STUDENT DEFENSE
NATIONAL STUDENT LEGAL DEFENSE NETWORK

1701 Rhode Island Ave NW
Washington, DC 20036
www.defendstudents.org

U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue Southwest
Washington, D.C. 20202-6110

August 26, 2022

Re: NPRM – Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program

Docket ID ED–2022–OPE–0062

Dear Secretary Cardona, Under Secretary Kvaal, and Assistant Secretary Paydar,

The National Student Legal Defense Network ("Student Defense") submits this comment in response to the Notice of Proposed Rulemaking published in the *Federal Register* on July 28, 2022 ("NPRM") proposing regulatory amendments regarding the Federal Pell Grant program, institutional eligibility, and student assistance general provisions.[1] Although the NPRM touches an array of important topics, Student Defense focuses here on proposals regarding determinations of institutional non-profit status, provisional certifications, and changes in ownership.

Student Defense commends the Department for tackling the issues addressed in the NPRM and supports many of the proposals to improve oversight over institutions. Nevertheless, we wish to highlight certain areas that require improvements or changes. **The Department should:**

- **Refine its definition of "nonprofit" to limit an institution's incentives to maximize profit at the expense of student outcomes. In this regard, we offer specific proposals to ensure student protections.**

- **Amend the rule to address the <u>illegal</u> proposal (and existing practice) allowing entities without audited financial statements to participate in Title IV programs without providing financial protection to cover 50% of "annual potential liabilities."**

- **Discard its proposal to water down the presumptive ownership percentage threshold triggering a "change of control."**

- **Revisit requirements regarding the length of time institutions are allowed to participate provisionally to conform to the clear text of the Higher Education Act.**

Thank you again for this opportunity to comment.

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[1] 87 Fed. Reg. at 45,432 (July 28, 2022). Student Defense is a non-partisan, 501(c)(3) non-profit organization that works, through litigation and advocacy, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.

I. THE DEPARMTMENT MUST REFINE ITS DEFINITION OF "NONPROFIT" TO LIMIT AN INSTITUTION'S INCENTIVES TO MAXIMIZE PROFIT AT THE EXPENSE OF STUDENT OUTCOMES.

Student Defense agrees that the Department must not rely exclusively on the Internal Revenue Service ("IRS") to conclusively determine whether an institution is a "nonprofit" under the HEA. As Brian Galle, a Professor of Law at Georgetown University Law Center, has noted, "the legal framework IRS employs isn't designed to implement Title IV, and fails to further Title IV goals in certain key respects."[2] Not only does the IRS lack specific expertise regarding higher education institutions,[3] but whereas tax law is aimed at safeguarding the public fisc, the Title IV distinction between nonprofit and proprietary (and public) ensures that institutions with financial incentives to maximize shareholder profit are subject to heightened standards and oversight.

The IRS, for example, has created certain safe harbors and exceptions that, standing alone, are inappropriate for the oversight of the Title IV programs. More specifically, tax regulations provide that large, repeated instances of resource diversions for private profit will not necessarily result in loss of 501(c)(3) status.[4] Such a rule fails to further Title IV's goal of protecting students from institutions prioritizing private profits over learning. Similarly, IRS regulations provide that the first contract between an institution and a given contractor cannot be a basis for loss of exempt status, no matter how abusive that contract or how long it governs the institution for. But exempting "initial" contacts from status determinations fails to guard against Title IV institutions increasing revenue and profit at the expense of student outcomes.[5]

Nevertheless, to guide future discretionary determinations and reduce uncertainty, the Department should articulate in the final preamble a clearer rationale behind its definition of "nonprofit institution." The proposed rule states that "a nonprofit institution is *generally* not an institution that" engages in certain activities. 87 Fed. Reg. at 45,489 (proposal to define "nonprofit institution") (emphasis added). As we note throughout, the proposed rule fails to explain the circumstances that would lead the Department to find inapplicable this "general" prohibition. Without additional explanation, institutions will be able to argue that they present a justifiable exception to the general rule.

The Department should further explain that its definition of "nonprofit institution" is important to restrain shareholder profit-motives at the expense of student outcomes. Congress created a distinction between for-profit and nonprofit institutions in the HEA, and arrangements that grant profit-incentivized parties significant influence over the educational mission undermine this

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2 *For-Profit College Conversions: Examining Ways to Improve Accountability and Prevent Fraud: Hearing Before the H. Comm. on Educ. and Lab.*, 117th Cong. (2021) (written testimony of Brian Galle, Professor of Law, Georgetown Univ. L. Ctr.), https://edlabor.house.gov/imo/media/doc/GalleBrianTestimony042021.pdf.
3 U.S. Gov't Accountability Off., GAO-21-89, *IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions* 36, (2020), https://www.gao.gov/products/gao-21-89.
4 Treas. Reg. § 1.501(c)(3)-1(f)(2)(ii), (iv) (example 3).
5 *See* Written Testimony of Brian Galle, *supra* note 2, at 3–6.

statutory purpose. Students are too often harmed by institutions extracting profits and minimizing investments in educational quality.[6]

Under these principles, we offer three categories of proposals to improve upon the paragraph (2) of the proposed definition of "Nonprofit institution." *See* 87 Fed. Reg. at 45,489.

a. The Department should clarify limits on debt arrangements in definitional section (2)(i).

As the Department implicitly recognizes, institutions indebted to their former owners are rarely genuine nonprofits. As Professor Galle has highlighted, there have been numerous examples of proprietary institutions using debt structures to retain substantial control over a converted "non-profit," and extract ongoing revenue from it, without formally holding an equity interest.[7] Nonprofit law already prohibits debtor-creditor relationships under circumstances where a creditor might use the relationship to control or derive excess benefit from the nonprofit, and such abuses would be relatively difficult for regulators to identify. For example, under federal law a private foundation may not loan money to its insiders.[8] New York and other states prohibit charities from lending money to their officers and directors.[9]

In this regard, the definitional limitation in § 2(i) could be improved:

- The limit should extend from former owners (and their related parties) to successors in interest of those parties. Otherwise, an institutional owner could establish an abusive debt arrangement with a converted "non-profit" institution, and immediately cash out that arrangement for its present value. Purchasers would, like the original owner, still have an interest in using the debt arrangement to maximize profit, not educational outcomes—indeed, purchasers would likely have to do so in order to justify the price they would pay to succeed the original owner.

- The Department should specifically state, as it has previously concluded,[10] that debt arrangements including terms related to an institution's revenues or profits are inconsistent with nonprofit status. As New York law has recognized, these provisions create an inherent risk that the institution will be managed to satisfy the revenue- or profit-related contract terms.[11]

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[6] *For-Profit College Conversions: Examining Ways to Improve Accountability and Prevent Fraud: Hearing Before the H. Comm. on Educ. and Lab.*, 117th Cong. (2021) (written testimony of Yan Cao, Att'y, The Century Found.), https://edlabor.house.gov/imo/media/doc/CaoYanTestimony042021.pdf .
[7] Written Testimony of Brian Galle, *supra* note 2, at 7.
[8] *E.g.*, 26 U.S.C. § 4941(d)(1)(A) (leases between private foundation and substantial contributor); 26 U.S.C. § 4941(d)(1)(B) (loans).
[9] N.Y. U.C.C. L. Ch. 38 § 2-716 (McKinney 2001); *see* Cal. Corp. § 5236(a) (West 2020) (prohibiting loans to officers and directors unless approved by the Attorney General).
[10] Letter from Douglas Parrott, Div. Dir., U.S. Dep't of Educ. to Eric Juhlin, Chief Exec. Officer, Ctr. For Excellence in Higher Educ. re: Decision on Change of Ownership (Aug. 11, 2016) https://www2.ed.gov/documents/press-releases/08112016-cio-decision.pdf.
[11] N.Y. U.C.C. L. Ch. 38 § 2-506(b) (McKinney 2014).

- The Department should affirmatively state that debt instruments between the institution and its former owner, with significant covenants potentially limiting the institution's autonomy to set policy or priorities, would not be consistent with status as a nonprofit institution, because such contract provisions may expose students to risk that the institution's operations will be based on the preferences of for-profit creditors.

b. The Department should close needless loopholes in the limit on revenue-sharing arrangements in definitional section (2)(ii).

Revenue sharing[12] arrangements reward one party to a contract for maximizing dollars, but not other organizational goals of the nonprofit. When the outside party can influence key aspects of the education, such as by shaping the size and composition of the student body, allocating financial aid, setting curriculum, providing instruction, or significantly affecting the financial burden of obtaining an education, students are vulnerable.

We agree with the Department's proposal in paragraph 2(ii) of the "nonprofit institution" definition to curtail arrangements in which an institution agrees to share revenues with its former owner (or related parties). Such arrangements are ripe for abuse and usually inconsistent with nonprofit status, as the IRS has long recognized.[13] The Department's proposal, however, can be improved upon in several respects:

- As noted above, the use of the word "generally" across subsection (2), *i.e.*, before the further subsections, creates an unnecessary loophole that could allow entities to avoid oversight. If the Department's goal is to recognize that there are instances in which a nonprofit institution may share revenue with service-providers (without running afoul of its nonprofit status), the rule could be clarified and articulate standards for such instances.

- The Department should not assume that revenue-sharing arrangements between a nonprofit institution and its former owner are consistent with nonprofit mission simply because such arrangements are "based on the market price" or "bear[] a reasonable relationship to the cost[s] of the services or materials provided." *See* 87 Fed. Reg. at 45,489 (discussing proposed definition to nonprofit institution at (2)(ii)). The problem with revenue-sharing contracts is not that they are too expensive; it is that they incentivize the service-provider to cut corners in order to squeeze more money from

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[12] We understand the limit on "revenue" sharing to cover both gross and net revenues, but a clarification to that effect may be appropriate.

[13] *See Redlands Surgical Servs. v. Comm'r*, 113 T.C. 47 (1999), *aff'd per curiam*, 242 F.3d 904 (9th Cir. 2001); I.R.S. G.C.M. 39,005, 1983 WL 197944, at *5 (June 28, 1983) ("By agreeing to serve as the general partner … the Corporation would take on an obligation to further the private financial interests of the limited partners. Since the promotion of those private interests would tend to foster operating and maintenance practices favoring the equity holdings of the limited partners … the Corporation's assumption of a duty to promote such interests in its capacity as general partner would necessarily create a conflict of interest that is legally incompatible with its being operated exclusively for charitable purposes.")

students.[14] For this reason, federal law treats revenue-based compensation as a risk factor in assessing the presence of excess private benefit.[15] Under the NPRM, however, institutions will often be able to demonstrate that an arrangement is "reasonable" even when it is not. Well-resourced private litigants usually prevail in any dispute with the government about the value of complex assets.[16]

- The Department's regulation should better limit all parties who threaten Title IV interests. As explained above, any limit on former owners (and related parties) must also apply to their respective successors and assignees. The Department has ample evidence of such arrangements which must be more closely scrutinized in the future.[17] An institution that turns over core educational functions to a for-profit contractor and pays that contractor with a defined share of revenues, is simply not operating as a non-profit.[18]

As federal law recognizes, using revenue-sharing to incentivize effort from individuals not positioned to substantially influence an institution's policies may be consistent with a nonprofit's mission, particularly where revenue-sharing is not the majority of those individuals' compensation.[19] In this regard, there may be instances in which a third party is compensated with revenue or profit sharing without significantly affecting the goals of Title IV. Vendors such as cafeteria operators or managers of the institution's investment assets, for example, are unlikely to substantially affect student outcomes, as the Department notes.[20] But revenue-sharing arrangements like these must be treated as the exception, not the norm.

c. Not All FMV Contractual Arrangements Should be Whitelisted in Definitional Section (2)(iii).

As with debt arrangements, leases and other contracts providing for an ongoing stream of payments between an institution and its former owners present particular opportunities for abuse.[21] Some proprietary institution owners have used such tools to continue to profit from a purportedly

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[14] Written Testimony of Yan Cao, *supra* note 6, at 2.
[15] Treas. Reg. § 1.4958-3(e), (e) (example 5).
[16] *See, e.g.,* Noël B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A "Revolutionary" Approach to Ownership*, 47 Tax L. Rev. 725, 743 & n.78 (1992) (explaining why government loses most valuation disputes); U.S. Gov't Accountability Off., GAO-12-608, *Appraised Value on Tax Returns: Burdens on Taxpayers Could Be Reduced and Selected Practices Improved* (2012), https://www.gao.gov/assets/gao-12-608.pdf (reporting IRS estimate that valuation errors in taxpayers' favor were four times as common as errors against).
[17] *See* Robert Shireman & Yan Cao, *Dubious Conversions of For-Profit Colleges: Decoding the GAO Report*, The Century Found. (Jan. 27, 2021), https://tcf.org/content/commentary/dubious-conversions-profit-colleges-decoding-gao-report; Letter from Douglas Parrott to Eric Juhlin, *supra* note 10, at 6, 8 (finding that payment of "contingent cash flow" to former owner was evidence that institution "ha[d] not transitioned" to genuine nonprofit status).
[18] *See St. David's Health Care Sys. v. United States*, 349 F.3d 232, 237–44 (5th Cir. 2003).
[19] Treas. Reg. § 1.4958-3(e) (example 10).
[20] 87 Fed. Reg. at 45,462.
[21] *Cf.* Treas. Reg. § 1.355-2(d)(iv)(C) (providing that transfer of non-essential cash-generating service operation is evidence that transaction is in economic reality a distribution of profits).

"nonprofit" institution.[22] We therefore agree with the Department that such arrangements merit close scrutiny.

The Department appears, however, to whitelist such arrangements wherever "the Secretary determines that the payments and terms under the agreement are comparable to payments in an arm's length transaction at fair market value." Yet a finding that a payment is at "fair market value" offers thin protection for students, because of the manipulability of that test. We understand this provision to be limited to "other agreements," that is, those that are not debt or revenue-sharing arrangements. In some circumstances, however, streams of payments that are not formally conditioned on revenues may incentivize prioritizing revenue over student outcomes. For example, payment obligations (whether under a loan agreement or otherwise) that approach or exceed expected inflows are the functional equivalent of an equity investment, because the obligee is likely to be paid only if the obligor takes on risky new projects aimed at increasing cash flow.

Consider a converted proprietary institution that enters a fixed-price service contract with its former owner to manage and operate the institution. The parties may agree to an annual payment equal to the gross revenues previously realized by the owner. Whether or not this amount is the "fair market value," it puts enormous pressure on the new nonprofit managers to replicate precisely the business practices of the former proprietary institution (*i.e.*, which they ran).

Alternatively, consider a 501(c)(3) organization that nominally owns an institution, but pays a for-profit service provider to run the institution's daily operations. Whether or not the service provider is paid based on revenues, as a practical matter the provider's profits likely depend on its ability to cut costs. If the nonprofit lacks power to block cost-cutting decisions that harm student outcomes, or as a practical matter fails to exercise such power, that is inconsistent with the presumptions about nonprofit behavior on which Title IV rests.[23] This risk is particularly acute if the service provider is the former owner of the institution, and able to draw on existing relationships, insider information, and patterns of behavior to exercise greater control than an ordinary contractor would.

Therefore, we suggest that the Department clarify that an agreement between an institution and its former owner (or related parties) may—under certain circumstances—prevent a determination that the institution is nonprofit, even if such agreement provides for payments at fair market value. Although this may "generally" be the case, the Department should make clear that it will determine that an institution is not nonprofit wherever its arrangements with former owners (and related parties) have the practical effect of causing key educational components to be operated in a manner that prioritizes profit over students.

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[22] *IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions*, *supra* note 3 at 22–23; *see* Letter from Douglas Parrott to Eric Juhlin, *supra* note 10 at 8–9.
[23] *See St. David's Health Care Sys.*, 349 F.3d at 237–38.

II. THE DEPARTMENT'S PROPOSAL TO ALLOW CHANGES IN OWNERSHIP WITHOUT AUDITED FINANCIAL STATEMENTS FROM NEW OWNERS IS UNLAWFUL ABSENT FINANCIAL PROTECTION TO COVER 50% OF "ANNUAL POTENTIAL LIABILITIES."

Under proposed 34 C.F.R. § 600.20(g)(3)(iv)(A), if an institution undergoes a change in ownership that results in a change of control, the Secretary may continue the institution's participation in Title IV programs if, *inter alia*, the institution provides the most recent two years of audited financial statements for the institution's new owner. Under proposed 34 C.F.R. § 600.20(g)(3)(iv)(B), if such statements are "not available," the institution can continue to participate in Title IV if it provides a "financial protection" to the Department that constitutes "[a]t least 25 percent of the institution's prior year volume." 87 Fed. Reg. at 45,490. Alternatively, if the new owner can provide only one year's worth of audited financial statements, they would be required to provide a similar protection at a 10 percent level. *Id.*

In the preamble, the Department justifies this proposal by asserting that this proposal "resemble[s]" existing practice. 87 Fed. Reg. at 45,463.[24] The current practice, according to the Department, was "designed to recognize that the Department is taking a chance on a new owner who has not met the requisite documentation requirements, while affording some protection to students and taxpayers in the event that the transaction leads to other liabilities." *Id.* at 45,463–64.

Student Defense strongly supports the idea of requiring financial protection to cover potential liabilities. Nevertheless, the specific proposal—and the Department's past practices—are unlawful and must be corrected.

Under HEA § 498, 20 U.S.C. § 1099c, the Secretary is charged with assessing institutional "financial responsibility" and institutions that are not financially responsible may not participate in the Title IV programs. To discharge this obligation, the Department is required to look, *inter alia*, at an institution's composite score. *See* HEA § 498(c)(2), 20 U.S.C § 1099c(c)(2) (discussing "ratios that demonstrate financial responsibility."). In the case of a change in ownership, the new institution has no existing composite scores. Although possible to calculate the acquiring entity's composite score based on its audited financials, the new entity cannot do so if there are no audited financial statements. In such a circumstance, the institution can only be deemed financially responsible by qualifying under HEA § 498(c)(3), 20 U.S.C. § 1099c(c)(3).

That provision, HEA § 498(c)(3), outlines four scenarios for an institution without a qualifying composite score to participate in Title IV: (1) by submitting financial protections **not less than one-half of the annual potential liabilities of such institution**; (2) by having its liabilities backed by the full faith and credit of a state; (3) by demonstrating, with support from audited financial statements, that the institution has the requisite financial standards; or (4) by meeting standards of

[24] *See also, e.g.*, David B. McClinktock, *How to Avoid a Letter of Credit After a Change in Ownership,* McClintock & Associates (Apr. 10, 2019), https://www.mcclintockcpa.com/how-to-avoid-a-letter-of-credit-after-a-change-in-ownership/ ("Historically a new owner who doesn't have two years of audited financial statements is required to post a 25% letter of credit.").

financial responsibility, set by regulation that indicate a level of strength above that which is required by the composite scores.

Where an institution has neither the backing of a state nor audited financial statements (and thus no composite score), and absent regulations from the Department regarding standards of financial responsibility not less than that required by the composite score, the HEA declares that an institution undergoing a change in ownership can **only** be deemed financially responsible by providing third-party guarantees equal to "not less than one-half of the annual potential liabilities of such institution to the Secretary." HEA § 498(c)(3)(A), 20 U.S.C. § 1099c(c)(3)(A).

The NPRM departs from the HEA in two key respects. First, and most fundamentally, neither ten percent nor twenty-five percent equal the fifty percent requirement set forth in the statute. Second, by basing the surety amount on "prior year volume of title IV aid," (*i.e.*, the denominator in the percentage calculation), rather than on "annual potential liabilities," as required by statute, the Department is unlawfully failing to account for the true costs of potential discharges, which often span well beyond the "prior year" volume of Title IV aid. But the Department has not acknowledged this point, explained why these figures are different, nor justified its equating of "annual potential liabilities" to prior year Title IV draw.

This flaw mirrors the flaw in the Department's "Financial Protection Alternative" set forth at existing 34 C.F.R. § 668.175(c). Importantly, when the Department adopted the early-version of the Financial Protection Alternative in 1997, it received comments on the second point noted above, *i.e.*, that basing a regulation on prior year Title IV revenue, rather than "annual potential liabilities," contradicted the HEA.[25] At the time, the Department dismissed those comments, noting simply that its approach was "reasonable" "especially since the law takes into consideration the value of potential loan discharges and unpaid student refunds."[26] At the time, however, the Department showed no analysis and failed to explain how a prior year's Title IV draw could serve as a proxy for potential closed school discharges, which—for multi-year programs—could vastly exceed the prior year's Title IV draw. Nor did the Department explain how this approach conforms to Congressional intent.[27]

Student Defense urges the Department to ensure that the final rule conforms to the clear statutory requirements in HEA § 498(c)(3). We also urge the Department to amend its regulation regarding the Financial Protection Alternative to ensure that the regulations are lawful.

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25 Student Assistance General Provisions, 62 Fed. Reg. at 62,830-01, 62,863 (Nov. 25, 1997) ("Many commenters maintained that the proposed rules continue to contradict statutory language in specifying that letters of credit be for one-half of all annual title IV, HEA disbursements, rather than for one-half of potential annual liabilities.").

26 *Id.*

27 Leading up to the 1992 Reauthorization, both the Nunn Committee and the Department's Inspector General highlighted substantial losses to taxpayers that resulted from minimal surety arrangements. *See* S. Rep. No. 102-58 at 26 (1991); *Hearings on the Reauthorization of the Higher Education Act of 1965: Program Integrity Before the Subcomm. On Postsecondary Educ. of the Comm. Of Educ. and Labor,* 102nd Cong. 277 (1991) (testimony of James B. Thomas, Jr. Inspector Gen., U.S. Dep't. of Educ.).

III. THE DEPARTMENT SHOULD DISCARD ITS PROPOSAL TO WATER DOWN THE OWNERSHIP THRESHOLD TRIGGERING A CHANGE OF CONTROL.

Under current regulations, so-called "other entities" (*i.e.*, not closely-held corporations or publicly traded corporations required to be registered with the U.S. Securities and Exchange Commission) experience a "change in ownership and control" when a person or entity acquires or ceases to have both control, and at least 25 percent of the voting stock, of the corporation. *See* 34 C.F.R. § 600.31(c)(3). The NPRM proposes, *inter alia*, to remove the 25 percent threshold and replace it with a 50 percent threshold.

Student Defense supports the broader goals of ensuring that regulations permit the Department to address new legal arrangements not expressly contemplated by current regulations. We also appreciate the resources that the Department has devoted in recent years to examining more thoroughly changes in ownership. Nevertheless, we oppose the proposal to elevate this threshold from 25 to 50 percent and are concerned that doing so provides a presumptive "free pass" to corporate changes beneath the 50 percent threshold.[28]

Irrespective of our policy concerns regarding the 50 percent threshold, we do not believe that the Department has sufficiently justified the standard. Moreover, to ensure compliance with the APA, the agency must provide "good reasons for the new policy." *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012) ("An agency's departure from past practice can, however, if unexplained, render regulations arbitrary and capricious.") (internal citations omitted). "Good reasons" need not be overly detailed or definitively establish that the new policy is objectively superior, but the agency's reasoning must demonstrate that the new policy is statutorily permissible and that the agency believes it is better than the pre-existing policy. *FCC v. Fox*, 556 U.S. at 515. To the extent the new policy "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests," a "more detailed justification" may be necessary. *FCC v. Fox*, 556 U.S. at 515; *accord, e.g., DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

Rather than explain <u>why</u> the 50 percent figure is appropriate, the Department simply asserts that many changes in ownership of at least 25 percent do not result in a change in control and "therefore do not require the heightened scrutiny that a full Department review entails for continued participation in the title IV, HEA programs." 87 Fed. Reg. at 45,466. But the mere view that the 25 percent threshold is too burdensome does not justify the Department's choice to use a 50 percent threshold.

For example, the Department has either not considered or not indicated that it has considered other possibilities. For example, the Department has not explained why it is not drawing from the Internal Revenue Code's use of a thirty-five percent threshold for "disqualified" individuals with respect to private foundations. *See* 26 U.S.C. § 4946. Under the I.R.C., the term "disqualified person" is vital to

[28] Student Defense supports proposed 34 C.F.R. § 600.31(c)(3)(iv), which gives the Department discretion *in any circumstance* to determine that a person, either alone or in combination with other persons, "has actual control over that entity."

the determination and status of exempt organizations classified as a private foundation; and in addition, Congress provided a list of disqualified persons with respect to a private foundation. In this context:

- A Corporation is a disqualified person if a substantial contributor, foundation manager, **20 percent owner**, or the family members of any such individuals**, own more than 35 percent of the total combined voting power in the corporation**. This includes constructive holdings.

- A **Partnership** is a disqualified person when a substantial contributor, foundation manager**, 20 percent owner**, or the family members of any such individuals, own more than 35 percent of the profits interest in the partnership. This includes constructive holdings.

- **Trusts or Estates** are a disqualified person when more than **35 percent of the beneficial interest in the trust or the estate is owned by a substantial contributor**, foundation manager, **20 percent owner and family members**. This includes constructive holdings.

26 U.S.C. § 4946; 26 C.F.R. § 53.4946-1.

The IRC's treatment of disqualified persons with respect to private foundations provides a baseline for any revision of the change-in-ownership regulations. Although we oppose *any* efforts to loosen the standards, we urge the Department to assess whether a 35 percent standard, standing alone, or combined with a 20-percent standard for related parties, would be more reasonable.

IV. THE DEPARTMENT MUST REVISIT ITS REQUIREMENTS REGARDING PROVISIONALLY CERTIFIED INSTITUTIONS.

The NRPM proposes several rules touching upon provisional certification. *See, e.g.*, 87 Fed. Reg. at 45,447 (discussing provisional certification and prison education programs); 87 Fed. Reg. at 45,459 (discussing provisional certification and the 90/10 rule); 87 Fed. Reg. at 45,462-63 (discussing provisional certification in relationship to change-in-ownership requirements under 34 C.F.R. § 600.20(g)); 87 Fed. Reg. at 45,464 (discussing changes to 34 C.F.R. § 600.20(h) regarding temporary provisional PPAs). With respect to provisional certification, as the Department correctly notes, HEA § 498(h) permits the Department to provisionally certify an institution "for up to three years if the institution's administrative capability and financial responsibility are being determined for the first time, there is a change of ownership, or the Department determines that an institution seeking to renew its certification is in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities." 87 Fed. Reg. at 45,462.

During Day 2 of Session 2 of the Institutional and Programmatic Eligibility Negotiated Rulemaking (February 15, 2022), one of the negotiated rulemaking committee members presented a legal memorandum from Student Defense detailing numerous legal flaws in the Department's current regulations and practices.[29] Among its topics, Student Defense highlighted how the Department's regulations and practices have "routinely" allowed institutions to participate under provisional certification for more than three years, despite an unambiguous three year statutory cap on the practice.[30]

The Department's "routine[]" end-around the statutory requirement is rooted in a 1994 interpretation allowing institutions that "have participated successfully under provisional certification, but who still do not satisfy certain requirements for full certification . . . to renew their provisional certification."[31] At the time, the Department did not believe that it needed specific regulatory language to authorize this interpretation, "because such decisions will be made in response to applications for certification that institutions will submit in response to the expiration of their current certifications."[32]

Respectfully, this rationale is both wrong and ill-explained. The Department never articulated what it meant by a school having "participated successfully." Nor did the Department explain how its interpretation complied with the language or intent of the HEA. When the Department enshrined this policy in regulations governing the Provisional Certification Alternative in 1997, *see* 34 C.F.R. § 668.175(f)(3), it did not attempt to square its interpretation with the idea that provisional certification is an *exception* to the general rule that schools *must* be financially responsible to participate in Title IV programs.

The Department's 1994 interpretation obviating the three-year cap on provisional certification rested on the erroneous assumption that Congress intended to limit only the term of an individual certification, but not prohibit serial terms. That assumption ignored contrary textual evidence. For example, when authorizing non-provisional (routine) certification, *i.e.*, where a period of renewal is the norm, Congress expressly referred to the possibility of "renewal."[33] But in the section regarding provisional certification, there is no reference to a "renewal," suggesting that three-years is the outermost limit on an institution's provisional certification.

Accordingly, all regulations and practices allowing single or consecutive provisional certification to last beyond three years are *ultra vires*. The Department should use the Rulemaking to:

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[29] Daniel A. Zibel and Kirin Jessel, Legal Memorandum: The Department of Education's Obligation to Reform Its Financial Responsibility Oversight, Student Defense (Feb. 2022), https://www.defendstudents.org/news/student-defense-publishes-legal-memo-on-department-of-eds-obligation-to-reform-financial-responsibility-regulations. This memorandum (hereinafter "Legal Memo") is also available on the Department's website for the 2021–2022 Negotiated Rulemaking, Institutional and Programmatic Eligibility Committee as part of the Materials Distributed by the Negotiators during Session 2.

[30] Legal Memo at 4.

[31] 59 Fed. Reg. at 22,348-01, 22,371 (Apr. 29, 1994).

[32] *Id.*

[33] HEA § 498(g), 20 U.S.C. § 1099c(g) (referring in the header to "[t]ime limitations on, *and renewal of*, eligibility" (emphasis added). Of course, the "title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about the meaning of a statute. *See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

(1) Within proposed 34 C.F.R. § 600.20(h) add a new § 600.20(h)(4) to state that following a change in ownership, an institution may only participate under a TPPPA or PPPA for a total consecutive period of 3 years. At the expiration of that three-year period, to continue to participate in Title IV, the institution must have executed a non-provisional PPA with the Department.

(2) Remove 34 C.F.R. § 668.175(f)(3) and clarify that provisional certification is only allowed for three consecutive years, irrespective of the term of any individual certification.

(3) Within 34 C.F.R. § 668.175(g), clarify that provisional certification is only allowed for three consecutive years, irrespective of the term of any individual certification.

Under these changes, institutions not financially responsible after the end of the provisional period would not be allowed to participate under Provisional Certification Alternatives set forth in 34 C.F.R. § 668.175(f) or 34 C.F.R. § 668.175(g). Consistent with the statute and existing regulations, such institutions would not be automatically removed from Title IV participation (although could be as a discretionary matter), but instead would need to qualify under a different standard such as the Financial Protection Alternative, 34 C.F.R. § 668.175(c).

Although changing the regulations (in both § 600.20 and § 668.175) is not proposed in the NPRM, our proposals are a clear logical outgrowth of the NPRM.[34] Student Defense's amendment would cabin the Department's proposal to 34 C.F.R. § 600.20(h) within clear boundaries of HEA § 498(h). Having made that modification, and having revisited its 1994 interpretation, it would be both logical and necessary for the Department to make conforming modifications to other regulations (*i.e.*, 34 C.F.R. § 668.175).

# # #

Thank you for your attention to these important issues facing student loan borrowers. For more information, please do not hesitate to contact us.

Sincerely,

The National Student Legal Defense Network

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[34] The Department is "free" and "encouraged" to "modify proposed rules as a result of the comments" it receives. *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000) ("the purpose of notice and comment rulemaking has been served, and . . . the Agency's change of heart on this issue only demonstrates the value of the comments it received"). Moreover, requiring a final rule to be identical to the NPRM "would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).