

**Congress of the United States**  
**Washington, DC 20515**

November 3, 2021

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

RE: Docket ID: ED-2021-OPE-0077

Dear Secretary Cardona,

We write to submit comments on the U.S. Department of Education's (Department) regulatory agenda to close the 90/10 loophole. Following Congressional action to close the 90/10 loophole in the American Rescue Plan (ARP), the Department must now issue regulations to define "Federal education assistance funds" to strengthen the 90/10 Rule and better protect students and taxpayers.

Every for-profit college has, by definition, a fiduciary duty to its shareholders to maximize profits. Success for these institutions of higher education (IHEs) is determined by the amount of revenue generated rather than the quality of education provided. Due to this incentive, the for-profit sector has been riddled with substantiated claims of fraud and abuse since the expansion of federally funded postsecondary student aid, beginning with the GI Bill.<sup>1</sup> In fact, research demonstrates that the for-profit college sector is the only sector within higher education that raises tuition when additional federal aid becomes available.<sup>2</sup>

The 90/10 Rule requires that, as a condition of participating in the Title IV aid programs authorized under the *Higher Education Act of 1965* (HEA), for-profit colleges cannot receive more than 90 percent of their revenue from tuition and fees from federal student aid. The provision is intended to ensure some measure of educational quality and financial viability at for-profit colleges. Congress' rationale in enacting the 90/10 Rule was that, if at least 10 percent of a for-profit college's revenue comes from students paying the cost of tuition out-of-pocket (i.e., without federal subsidies), the free market has deemed the IHE viable, and students with the ability to pay out-of-pocket have deemed the educational programs to be worth their time and money. The 90/10 Rule has long served as a market-based consumer check on for-profit colleges and has helped to protect students and taxpayers from low-quality, high-cost education.

However, loopholes within the rule have incentivized bad actors in the for-profit industry to aggressively target and exploit students receiving non-Title IV student aid, in particular student

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<sup>1</sup> See generally S. Rept. No. 102-58 (1990); Senate Health, Education, Labor, and Pensions Committee, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, (July 30, 2012).

<sup>2</sup> Stephanie R. Cellini and Claudia Goldin. *Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges*. National Bureau of Economic Research, Working Paper No. 17827, (2012)  
<https://www.nber.org/papers/w17827>.

veterans, whose enrollment allowed these companies to recruit and enroll more Title IV aid recipients. Thankfully, Congress took long-overdue action to close these loopholes in ARP, and, in recognition of the urgent need to protect students, required by law that the revised 90/10 Rule shall apply to institutional fiscal years beginning on or after January 1, 2023.<sup>3</sup> As the Department moves forward with the implementation of these provisions and undergoes a rulemaking to close the 90/10 loophole, we urge the Department to consider the following recommendations:

**1. The Department should ensure that the definition of “Federal education assistance funds” fully capture all federal funding streams used by students to pay for tuition and fees.**

In closing the 90/10 loophole, Congress used the term “Federal education assistance funds” to capture all types of federal funds used by students to pay for tuition and fees at for-profit IHEs. We urge the Department to comprehensively review all types of funding used by students to pay for their tuition and fees to ensure that all current loopholes are closed. We further encourage the Department to work with other federal agencies including the Department of Veterans Affairs, Department of Defense (DoD), and Department of Health and Human Services to ensure the consistent reporting of student aid funding so that federal funds that are disbursed directly to students are also captured.

While a comprehensive review will be necessary to identify all relevant federal funding streams, Department’s definition of “Federal education assistance funds” should include, at a minimum, all forms of GI Bill benefits, DoD funding including Tuition Assistance, Segal AmeriCorps Awards, Chafee Education and Training Vouchers, scholarships under the Public Health Service Act, scholarships from the National Science Foundation, Bureau of Indian Education Scholarships, and student aid funding provided under WIOA, the Rehabilitation Act, and Trade Adjustment Assistance programs. We urge you to include these funding streams in the definition and fully review all available federal student aid funding to close all current loopholes.

**2. The Department should ensure that there is flexibility to capture future funding streams.**

To prevent the creation of future loopholes, the Department must provide flexibility in the definition of “Federal education assistance funds” so that new federal funding streams can be added as they are created. For example, H.R. 5376, the Build Back Better Act, includes a new voucher program to provide scholarships for students pursuing medical education.<sup>4</sup> As Congress works to further improve college affordability, it is critical that the Secretary have discretion to add new funding streams under the 90/10 Rule as they are created to ensure students are protected from aggressive and targeted recruitment.

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<sup>3</sup> Higher Education Act of 1965, 20 U.S.C. § 1094, as amended by the American Rescue Plan Act of 2021, Pub. L. No. 117-2.

<sup>4</sup> Build Back Better Act, H.R. 5376, 117<sup>th</sup> Cong. (2021), Sec. 137401.

**3. The Department should ensure a “clean” closure of the 90/10 loophole without an appeal or delayed penalties for failing IHEs.**

We urge the Department to implement a “clean” closure of the loophole without an appeal or delayed penalties for IHEs that fail the 90/10 Rule. For-profit IHEs have ample time to come into compliance, as the revised 90/10 Rule will not apply to institutional fiscal years starting before January 1, 2023. IHEs can use this time to ensure compliance by lowering tuition or improving educational programming to attract more students who can pay out of pocket and employers who are willing to pay the cost of tuition on behalf of their employees.

**4. The Department should enforce consequences after the first year in which an IHEs fails the 90/10 requirement.**

Under current law, an IHE can fail the 90/10 requirement for two consecutive years before losing access to federal financial aid. This allows for financially unstable IHEs to continue to participate in federal financial aid programs and essentially fail every other year without consequences. To better enforce the 90/10 Rule and provide a stronger incentive for for-profit IHEs to diversify their revenue streams, we urge the Department to include additional consequences that apply after one year of failing the 90/10 Rule. Such consequences could, for example, be included in an IHE’s provisional program participation agreement (PPA).

**5. The Department should extend the enforcement of the 90/10 Rule to IHEs that convert from for-profit to non-profit status for additional years post-conversion.**

Over the last decade, for-profit IHEs have applied to the Department and the Internal Revenue Service to convert to non-profit status for a variety of reasons. For example, in the case of Dream Center Education Holdings (Dream Center), executives claimed that a conversion would allow the college chains owned by Dream Center to reduce tax obligations, avoid accountability requirements (e.g., Gainful Employment and the 90/10 Rule), access additional grant funding, and rebuild their brands.<sup>5</sup> Shortly after applying to convert to non-profit status, Dream Center IHEs abruptly collapsed, leaving students with worthless credits, incomplete degrees, and unmanageable debts. Additionally, the Department has estimated that the collapse of Dream Center IHEs has resulted in liabilities that will cost taxpayers at least \$600 million.<sup>6</sup>

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<sup>5</sup> *Structural Change Site Visit Report*, Western Association of Schools and Colleges 15-16 (Apr. 12, 2017) <https://wascsenior.box.com/shared/static/7hkj7dizr9qgkc7wyyoiap1m4101lzgp.pdf>

<sup>6</sup> *See generally Shattered Dreams: Examining the Education Department’s Role in the Misconduct of Dream Center Education Holdings*, House Committee on Education and Labor, (July 2020) <https://edlabor.house.gov/imo/media/doc/Shattered%20Dreams%20Examining%20the%20Education%20Department%20Role%20in%20the%20Misconduct%20of%20Dream%20Center%20Education%20Holdings1.pdf>.

While for-profit IHEs that convert to non-profit status must comply with the 90/10 Rule for one additional year as part of their provisional PPAs,<sup>7</sup> this single year extension does not serve as a strong enough disincentive for predatory IHEs looking to evade accountability through non-profit conversions. To better deter bad actors from pursuing conversions, the Department should extend the period during which converted for-profits must meet the 90/10 Rule. The Department should further enforce meaningful consequences for converted for-profits that fail 90/10 post-conversion.

**6. The Department should improve 90/10 reporting to ensure greater transparency for students and stakeholders.**

Under Section 487(d)(4) of the HEA, the Department is required to submit to Congress an annual report that includes the 90/10 data for each for-profit IHE. However, the 90/10 reports sent to Congress and posted publicly are incomplete due to the timing of data collection efforts. Specifically, the Department's Office of Federal Student Aid (FSA) collects 90/10 data once a year, and, if FSA is still reviewing an IHE's data when information is submitted to Congress, that IHE's data is simply not included in the report. Without complete data, students, stakeholders, and Congress are unable to glean a full picture of the financial health of for-profit IHEs. We urge the Department to address this issue by conducting 90/10 reporting on a quarterly basis and ensuring that all 90/10 reports, including those that were previously submitted, include complete information.

**Conclusion**

For too long, the 90/10 loophole created a perverse incentive for predatory for-profit IHEs to aggressively target student veterans and other students who rely on non-Title IV federal aid without regard for educational quality or student outcomes. As a result, millions of students have been left with debt they cannot repay and degrees that are not valued by employers. Thankfully, after over a decade of advocacy and decisive action by Congress, the 90/10 loophole will finally be closed. As you move forward with the implementation of this critical change, we urge the Department to protect students from predatory actors by capturing all current and future federal funding streams, enforcing meaningful consequences for failing and converted institutions, and improving 90/10 reporting. We thank you for considering our requests.

Sincerely,



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**MARK TAKANO**  
Member of Congress



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**JOE COURTNEY**  
Member of Congress

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<sup>7</sup> U.S. Department of Education, Federal Student Aid. *Federal Student Aid Handbook, Volume 2: School Eligibility and Operations (2019-2020)* <https://fsapartners.ed.gov/sites/default/files/2021-02/2019-2020%20Volume%20%20-%20School%20Eligibility%20and%20Operations%20Master%20file.pdf>.



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