondary-education/>.

⁵⁸ “Fiscal Year 2024 Congressional Justifications: Student Loans Overview,” U.S. Department of Education, March 2023, pages 18 and 26, <https://www2.ed.gov/about/overview/budget/budget24/justifications/s-sloverview.pdf>.

are.⁵⁹ Too often, these programs are overpriced relative to the value they provide to graduates.⁶⁰ Consider, for instance, several graduate education programs that are low-value, and yet all of which would pass a high school earnings threshold: a master’s degree program in film that results in median earnings of \$31,008 relative to median debt of \$105,200;⁶¹ a master’s degree program in accounting that reports median earnings of \$33,228 to a median debt load of \$53,300;⁶² and a criminal justice master’s degree program that typically leaves students with \$43,500 in debt but leads to jobs earning just \$41,407.⁶³ Research from the Georgetown Center on Education and the Workforce has found that, while bachelor’s degree holders earn far more than they would if they only held a high school diploma, “one quarter of workers with a bachelor’s degree earn more than half of workers with a master’s or a doctoral degree” – without investing the additional time and money in those programs.⁶⁴

Some have proposed – and we agree – that the bar should be raised for the demonstration of labor market value for graduate programs, relative to undergraduate programs.⁶⁵ Specifically, graduate programs should be held to an earnings threshold of those in the labor force with a bachelor’s degree in the same general field as the graduate program. By raising the bar, the Department can address head-on the particular challenges that graduate programs present, both in measuring their value and in minimizing the risk that they present both to students and to taxpayers.

Earnings Threshold for U.S. Territories Should Be Measured Against the Poverty Guidelines

34 CFR 668.402(e)

⁵⁹ The Congressional Budget Office now reports a positive subsidy rate for all types of student loans except Parent PLUS loans; the subsidy rate for Graduate PLUS loans is projected to be nearly as high as the subsidy rate for subsidized (undergraduate) student loans. “Congressional Budget Office Baseline Projections: Federal Student Loan Program,” Congressional Budget Office, May 2023, <https://www.cbo.gov/system/files/2023-05/51310-2023-05-studentloan.pdf>.

⁶⁰ Delisle, Jason, and Jason Cohn, “Master’s Degree Debt and Earnings: New Federal Data Expose Risks for Students and the Government,” Urban Institute, December 2022, <https://www.urban.org/sites/default/files/2022-12/Master%E2%80%99s%20Degree%20Debt%20and%20Earnings.pdf>.

⁶¹ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines a master’s degree program offered by Academy of Art University at 4-digit CIP code 50.06.

⁶² Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines a master’s degree program offered by American InterContinental University at 4-digit CIP code 52.03.

⁶³ Analysis of Department of Education data released alongside this Notice of Proposed Rulemaking. Examines a master’s degree program offered by Walden University at 4-digit CIP code 43.01.

⁶⁴ Carnevale, Anthony P., Ban Cheah, and Emma Wenzinger, “The College Payoff: More Education Doesn’t Always Mean More Earnings,” Georgetown University Center on Education and the Workforce, 2021, <https://cew.georgetown.edu/cew-reports/collegepayoff2021/>.

⁶⁵ See, for example, Caldwell, Tia, Rachel Fishman, and Sarah Sattelmeyer, “How to Make Gainful Employment Regulations Even Better,” New America, May 30, 2023, <https://www.newamerica.org/education-policy/edcentral/gainful-employment-recommendations/>; and Matsudaira, Jordan and Lesley J. Turner, “Towards a Framework for Accountability for Federal Financial Assistance Programs in Postsecondary Education,” Brookings Institution, November 23, 2020, <https://www.brookings.edu/research/towards-a-framework-for-accountability-for-federal-financial-assistance-programs-in-postsecondary-education/>.

The data released alongside the Department’s proposed rule assess a threshold of 150 percent of the Federal Poverty Guidelines for U.S. territories (other than Puerto Rico) and foreign institutions; and the Department has specifically sought feedback on how best to determine the earnings threshold for such programs, where data on the earnings of high school graduates may not be as accessible. Particularly given the significantly higher rates of poverty in the U.S. territories, and the lack of available data on either the earnings of high school graduates or of specific poverty guidelines for each territory, we believe this is an appropriate level.⁶⁶ It aligns with the definition of discretionary income proposed under these rules;⁶⁷ and under the statute, this is also the level at which all federal student loan borrowers – including borrowers from the territories or who attended foreign institutions – are expected to make no payments under the Income-Based Repayment plan, suggesting that if most graduates from the institution are earning below that level, it is indicative of serious problems in the value of the education provided, and presents a significant risk to taxpayers.⁶⁸

Disclosures Across Sectors Will Support Informed Student Decision-Making

34 CFR 668.43(d), 668.407, and 668.605

We support the Department’s proposal to ensure clear, consistent disclosures and acknowledgements that would be made available to prospective and enrolled students across all sectors. While disclosures are far from sufficient to ensure students receive an education of adequate quality, they are a necessary step to provide students, families, and consumers with high-quality information about their options. We appreciate the steps the Department has taken to ensure these disclosures would be made efficiently, and that the information provided is comprehensible to students. Below, we respond to some of the Department’s directed questions and provide some additional specific feedback.

Disclosures About Low-Earnings Programs Should Be Provided to All Students with an Acknowledgement Requirement

34 CFR 668.407

Under the proposed regulations, the Department has suggested that all gainful employment programs be subject to the requirement to provide disclosures and seek student acknowledgements for both financial value metrics (debt-to-earnings and earnings premium), but that non-gainful employment programs only be subject to the acknowledgement requirement for the debt-to-earnings measure. We recommend the Department require that all students, across all sectors and regardless of whether they are considering or enrolled in a GE program, be provided these disclosures (and required to acknowledge receipt of them) when their programs fail either measure.

⁶⁶ Gootnick, David, Director of International Affairs and Trade, “Poverty Determination in U.S. Insular Areas,” U.S. Government Accountability Office, November 10, 2009, <https://www.gao.gov/assets/gao-10-240r.pdf>.

⁶⁷ Proposed 34 CFR 668.403(a)(1).

⁶⁸ 20 U.S.C. 1098e(a)(3)(B)(ii).

The earnings premium measure provides students with very valuable insights into their programs: It indicates that most students who graduate from the program are not better off than they would have been without ever enrolling in the first place. With more and more public debate over the value of higher education – and given that most students list their job prospects as a major reason they attend college in the first place – this is a critical measure to help students understand their options, select their institutions and programs, and make informed decisions about their futures.

To be sure, students not enrolled in programs that are explicitly career-training programs may, in some cases, wish to enroll for the types of “nonpecuniary” reasons that the Department indicates in its proposed rule.⁶⁹ However, a student acknowledgement of the disclosure will help to ensure the student has, in fact, made that decision *for those reasons*, rather than simply because the student was unaware of the labor market prospects for graduates of the program. The Department should not assume students’ intent in enrolling in low-earning programs; instead it should work to ensure that students have access to high-quality, actionable information so they can make informed decisions. The Department has a responsibility both “to encourage the increased involvement of the public, parents, and students in federal education programs,”⁷⁰ and to serve as stewards of taxpayer dollars. Particularly because the Department is proposing only to provide students with disclosures about the programs in which they are considering enrolling, not to foreclose students’ ability to enroll in those programs should they choose to disregard them, the downside risks of providing these disclosures both for debt-to-earnings and earnings premium metrics are limited.

Expand Disclosure Acknowledgements to Address Undeclared Majors and Student Transfers Across Programs

34 CFR 668.407 and 668.605

In its notice of proposed rulemaking, the Department sought particular feedback from the public on how to ensure students acknowledge they have received disclosures about their failing programs when students either enter the institution without a declared major or when they transfer from one program to another. This is an important question, and we appreciate the Department’s careful consideration of the best ways to ensure students have ready access to this information.

For students who are entering the institution without a declared major, the Department should take advantage of that moment to help inform those students’ later choices about what they will major in. Undeclared majors, who are not yet wedded to their academic plans, may be particularly receptive to information that could help them decide which program they want to pursue. One option for these students would be for the Department to produce an institutional page that includes information about all programs offered by the college, and to ensure students entering without a major declared are offered the information on that page. This page – which could take the form of the College Scorecard, provided it includes both the data points that will be disclosed

⁶⁹ 88 Fed. Reg. 32338.

⁷⁰ 20 U.S.C. 3402(3).

to all students under these regulations and the labels of “high debt-burden” and “low earnings” for programs that fail to meet the standards in the proposed regulations – would be a source of trustworthy, comparable information.

The Department should also consider how best to ensure students acknowledge the disclosures for high debt-burden (and/or low-earnings) programs if they subsequently decide to enroll in such a program, or if they opt to transfer programs into a failing program, given that a simple informational site would not ensure students complete the necessary acknowledgements. Instead, those acknowledgements are appropriately made prior to the student’s making a financial commitment for the specific intended program of study – i.e., before receiving additional federal aid for a program in which they have now declared a major or into which they have transferred. In fact, the Department already requires institutions to track and report when their students withdraw from or change programs at an institution.⁷¹ This existing reporting requirement provides a mechanism by which the Department can ensure students who declare or change their majors within an institution have received and acknowledged any necessary disclosures prior to receiving subsequent disbursements of federal dollars.

Federal Earnings Data Are the Best Available Information on Labor Market Outcomes

34 CFR 668.405(c)

Importantly, federal earnings data like those the Department of Education has proposed to use in this measure are the best source of information available. Federal earnings data are reported from federal tax data – the most robust source of administrative data. IRS records, like those used in the draft data that the Department released alongside the proposed rules, include W2 and self-employment data for every student measured, including for federal employees and service members, while state data typically lack self-employment, federal, and military employment information.⁷² When compared with other federal data that are instead derived from such state data, like the Census data produced through the Postsecondary Employment Outcomes program, the Department has noted that “the two estimates...are generally in concordance,” despite

⁷¹ The NSLDS enrollment reporting guide requires that “whenever a student completes a program, withdraws from a program, or changes programs, the school must appropriately update or add the enrollment status for each program when it next reports the student’s enrollment to NSLDS.” Such updates (or any reporting to certify enrollment) must be made no fewer than every 60 days, and within 15 days of when NSLDS sends a roster file to the institution, as noted on page 2 of the guide. “NSLDS Enrollment Reporting Guide,” Office of Federal Student Aid, U.S. Department of Education, November 2022, <https://fsapartners.ed.gov/sites/default/files/2022-11/NSLDSEnrollmentReportingGuideNovember2022.pdf>

⁷² “Technical Documentation: College Scorecard Data by Field of Study,” U.S. Department of Education, April 2023, <https://collegescorecard.ed.gov/assets/FieldOfStudyDataDocumentation.pdf>; and Prescott, Brian T. and Patrick Lane, “Fostering State-to-State Data Exchanges,” National Center for Higher Education Management Systems and Western Interstate Commission for Higher Education for Institute for Higher Education Policy, May 2016, <https://www.wiche.edu/wp-content/uploads/2020/06/Fostering-State-to-State-Data-Exchanges.pdf>.

differing methodologies.⁷³ Perturbations in the Scorecard data are small,⁷⁴ and the Department has effectively countered the risk of misidentifying a program as failing these measures, including by extending the earnings period from approximately two years post-graduation to three years. While data exclude students who have not received Title IV aid, this limitation is statutorily mandated.⁷⁵

Some have argued that federal earnings data underreport income, at least in some fields, due to unreported tipped income.⁷⁶ Yet, first and foremost, there is little evidence of such significant or systemic tax evasion by recent college graduates. As even the Trump Administration noted, those arguing this point provided “no evidence of unreported income being an actual – much less widespread – practice among cosmetology program graduates...”⁷⁷ Estimates of underreported tipped income based on analysis of IRS tax gap data found that this underreporting likely constitutes just 8 percent of earnings, though institutions that appealed their earnings data under the first GE rule instead argued their earnings should be inflated by a massive 82 percent.⁷⁸ One industry-funded study⁷⁹ similarly shows drastically higher earnings levels for those working in cosmetology than is borne out by the College Scorecard data – but even disregarding the “perceived and actual conflicts of interest” that the company acknowledged were present in the research, the study also looked at a biased and unrepresentative sample of salon owners, and likely overstated employment and earnings of cosmetologists as a result (as is apparent by comparing the report’s estimates to other federal data sources⁸⁰).

⁷³ For example, Census PSEO data exclude individuals who were not working for the majority of the year, while Scorecard only excludes those who did not work for the full year; PSEO data are derived from state UI data and do not include self-employment or some public-sector employment data, while Scorecard data are derived from tax records; and PSEO data include all students, while Scorecard data are statutorily limited to Title IV recipients. “Technical Documentation: College Scorecard Data by Field of Study,” U.S. Department of Education, April 2023, <https://collegescorecard.ed.gov/assets/FieldOfStudyDataDocumentation.pdf>.

⁷⁴ *Ibid*; see Exhibit 2.

⁷⁵ 20 U.S.C. 1015c.

⁷⁶ *American Association of Cosmetology Schools v. DeVos*, Case 1:17-cv-00263-RC, Complaint, Filed February 10, 2017, <https://www.republicreport.org/wp-content/uploads/2017/02/AACS-v-Devos-complaint.pdf>.

⁷⁷ *American Association of Cosmetology Schools v. DeVos*, Case 1:17-cv-00263-RC, Defendant’s Memorandum in Opposition to Plaintiff’s Motion for a Preliminary Injunction, Filed March 29, 2017, available at https://www.insidehighered.com/sites/default/files/files/AACS_DeVos.pdf.

⁷⁸ Cellini, Stephanie Riegg, and Kathryn J. Blanchard, “Hair and Taxes: Cosmetology Programs, Accountability Policy, and the Problem of Underreported Income,” Postsecondary Equity & Economics Research Project, January 2022, https://www.peerresearchproject.org/peer/research/body/PEER_HairTaxes-Final.pdf.

⁷⁹ The executive summary of the study is available at <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD57&meetingId=193423&acronym=1840-ED/OPE>. The citation for the study is as follows: “A Career in Pro Beauty: Compensation Study: Data & Insights,” Qnity Institute, 2023.

⁸⁰ “Full-Time, Year-Round Workers & Median Earnings by Sex & Occupation,” United States Census Bureau, 2021, <https://www.census.gov/data/tables/time-series/demo/industry-occupation/median-earnings.html>.

Even if such underreporting were rampant, most cosmetology programs under the 2014 gainful employment rule still managed not to fail the debt-to-earnings rates.⁸¹ As industry representatives have noted,⁸² many of the failing programs under the Department's estimates are cosmetology programs; yet hundreds of other cosmetology programs pass, indicating the measures help to effectively identify poor-performing programs, not under-compliant occupations. The second-largest number of failing programs in a single field is within medical assisting, which would not be affected by underreported tipped income.

Furthermore, the Department is under no obligation to sanction the tax evasion tactics of graduates of a small minority of schools and fields by providing them continued access to federal dollars even when their graduates report low earnings. In fact, research suggests that plenty of cosmetology programs — even most — already operate outside of the Title IV system, with similar results on licensure exams and at a significantly lower price to students.⁸³ And as the Department itself noted, it relies heavily on (reported) tax data in many cases within higher education, including in assessing applicants' eligibility for federal student aid and in calculating income-driven repayment amounts for borrowers.⁸⁴

To that end, we urge the Department to take the federal earnings data produced under the rule at face value. Rather than applying unwieldy and gameable appeals options that, under a previous gainful employment rule, left both institutions and the Department unable to balance efficiency and accuracy of the information submitted, these administrative data provide the best available earnings data source. They should serve as the basis for this assessment of programs eligibility for federal student aid under the gainful employment rules.

Suggested Technical Improvements to the Proposed GE and Financial Value Metrics

In addition to our broadly supportive and substantive comments above, we include several technical recommendations here. These recommendations address questions from the Department.

⁸¹ American Association of Cosmetology Schools v. DeVos, Case 1:17-cv-00263-RC, Defendant's Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction, Filed March 29, 2017, available at https://www.insidehighered.com/sites/default/files/files/AACS_DeVos.pdf. The filing reads, "The published D/E rates show that over 91% of cosmetology programs had passing or 'in the zone' D/E rates for the 2015 debt measure year, which is the only year where D/E rates have been calculated so far. Only 8.83% of such programs had failing rates."

⁸² For example, see "GE Data Analysis 2022-3" file available at: <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD57&meetingId=190473&acronym=1840-ED/OPE>.

⁸³ Cellini, Stephanie Riegg, and Bianca Onwukwe, "Cosmetology Schools Everywhere: Most Cosmetology Schools Exist Outside of the Federal Student Aid System," Postsecondary Equity & Economics Research Project, August 2022, https://www.peerresearchproject.org/peer/research/body/PEER_Cosmetology_B.pdf; and Cellini, Stephanie Riegg, and Claudia Goldin, "Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges," American Economic Journal: Economic Policy, 6:4, November 2014, <https://www.aeaweb.org/articles?id=10.1257/pol.6.4.174>.

⁸⁴ 88 Fed. Reg. 32334.

Where Programs Are Too Small to Report Data, Consider Broadening the Assessment of a Program

34 CFR 668.405(d)(1)

According to data released by the Department, nearly 87 percent of programs — albeit constituting just 34 percent of enrollees — do not have reported debt-to-earnings or earnings premium data, generally because the programs are too small to release data under applicable privacy protocols.⁸⁵ While this still means that the vast majority of students will have accessible information about their programs, the Department should seek to maximize the availability of information where it’s possible to do so, without compromising student privacy. The Department already intends to increase the pooled cohorts from two years to four years if the two-year cohort remains too small to produce data; this will help to increase coverage for “an additional 13 percent of eligible non-GE enrollment and 8 percent of GE enrollment,” expanding the universe of students with data to 82 percent.⁸⁶ The Department should also consider, when both two- and four-year cohorts remain too small to produce data, requesting that IRS roll the remaining (privacy-suppressed) programs within each credential level up from the 6-digit CIP code to the 4-digit CIP code. While this would mean the data are less specific to the exact program of study in which students are enrolled, it would provide valuable information for transparency purposes to those students. The Department previously sought comment on a similar approach in its request for information on establishing a low-financial-value list of programs; as we wrote at the time, “while the Department cannot — and should not and would not — produce information that would put students’ privacy at risk, it must seek to provide the most complete data possible, even where it requires broadening the measurement slightly to include multiple academic programs that fall within the same credential level and category of program.”⁸⁷

Utilize a Three-Year Earnings Measurement Period, Rather Than a Two-Year Timeframe

34 CFR 668.2 Cohort Period (1)(i)

While the Department’s 2014 gainful employment rules measured earnings of completers two years after they left school, the Department’s more recent data and its proposed rule uses a three-year timeframe. We support this timeframe. Research has shown that the correlation between short- and long-term earnings grows year over year, with year-one earnings potentially “misleading” but measurements at year two or year four both highly correlated to longer-term earnings.⁸⁸ A three-year earnings timeframe thus appropriately balances the need for high-quality, accurate information reflective of graduates’ eventual labor market outcomes with the

⁸⁵ 88 Fed. Reg. 32417, Table 3.3b.

⁸⁶ 88 Fed. Reg. 32310.

⁸⁷ Comment to U.S. Department of Education from Arnold Ventures, Docket ID # ED-2022-OUS-0140, February 10, 2023, page 10, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Comments-on-Value-RFI-FINAL.pdf>.

⁸⁸ Minaya, Veronica and Judith Scott-Clayton, “Labor Market Outcomes and Postsecondary Accountability: Are Imperfect Metrics Better Than None?,” Chapter in “Productivity in Higher Education,” ed. by Caroline M. Hoxby and Kevin Stange, University of Chicago Press, November 2019, available at <https://www.nber.org/system/files/chapters/c13876/c13876.pdf>.

need for timely information that is actionable for the institution. Further, as the Department notes, this shift from a two-year to a three-year earnings timeframe does increase earnings considerably,⁸⁹ providing a significant benefit to programs that will serve as a “buffer” for programs from statistical noise and any apparently small amounts of unreported tipped income that may exist.⁹⁰

Consider Safe Harbors for Programs Located in Persistent Poverty Counties

The Department sought feedback on the possibility of allowing programs in severely economically disadvantaged areas a safe harbor to see some additional adjustments if they fail to meet the earnings premium measure. We believe this would be a responsible adjustment to the GE rule. In particular, we recommend that gainful employment programs in extremely high-poverty counties – those that have the designation of Persistent Poverty Counties, a definition established by lawmakers in the American Recovery and Reinvestment Act of 2009 as reflecting counties that have had poverty rates of 20 percent or more for at least three decades – be afforded the opportunity to appeal a failure of the earnings premium measure. To avoid incentives for institutions to move into these areas as a way to evade sanctions, we also recommend that this safe harbor be provided only for institutions that are located within Persistent Poverty Counties as of the effective date of the regulations, and that institutions claiming this safe harbor furnish documentation showing that at least half of regular enrolled students live in that county (disallowing distance education programs, for instance, in which most students live elsewhere).

To be clear, we still urge the Department to ensure that institutions that fall within Persistent Poverty Counties be required to meet the debt-to-earnings metrics for their GE programs, and to provide student disclosures and seek acknowledgements from students for any of their programs (GE or non-GE programs) that fail either the debt-to-earnings or earnings premium measure. Students have the right to this kind of critical information about their programs and the likely outcomes they can expect to see; and taxpayers have a significant interest in ensuring students who aren’t likely to earn more than the typical high school graduate in the state are at least not buried in debt, including and especially if they are likely to find themselves living and working in persistently high-poverty places. However, this safe harbor will appropriately recognize the challenges such institutions may face in meeting a threshold that, while appropriate for the rest of the state, may be difficult to reach within their specific local labor market context.

We are not aware of other data sources that would provide a similarly well-targeted, carefully designed, and robust measure that is truly reflective of the long-term local economic circumstances of a community. Given that, we suggest that the Department use the Persistent Poverty Counties designation – one established in the law and used in other contexts, as well.

⁸⁹ 88 Fed. Reg. 32335. The Department notes that moving from two years to three years from the earnings measurement results in earnings “...on the order of \$4,000 (about 20 percent) higher for GE programs with earnings between \$20,000 and \$30,000, which are the programs most at risk for failing the earnings premium threshold.”

⁹⁰ 88 Fed. Reg. 32335; and Cellini, Stephanie Riegg, and Kathryn J. Blanchard, “Hair and Taxes: Cosmetology Programs, Accountability Policy, and the Problem of Underreported Income,” Postsecondary Equity & Economics Research Project, January 2022, https://www.peerresearchproject.org/peer/research/body/PEER_HairTaxes-Final.pdf.

Measure Total Debt Loads of Programs, Including Intergenerational Debt
 34 CFR 668.403(d)

While the Department previously proposed to include Parent PLUS loans in the median debt levels used for debt-to-earnings calculations, we note that the notice of proposed rulemaking instead includes only student debt, and not all debt borrowed for the student’s education. The Department notes that the repayment of Parent PLUS loans is not the responsibility of the student, but of the borrower. However, we note that there is a significant risk that institutions will use this loophole as a way to skirt accountability, as some seem to have done with respect to cohort default rates.⁹¹ Were the Department to include Parent PLUS, analysis of the data released alongside the NPRM and the data previously released during negotiations suggests that almost 90 programs that pass would instead have failed – virtually all of them at for-profit colleges, and about half in cosmetology programs.⁹² By including Parent PLUS loans, the Department could foreclose a loophole that might lead predatory institutions to load up their students’ families with debt as a way to avoid measuring that debt in their gainful employment measures.

The Department sought to address this concern by requiring institutions to provide adequate financial aid counseling to students and families. However, the reality is that institutions have often used financial aid counseling to effectively promote Parent PLUS loans, including by “zeroing out” a low-income prospective student’s financial aid package and making up the difference with tens of thousands of dollars in Parent PLUS loans.⁹³ At a minimum, the Department should expand its language under proposed 34 CFR 668.16(h) to explicitly prohibit institutions from including an amount for Parent PLUS or non-federal loans in the information they provide to students; more details on this proposal are included in the administrative capability section of our comments.

Ensure Reporting on Distance Education Status of Students
 34 CFR 668.408

The Department’s proposed regulations include a number of new or clarified reporting requirements to ensure that it can calculate the necessary data. We suggest that the Department add to that proposed section a requirement that institutions report the distance education status of their students as entirely online, entirely ground-based, or hybrid. These data will allow the Department to provide useful insights to the public about the outcomes of online and hybrid programs, which are data not currently broadly available to students. It would also enable the Department to more straightforwardly enforce its proposed high school earnings threshold, which proposes to use a national rather than a state-based threshold for programs in which fewer than

⁹¹ Fishman, Rachel, “Finally. Parent PLUS Institutional Default Rates Are Here,” *New America*, January 12, 2021, <https://www.newamerica.org/education-policy/edcentral/parent-plus-default/>.

⁹² Data analysis by New America, available from Tia Caldwell upon request.

⁹³ Burd, Stephen, Rachel Fishman, Laura Keane, Julie Habbert, Ben Barrett, Kim Dancy, Sophie Nguyen, and Brendan Williams, “Decoding the Cost of College: The Case for Transparent Financial Aid Award Letters,” *New America* and *uAspire*, June 5, 2018, <https://www.newamerica.org/education-policy/policy-papers/decoding-cost-college/>.

half of students are located in the state as a way to address the geographic spread of distance education programs.

Implement The Gainful Employment Regulations As Soon As Possible
34 CFR 668.408(c)

The Department has indicated its intent to begin implementing these rules next year (assuming they are final by November 1, 2023, and effective July 1, 2024), measuring graduates from the 2017-18 and 2018-19 award years and assessing their earnings for calendar years 2021 and 2022, respectively. For smaller programs, the Department would instead use a four-year cohort period, measuring completers from the 2015-16 through 2018-19 award years and assessing their earnings in 2019 through 2022.⁹⁴ We encourage the Department to aggressively work to meet this timeline, and to prioritize the rapid construction of data systems and other tools needed to implement the rules.

Importantly, these rules are not entirely new for institutions. Institutions with gainful employment programs have implemented many aspects of the Department’s proposed rules before, and all institutions are already required to report data on many of the data points included in the proposed regulation.⁹⁵ Even in the absence of gainful employment regulations, the statute has required that GE programs must lead to gainful employment, suggesting institutions have an ongoing and continuous responsibility to consider their program quality and pricing regardless.

Additionally, some have raised concerns about including in these measures any earnings years during which the COVID national emergency was in effect.⁹⁶ However, we do not believe there is sufficient evidence to warrant a full exclusion. For instance, comparing three-year earnings data (measured in calendar years 2018 and 2019) to four-year earnings data (measured in 2019 and 2020, so including the first — and most affected — year of the pandemic) shows that the vast majority of programs (about 96 percent) reported an increase in earnings.⁹⁷ Similarly, median annual earnings of full-time workers remained relatively constant at nearly every level of education from 2019 to 2020, and again from 2020 to 2021.⁹⁸ Furthermore, to the extent Americans’ earnings were affected by the pandemic, the high school earnings threshold used for

⁹⁴ 88 Fed. Reg. 32329.

⁹⁵ 75 Fed. Reg. 66831; 79 Fed. Reg. 64889; and “NSLDS Enrollment Reporting Guide,” Office of Federal Student Aid, U.S. Department of Education, November 2022, <https://fsapartners.ed.gov/sites/default/files/2022-11/NSLDSEnrollmentReportingGuideNovember2022.pdf>.

⁹⁶ See, for example, documents available at: <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD57&meetingId=193123&acronym=1840-ED/OPE>.

⁹⁷ Please note that the three- and four-year earnings measures compiled here are not identical. However, they should provide a sense of magnitude. Arnold Ventures analysis of data that are available at: Kelchen, Robert, “Examining Trends in Debt to Earnings Ratios,” Blog, April 25, 2023, <https://robertkelchen.com/2023/04/25/examining-trends-in-debt-to-earnings-ratios/>.

⁹⁸ “Figure 3: Median Annual Earnings of Full-Time, Year-Round Workers Ages 25-34, by Educational Attainment,” National Center for Education Statistics, U.S. Department of Education, via data from U.S. Census Bureau, 2022, <https://nces.ed.gov/programs/coe/indicator/cba/annual-earnings#3>.

the earnings premium measure will similarly adjust, because it is based on actual earnings in those years – in a sense, self-correcting for broader economic changes.

Certification Procedures

The Department Should Fully Investigate, and Regularly Reevaluate, Problematic Institutions

34 CFR 668.13(b)(3) and 668.13(c)(2)(ii)

The Department has proposed several changes to the current timeframes for the process of certifying, or recertifying, institutions to participate in the Title IV programs. First, the Department proposed to eliminate a provision that previously required it to approve the participation of an institution if it had not acted on an application within 12 months. As the Department noted, this provision could lead the Department to make a premature or unwarranted decision – either to certify the institution after allowing the 12 months to elapse while the Department investigates the institution, or to deny an application so as not to be forced to recertify the institution – with respect to an institution that has outstanding issues. The risk of potential detriment to students and taxpayers, not to mention to the institution, in such cases is inappropriate and unnecessary. We support the Department’s proposal to eliminate the automatic timeframe.

We also noted the Department’s proposal to limit the maximum recertification period for institutions that have significant consumer protection concerns to two years, and its directed question about whether to extend that timeframe up to three years. We urge the Department not to extend the timeframe. We recognize that the recertification process is both lengthy and burdensome, and that the Department is likely concerned about the challenges a short recertification period may present both to institutions and to the Department itself. However, as the Department is aware, actions against an institution are themselves a lengthy process; should the Department determine the consumer protection concern warrants new limitations or termination of eligibility, it will only have extended that process. That extension will come at the expense of students who will continue to enroll in the institution, using taxpayer-financed Title IV dollars, in the interim. The Department should accept the relatively small additional burden of going through another recertification process at two years – or shorter, as appropriate – rather than forcing students to bear the expense and wasted time of enrolling in a program with known concerns without the benefit of careful Department oversight.

Stronger Conditions for High-Risk Institutions Will Enable Much-Needed Oversight

34 CFR 668.14

One of the Education Department’s most fundamental responsibilities is to oversee the institutions within its portfolio of Title IV-participating schools. Through program reviews, audits, investigations, enforcement actions, and other oversight activities, the Department seeks to ensure institutions comply with federal rules and regulations, and to protect students and

taxpayers. Yet too often, even very high-risk institutions have been able to continue receiving federal dollars unencumbered, without additional protections layered on for students and taxpayers. The Department's proposed changes will greatly expand the number and utility of tools in the agency's oversight toolbox.

We also include some specific suggestions to further improve the Department's efforts in this regard. For instance, in proposed 34 CFR 668.13(c)(1)(i)(G), we recommend the Department specify that provisional certification may be applied if an institution *is not financially responsible* under the provisions of Subpart L. Other suggestions follow below.

Schools At Risk of Closure Should Be Subject to Heightened Requirements

34 CFR 668.14(e)(1) and 668.14(e)(2)

The Department proposed important changes to allow for certain conditions to be applied to schools that are at a risk of closure. College closures can be devastating for the students, as well as the faculty and staff, of an institution. Too often, particularly in recent years, colleges have shuttered suddenly and without much warning to students, leaving them without good options to continue their education and putting taxpayers on the hook for the costs of loan discharges. A report by the State Higher Education Executive Officers Association found that fewer than half of students affected by a closure reenrolled in another institution to complete their program afterwards; even among those who did, more than half left school without earning their degree or certificate.⁹⁹ Seven in 10 students experienced a precipitous, or abrupt, closure; reenrollment rates and outcomes for those students were even worse.¹⁰⁰ We support the Department's efforts to better protect students and taxpayers, including by ensuring the Department may require institutions at risk of closure to comply with the submission of a teach-out plan or agreement; submission of a records retention plan to address student transcripts and other key documentation; restrictions on opening new programs or locations; restrictions on growing the number of students or Title IV volume; and more.

Changes in Ownership Present Risks Against Which the Department Should Protect

34 CFR 668.14(f) and 668.14(g)

The Department included key provisions ensuring it will apply additional conditions to institutions that have undergone a change in ownership in which a proprietary institution is seeking to convert to nonprofit status. These conditions include continued compliance with the 90/10 rule and gainful employment requirements until the conversion has been approved; regular reporting on the relationship between the institution and its former owner; restrictions on advertising as a nonprofit institution until the conversion has been approved; and other timely reporting on regulator actions with respect to the institution. The risks of these types of

⁹⁹ Burns, Rachel, Lynneah Brown, Kelsey Heckert, Dustin Weeden, Hee Sun Kim, Beatrix Randolph, Aaron Pevitz, Sarah Karamarkovich, Jennifer Causey, "A Dream Derailed? Investigating the Impacts of College Closures on Student Outcomes," State Higher Education Executive Officers Association and National Student Clearinghouse Research Center, 2022, <https://sheeo.org/project/college-closures/>.

¹⁰⁰ Ibid.

conversions are significant; the Government Accountability Office reported in recent years that in a third of conversions examined, a former owner or other official maintained an inappropriate “insider” role in the transaction; and 13 closed before the Department even issued a decision about whether to approve the conversion for Title IV purposes.¹⁰¹ Particularly coupled with the much stronger change in ownership regulations the Department issued last year, these are critical protections, and we urge the Department to retain these provisions.

Strengthen States’ Ability to Enforce Consumer Protection Laws, Including in Reciprocity Agreements
 34 CFR 668.14(b)(32)(iii)

We agree with the Department’s concerns that states that participate in the State Authorization Reciprocity Agreement (SARA) are currently unable to enforce many of their consumer protection laws with respect to SARA-participating institutions that are located out of state, but which enroll in-state students. As we noted in our comments to the Department on its upcoming rulemaking, efforts to “streamline the process of state authorization for schools that cross state lines in enrolling students online... have unfortunately undermined the intended role of states in some cases.”¹⁰² This is because SARA, in which nearly every state and over 2,300 institutions participate, sets too low a bar for consumer guardrails, and by prohibiting member states from enforcing their state laws with respect to out-of-state SARA-participating institutions, has left many states unable to properly protect their residents.

While the Department’s language is intended to appropriately return some of that authority to the states, we are concerned the proposed changes do not address the scale of the problem. By proposing only to allow states to enforce laws that relate to college closures, student recruitment, and misrepresentations, students will remain unprotected in all other arenas – including related to tuition refund policies, student cancellation policies for those who decide not to proceed with the program, disclosures, and transparency, requirements specific to for-profit or other high-risk colleges, student outcomes-based standards, and more.¹⁰³ States are intended to serve as protectors of their residents – but an institution-designed and largely institution-governed reciprocity agreement has allowed thousands of institutions to instead operate across state lines without complying with state consumer protection laws.¹⁰⁴

¹⁰¹ “IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions,” U.S. Government Accountability Office, GAO-21-89, December 31, 2020, <https://www.gao.gov/products/gao-21-89>.

¹⁰² Comment to U.S. Department of Education from Arnold Ventures, Docket ID # ED-2023-OPE-0039, April 24, 2023, pages 7-8, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Written-Comments-Intent-to-Establish-Rulemaking-Committee-FINAL.pdf>.

¹⁰³ Fast, Carolyn, “Six Steps to Better Consumer Protections for Online Students,” The Century Foundation, January 26, 2023, <https://tcf.org/content/report/six-steps-to-better-consumer-protections-for-online-students/>.

¹⁰⁴ Note, SARA does permit institutions to enforce “general purpose” laws that apply to all business, and not just to institutions of higher education. These laws include fraud and unfair and deceptive practices. However, the Department’s proposed language refers only to “misrepresentations,” which could unintentionally imply a narrowing of the scope of that existing requirement – perhaps leading institutions to erroneously believe they are *not* obligated to comply with general purpose laws other than those related

We urge the Department to instead ensure states may enforce *all* consumer protection laws, rather than limiting the scope of those laws to only closures, recruitment, and misrepresentations. Though these are important protections, they are far from sufficient to address the needs of students or of states; many other types of student protections should also be treated as enforceable, including with out-of-state institutions participating in a reciprocity agreement. While SARA can streamline institutions' access to state authorization by limiting the need for individual state applications and fees, precluding states' authority to hold institutions accountable for their conduct overreaches and undermines the intent of state authorization requirements in the Higher Education Act. We also hope the Department will address other key issues related to state authorization, including the governance of the agreement and state resources available under reciprocity agreements, in its upcoming rulemaking.¹⁰⁵

Even if the Department opts to keep its current, limited approach to ensuring institutions' compliance with state laws, we provide suggestions in this footnote for technical language changes to proposed 34 CFR 668.14(b)(32) that will address some inadvertent challenges with the language as the Department proposed it.¹⁰⁶

The Department Should Consider Student Outcomes in Recertifying Institutions' Title IV Participation

34 CFR 668.13(e)

The Department included in its proposal a number of supplementary performance measures that will enable it to consider, as part of the holistic review process, key student outcomes measures—including debt-to-earnings rates, the earnings premium measure, and licensure passage rates, among others. We strongly urge the Department to retain these provisions. Student outcomes are core to assessing whether institutions have met their mission and fulfilled their promises to

to misrepresentation. Furthermore, because the proposed language does not explicitly refer to institutions covered by a reciprocity agreement (as the preamble language makes clear is the Department's intent), some institutions may erroneously believe that even their ground-based, non-SARA programs are not required to comply with state laws. We propose language in a subsequent footnote to address these oversights.

¹⁰⁵ Comment to U.S. Department of Education from Arnold Ventures, Docket ID # ED-2023-OPE-0039, April 24, 2023, pages 7-8, <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Written-Comments-Intent-to-Establish-Rulemaking-Committee-FINAL.pdf>.

¹⁰⁶ Proposed technical revisions to this language follow, with edits noted in bold:

(32) In each State in which the institution is located or in which students enrolled by the institution are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2), the institution must determine that each program eligible for title IV, HEA program funds—

...
(iii)

(A) Complies with all applicable State consumer protection laws; and

(B) For institutions covered by a State authorization reciprocity agreement as defined in 34 CFR 600.2, notwithstanding any limitations in that agreement, complies with all State higher education requirements, standards, or laws related to risk of institutional closure, or to recruitment and marketing practices, and with all State general-purpose laws, including but not limited to those related to misrepresentations, fraud, or other illegal activity including both generally applicable State laws and those specific to educational institutions;

students; yet they are all but absent in the recertification process. Even where institutions show abominable licensure pass rates, or load students up with unaffordable debt levels they will never be able to repay, the Department is rarely able to take action or apply additional conditions. This provides the Department with critical information about the institution's performance, at a time when it might leverage provisional participation, apply conditions or limitations to an institution's performance, or decide to investigate the institution more fully before reextending access to billions of dollars in federal aid.

Furthermore, we urge the Department to expand this provision by *requiring* the Department to consider these measures; while this consideration should not be the only factor in approving the recertification of an institution, the agency is obligated to consider a fulsome picture to understand taxpayers' investments in these institutions.¹⁰⁷

Licensure Programs Should Not Be Permitted to Inflate Their Program Lengths Beyond State Requirements

34 CFR 668.14(b)(26)

We also support the Department's proposal to limit the number of hours for gainful employment programs that prepare students for licensed occupations to the number of hours required by the state or, in certain edge cases, to the number of hours required by a neighboring state in which most students do or will live or work (whichever is greater). For years, the Department has permitted institutions to offer such programs one-and-a-half times the required length – forcing students to expend more time and money for programs that took advantage of the allowance. This change will greatly benefit students and taxpayers alike, and provides a reasonable restriction on institutions' programs in fields that are often already overregulated and inflated in required licensure hours.¹⁰⁸

Financial Protection Measures Will Protect Taxpayers and Help Deter Misconduct

34 CFR 668.14(a)(3)(ii)

The Department proposes to codify and clarify financial protection measures for private institutions by requiring entity owners to sign program participation agreements alongside a representative of the institution itself. This policy, which expands on a policy previously established via Departmental guidance, will offer a common-sense protection to ensure that, in the event liabilities are incurred, the Department is able to recoup the funds from both the institution and the company that owns it, as applicable. This straightforward policy is a critical

¹⁰⁷ Specifically, we propose to reword the language as follows, with edits noted in bold: (e) *Supplementary performance measures*. In determining whether to certify, or condition the participation of, an institution under §§ 668.13 and 668.14, the Secretary **may shall** consider the following, among other information at the program or institutional level:

* * *

¹⁰⁸ Kolodner, Meredith, and Sarah Butrymowicz, "A \$21,000 Cosmetology School Debt, and a \$9-an-Hour Job," *The New York Times*, December 26, 2018, <https://www.nytimes.com/2018/12/26/business/cosmetology-school-debt-iowa.html>.

protection for taxpayers and will help to address the significant gap the Department identified between the amount of liabilities institutions incur and the amount taxpayers recoup.¹⁰⁹

Administrative Capability

Greater Transparency Is Needed to Inform Students' College Choices

34 CFR 668.16(h)

The Department proposed to strengthen requirements for institutions' financial aid counseling to students, including by requiring that financial aid communications include key information about the costs of college and the price students will be expected to pay. We support these changes. As the Government Accountability Office noted in a recent report, institutions' failure to clearly state the costs of college is a widespread problem; 91 percent of colleges studied either do not include a net price, or understate the net price in ways that make the college look more affordable than it is, on their financial aid offers.¹¹⁰ More than half do not provide the total cost of attendance, including both direct and indirect costs.¹¹¹ Other research has identified many of the same problems.¹¹²

The Department should retain and strengthen these provisions to ensure institutions are much clearer with their prospective and enrolled students, and that those students can make informed decisions about college with a full understanding of the costs they will bear. In particular, we recommend clarifying that such requirements apply to any financial aid communication from the school detailing students' financial aid packages. We suggest specifying that institutions may not include amounts for Parent PLUS loans, private education loans (including income-share agreements), or state or institutional loans in the offer they provide to students; this will help to prevent institutions from seeking to "package" such loans, which borrowers do not necessarily qualify for (pending the results of an adverse credit history check, in the case of Parent PLUS loans), in ways that make the college appear affordable when it includes tens of thousands of dollars in federal parent or non-federal student loans in addition to federal student loans. Finally, we propose to clarify the Department's proposed language requiring that institutions advise students on accepting the most beneficial types of aid first. Our suggested technical changes are included in this footnote.¹¹³

¹⁰⁹ 88 Fed. Reg. 32450, Table 4.7.

¹¹⁰ "Financial Aid Offers: Action Needed to Improve Information on College Costs and Student Aid," U.S. Government Accountability Office, GAO-23-104708, November 2022, <https://www.gao.gov/assets/gao-23-104708.pdf>.

¹¹¹ *Ibid.*

¹¹² Burd, Stephen, Rachel Fishman, Laura Keane, Julie Habbert, Ben Barrett, Kim Dancy, Sophie Nguyen, and Brendan Williams, "Decoding the Cost of College: The Case for Transparent Financial Aid Award Letters," *New America* and *uAspire*, June 5, 2018, <https://www.newamerica.org/education-policy/policy-papers/decoding-cost-college/>.

¹¹³ Proposed language, derived in part from a proposal made by a negotiator

(<https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/amandaadminicap.pdf>), is pasted below, with proposed changes in bold:

Additionally, the Department should calculate the Parent PLUS borrowing rates of the institution. For institutions at which parents borrow for the enrollment of at least 25 percent of students, the Department should assess the institution's administrative capability by determining whether at least one GE program that passes would have failed with the inclusion of those parents' debt. This will help to ensure that, if parent loans are excluded from debt-to-earnings calculations, the institution has not used the Parent PLUS program as a loophole from accountability.

Institutions Should Provide High-Quality Career Services to Students

34 CFR 668.16(q)

The Department also proposed to require that institutions provide adequate career services to their students, assessed in part by the share of students in career-training programs, the number of career services staff, the promises the institution made to offer career services, and employer partnerships with the institution. Students name employment outcomes as one of the most critical reasons for attending college;¹¹⁴ and institutions and employers alike have identified stronger preparation and career services (including internships and apprenticeships, work-study, and

(h) Provides adequate financial aid counseling with clear and accurate information to students who apply for title IV, HEA program assistance. In determining whether an institution provides adequate counseling, the Secretary considers whether its counseling and ~~financial aid any communications made to the student detailing their financial aid package advise students and families to accept the most beneficial types of financial assistance available to them and~~ include information regarding—

(1) The cost of attendance of the institution as defined under section 472 of the HEA, including the individual components of those costs and a total of the estimated costs that will be owed directly to the institution, for students, based on their attendance status;

(2) The source and amount of each type of aid offered, **excluding an amount for Federal Parent PLUS loans, private education loans, state loans, institutional loans, and income-share agreements**, separated by the type of the aid and whether it must be earned or repaid;

(3) The net price, as determined by subtracting total grant or scholarship aid included in paragraph (h)(2) of this section from the cost of attendance in paragraph (h)(1) of this section;

(4) The method by which aid is determined and disbursed, delivered, or applied to a student's account, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts;

(5) Guidance to accept the most beneficial types of financial assistance available to them, including prioritizing grants and scholarships, followed by Federal Subsidized and Unsubsidized loans, before other aid options, including Federal Parent PLUS loans, Federal Grad PLUS loans, private education loans, state loans, institutional loans, and income-share agreements; and

~~(56)~~ The rights and responsibilities of the student with respect to enrollment at the institution and receipt of financial aid, including the institution's refund policy, the requirements for the treatment of title IV, HEA program funds when a student withdraws under § 668.22, its standards of satisfactory progress, and other conditions that may alter the student's aid package;

¹¹⁴ Fishman, Rachel, "2015 College Decisions Survey Part I: Deciding to Go to College," New America, May 2015, https://static.newamerica.org/attachments/3248-deciding-to-go-to-college/CollegeDecisions_PartI.148dcab30a0e414ea2a52fod8fb04e7b.pdf; and "Strada-Gallup Education Survey (2020-2021)," Strada Education Foundation, <https://stradaeducation.org/research-education-survey/>.

exposure to work in the community) as critical to improving students' odds of employment outcomes.¹¹⁵ Yet some institutions provide little to no assistance to students in moving from the classroom to the workplace. These additions will help to ensure institutions fulfill their obligations to provide access to career services.

The Department Must Protect Against Waste, Fraud, and Abuse Among Institutions

34 CFR 668.16(p)

One clarification under the Department's proposed language would build on an existing requirement that institutions have a process to assess whether potentially invalid high school diplomas are valid and qualify the student for federal financial aid. We support these additions, which include detailing more about the steps that institutions must take to evaluate the diploma, as well as the types of diplomas that will not be valid. Unfortunately, diploma fraud is not a new problem in higher education – sometimes perpetrated by the institution itself. An undercover investigation conducted by the Government Accountability Office for a 2011 report found that 12 of 15 online for-profit institutions agreed to enroll investigators who were using invalid evidence of high school graduation.¹¹⁶ Unfortunately, it appears that some institutions and officials still engage in fraud related to high school diplomas.¹¹⁷ These changes, which are designed to address fraudulent diplomas and – as the Department notes – not valid religious high schools or other non-public secondary schools that are not regulated by the state, would restore greater program integrity.

Financial Responsibility

Financial Protection Triggers Will Help Protect Taxpayers from High-Risk Institutions

34 CFR 668.171(c) and (d)

¹¹⁵ Boyer, John, "How Liberal Arts Colleges Can Make Career Services a Priority," Higher Ed Dive, June 5, 2023, <https://www.highereddive.com/news/liberal-arts-college-career-services-john-boyer/651959/>; and Finley, Ashley, "How College Contributes to Workforce Success: Employer Views on What Matters Most," Association of American College and Universities, <https://www.aacu.org/research/how-college-contributes-to-workforce-success>.

¹¹⁶ "Experiences of Undercover Students Enrolled in Online Classes at Selected Colleges," U.S. Government Accountability Office, October 2011, <https://www.gao.gov/assets/gao-12-150.pdf>.

¹¹⁷ Weaver, Jay, "Florida Nursing School Operators Plead Guilty to Selling Fake Diplomas to Thousands of Students," *Tampa Bay Times*, April 11, 2023, <https://www.tampabay.com/news/crime/2023/04/11/florida-fake-nursing-diploma-degree-scheme-guilty-plea/>; "Fact Sheet: School Closure, Marinello Schools of Beauty Located in California," February 2016, <https://studentaid.gov/sites/default/files/marinello-ca.pdf>; Office of Federal Student Aid, U.S. Department of Education, and "High School Diploma Scams," Federal Trade Commission, May 2021, <https://consumer.ftc.gov/articles/high-school-diploma-scam>.

Existing financial responsibility requirements are, quite evidently, insufficient to protect taxpayers from the risk of too many institutions. When colleges close, commit fraud, or engage in wrongdoing, it is much too often taxpayers, and not the institutions at fault, who bear the costs of that misconduct. As New America wrote in a past comment to the Department, “among the institutions with the largest amounts of closed school discharges paid out to students – 62 institutions that closed between 1987 and 2016 and had over \$1 million in closed school discharge liabilities – just six institutions had letters of credit on file, and only one had a letter of credit large enough to cover the entirety of the closed school discharge liabilities.”¹¹⁸ The Department’s proposed rule provides more evidence of this: Between 2013 and 2022, institutions incurred more than \$1.6 billion in liabilities (including closed school discharges, as well as other types of liabilities), while the Department collected just \$344 million in repaid liabilities over the same timeframe.¹¹⁹ In only one instance has the Department recovered funds for any borrower defense discharges – and even then, only via a bankruptcy proceeding for the institutions in question.¹²⁰ It is clear that much stronger taxpayer protections are needed to prevent losses from high-risk institutions that incur liabilities they cannot, or will not, repay.

The Department’s proposed mandatory and discretionary triggers, which require or allow (respectively) the Department to seek financial protection from an institution when it has experienced a listed high-risk event, are an effective way to enable much stronger taxpayer protection. We support the inclusion of all of these triggers in the financial responsibility regulations.

Clearer Bars for Considering Discretionary Triggers Will Strengthen the Department’s Ability to Protect Taxpayers
 34 CFR 668.171(d)(3) and 668.171(d)(4)

To ensure the discretionary triggers are more actionable, we recommend incorporating thresholds at which the Department will assess whether financial protection is needed for several of them. The first is related to fluctuations in Title IV volume from year-to-year (or over a period of years), indicating a possible risk of closure.¹²¹ We recommend that the Department evaluate whether financial protection is needed for private colleges that have seen a 25 percent fluctuation in Title IV volume either in a single year or across a three-year period. Research has found that a one-year 10 percent drop in enrollment, which is closely associated with federal financial aid volume at many institutions, is correlated with subsequent closure of the institution; however, the study identified that these enrollment drops identified more than one in five nonprofit colleges and one

¹¹⁸ Comments to U.S. Department of Education, Docket ID # ED-2018-OPE-0027-0001, New America, August 30, 2018, page 29, https://s3.amazonaws.com/newamericadotorg/documents/New_America_Comments_BD_NPRM_2018-OPE-0027_FINAL.pdf.

¹¹⁹ 88 Fed. Reg. 32450, Table 4.7.

¹²⁰ 88 Fed. Reg. 32446.

¹²¹ Proposed 34 CFR 668.171(d)(3).

in three for-profit colleges.¹²² A 25 percent change is likely to identify some of the highest-risk institutions (and mirrors with the discretionary triggers on discontinuation of programs or closure of locations). The Department can assess, among those institutions facing a 25 percent decline, whether the drop in revenue will have a significant adverse effect on the school’s finances, and require a letter of credit or other financial protection as appropriate.

The other is related to high annual dropout rates, which are also a statutorily mandated factor in determining institutions that are selected for a program review.¹²³ Researchers have found low retention rates – and by implication, their inverse, high dropout rates – to be associated with college closures, as well.¹²⁴ We recommend assessing private institutions with a withdrawal (or dropout) rate of greater than 33 percent to determine whether additional financial protection is needed; this rate has long been considered by the Department to be a minimum requirement for new institutions seeking to participate in Title IV for the first time, so is a well-established minimum bar for the agency’s risk tolerance.¹²⁵ Again, the Department can, and should, evaluate the potential financial impact of such poor withdrawal rates on an institution-by-institution basis.

Incorporate a Discretionary Trigger for Certain Government Investigations
34 CFR 668.171(d) and 668.171(f)(iii)

In its proposed rules, the Department seeks to incorporate certain types of government investigation steps – receipt of a civil investigative demand, subpoena, request for documents or information, or other formal or informal inquiry from a government entity – as a reporting requirement to the Department. This is a critical step, as it will ensure the Department is aware of potentially high-risk investigations early in the process. However, we recommend that the Department expand the requirement to also include a discretionary trigger based on this reporting requirement. If the Department has knowledge of these investigatory steps, and valid reason to believe that the investigation is likely to have a significant adverse effect on the institution’s financial condition (a threshold requirement for all discretionary financial responsibility triggers), it should obtain financial protection at that time. The Department will need to individually assess the steps taken, the likelihood of the investigation proceeding and leading to consequences or sanctions for the institution, and the impact of those consequences on the school’s financial circumstances in order to determine whether the action simply warrants additional monitoring or whether it demands taxpayer protection.

Increased Requirements for Public Institutions Should Apply to Changes in Ownership

34 CFR 668.171(g)(1)(ii)

¹²² Kelchen, Robert, “Examining the Feasibility of Empirically Predicting College Closures,” Brookings Institution, November 2020, <https://www.brookings.edu/wp-content/uploads/2020/11/ES-11.23.20-Kelchen.pdf>.

¹²³ 20 USC 1099c-1(a)(2)(E).

¹²⁴ Zemsky, Robert, Susan Shaman, and Susan Campbell Baldrige, “The College Stress Test: Tracking Institutional Futures Across a Crowded Market,” Johns Hopkins University Press, 2020, available at: <https://muse.jhu.edu/book/72586>.

¹²⁵ 34 CFR 668.16(l).

The Department proposes in its regulations to require that public institutions submit documentation confirming they are backed by the full faith and credit of their state or other relevant government entity, including upon initial certification, upon changes in ownership and request to be recognized as a public institution, and at the first recertification after these regulations become effective. These requirements are critical to ensuring public institutions are financially responsible; the basis for exempting such institutions from the financial responsibility composite score is their backing by the full faith and credit of a state or other government entity. Though this backing has rarely been needed in the past, given the low frequency of closure or other liabilities incurred by public colleges, even public institutions are increasingly likely to engage in high-risk acquisitions or transactions, and even to use the high-risk, predatory practices associated more commonly with risky private colleges.¹²⁶ We encourage the Department to retain this requirement and work with states and institutions to collect the necessary documentation, providing a waiver from the documentation for institutions that demonstrate financial responsibility in accordance with alternative documentation as specified by the Department. In all cases of changes in ownership or corporate restructuring and a request to be recognized as a public institution (cases that represent the highest risk for taxpayers¹²⁷), however, we recommend that the Department retain the provision stating that it will require this documentation.

The Department Should Ensure Transparency into Institutional Expenditures

34 CFR 668.23(d)(5)

We strongly support the Department’s proposal to require institutions to disclose, via a footnote in their audited financial statements, the amount spent in a fiscal year on recruiting activities, advertising, and other pre-enrollment expenditures. This disclosure will ensure the Department has access to information on whether institutions are spending down their resources on marketing and other activities, rather than investing in their students’ education.

¹²⁶ Cheslock, John J., Kevin Kinser, Sarah T. Zipf, and Eunjong Ra, “Examining the OPM: Form, Function, and Policy Implications,” Penn State College of Education, EdArXiv, December 10, 2021, <https://edarxiv.org/py3sz/>; and “Education Needs to Strengthen Its Approach to Monitoring Colleges’ Arrangements with Online Program Managers,” U.S. Government Accountability Office, GAO-22-104463, April 2022, <https://www.gao.gov/assets/gao-22-104463.pdf>. The GAO found that at least 550 colleges, 90 percent of which were public or nonprofit institutions, worked with an online program manager, and cites LISTedTECH’s data showing that similar numbers of public and nonprofit colleges work with an OPM. OPMs have been associated with predatory practices that could give rise to borrower defense claims. For examples of such practices, see the “Omission” section beginning on page 13, “Comments from the Legal Aid Community to the U.S. Department of Education re: Proposed Regulations on Borrower Defense, Arbitration, Interest Capitalization, Closed School Discharge, Total and Permanent Disability Discharge, False Certification, and Public Service Loan Forgiveness,” Docket ID ED-2021-OPE-0077, August 12, 2022, https://www.nclc.org/wp-content/uploads/2022/08/BD_CSD_TPD_FC_PSLF_Interest_coalition_comment-1.pdf.

¹²⁷ “IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions,” U.S. Government Accountability Office, GAO-21-89, December 31, 2020, <https://www.gao.gov/products/gao-21-89>.

However, we urge the Department to expand this requirement so it can effectively implement another aspect of the rules. The Department has also proposed a number of supplementary performance measures that the Secretary may consider in determining whether or how to allow or continue an institution's participation in the Title IV programs. One of those relates to "educational and pre-enrollment expenditures," which it notes would be evaluated through a disclosure in the audited financial statements as required under proposed § 668.23(d). In addition to the pre-enrollment expenditures that the Department has already proposed to require disclosure of in § 668.23(d)(5), the Department should require that the footnote also contain a separate notation with "the amounts the institution spent on instruction and instructional activities, academic support, and support services." This will provide the Department with the information it needs to assess both aspects of this proposed supplementary performance measure.