Re: *Program Integrity and Institutional Quality: Distance Education, Return of Title IV, HEA Funds, and Federal TRIO Programs*, Docket ED-2024-OPE-0050

To whom it may concern:

I write to point out defects in the analysis supporting an amendment proposed in the above-captioned rulemaking and to suggest an alternative course of action. The amendment of concern is that proposed to 34 C.F.R. 668.21(a)(2)(ii); the amendment would allow student borrowers who never begin attendance during the period covered by a loan to repay the loan under the terms of their promissory notes rather than (as under the current regulations) immediately upon demand.[1]

The Department's reason for proposing the change is that some students who fail to begin attendance may nevertheless have spent some of their loan proceeds on "necessary expenses, such as housing."[2] That is fair enough, but reasoned decision-making requires that an agency take into account reasons both for and against its proposed course of action. Here there is at least one powerful reason against the proposed amendment that the Department fails to discuss, namely, the perverse incentives the amendment would create. Persons in need of loans for household expenses and other non-education-related needs would, under the amendment, be heavily incentivized to enroll in a program of higher education with no intention of attending, secure a loan on favorable terms and spend the proceeds on non-education-related needs, and then withdraw without attending, paying the loan back over the course of many years. This perverse incentive could potentially prompt many persons to engage in behavior of this sort, outnumbering the (presumably relatively few) people who receive Title IV funds, spend them on education-related expenses in the few days before classes start, but then fail to begin attendance. For this reason, it seems likely that the need to avoid creating this perverse incentive outweighs the Department's objective in proposing the amendment. In any event, the Department must discuss this perverse incentive and give its reasons for concluding that it is outweighed by the good the amendment would do.

Relatedly, the proposal's regulatory impact analysis underestimates the impact of the proposed amendment. It identifies only the compliance costs of the amendment to loan servicers.[3] But the amendment, for the reasons given, would also increase the number of persons who seek loans. The proposal fails to account for costs and transfers that such an increase would prompt. Indeed, it does not even account for the transfer from the federal government (and thus federal taxpayers) to borrowers from allowing borrowers to repay over the course of time marked out by their promissory notes rather than immediately upon demand. The Department must account for these costs for the rulemaking to result in a reasoned regulation.

[1] *See* 89 Fed. Reg. at 60263.
[2] *Id.*
[3] *See id.* at 60273.

Finally, the proposed amendment is at present unreasoned because it is hopelessly disproportionate to the ill the Department seeks to address. The Department's concern is that borrowers may have spent some funds in the few days before class on necessary expenses, yet it allows them to repay the *whole sum* they have received under the terms of their notes rather than upon demand. A far superior alternative that would fully address the Department's concern would be for students to repay upon demand all funds *except those* already spent on necessary education-related expenses, which could be repaid under the terms of the note or (better yet) during a shortened yet adequate period of time. The Department unfortunately does not identify and discuss this alternative.[4] Its failure to do so in the final rule, and to explain the basis for its rejection, would render the final rule arbitrary and capricious.

Thank you for your consideration.

Cordially,

Paul J. Ray[5]

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[4] *See id.* at 60277-78.

[5] Director of the Thomas A. Roe Institute for Economic Policy Studies at the Heritage Foundation. I file this comment in my individual capacity rather than as an employee of the Heritage Foundation; information regarding my institutional affiliation is provided for informational purposes only.