WALDEN UNIVERSITY

VIA ELECTRONIC MAIL

The Honorable John King Jr.
U.S. Department of Education
400 Maryland Ave. SW
Washington, D.C. 20202

Attn: Jean-Didier Gaina

Re: (ED-2015-OPE-0103) Comments of Walden University to the U.S. Department of Education on Its Notice of Proposed Rulemaking Relating to Borrower Defenses to Repayment and Other Federal Direct Loan Program Regulations

Dear Secretary King:

Walden University ("Walden") respectfully submits these comments in response to the U.S. Department of Education's (the "Department") Notice of Proposed Rulemaking ("NPRM") relating to Borrower Defenses to Repayment and other Federal Direct Loan Program Regulations (Docket ID ED-2015-OPE-0103), as published on June 16, 2016 at 81 Fed. Reg. 39329 et seq.

For more than 45 years, Walden University has supported working professionals in achieving their academic goals and making a greater impact in their professions and their communities. Today, more than 50,000 students from all 50 states and many countries outside the U.S. are pursuing their doctoral, master's, or bachelor's degrees online at Walden. Walden educates primarily at the graduate level, with approximately 85% of its students enrolled at the master's and doctoral levels, providing working adults with the opportunity to enhance their expertise in their current field or to change careers. Our areas of study include: health sciences, counseling, human services, management, psychology, education, public health, nursing, public administration, and technology. Based in Minneapolis, Minnesota, Walden University is accredited by the Higher Learning Commission ("HLC").

By offering quality educational programs that allow students to maximize their professional options and increase their earning potential, Walden and the other U.S. postsecondary institutions owned and operated by Laureate Education, Inc. ("Laureate") are committed to being good stewards of Title IV funds. This is evidenced by Walden and Laureate's other U.S. institutions all maintaining Title IV loan cohort default rates below the national average of 11.8% for FY 2012 (the most recent year for which the Department has issued official rates), with Walden's cohort default rate well below that figure at 6.8% for FY 2012.[1]

[1] With respect to the FY 2012 cohort default rates for Laureate's other U.S. institutions: (i) Kendall College, also accredited by HLC, had a rate of 7.9%; (ii) NewSchool of Architecture and Design, accredited by the WASC Senior College and University Commission ("WASC"), had a rate of 10.2%; and (iii) University of St. Augustine for Health Sciences, accredited by WASC, had a rate of 0.5%.

Walden and Laureate's other U.S. institutions also attract many students who are not dependent on Title IV assistance, as indicated by "90/10" ratios that are consistently and significantly below the statutory limit of 90 percent. Specifically, Walden derived approximately 73%, 74%, and 74% of its revenues (calculated on a cash basis) from Title IV program funds in fiscal years 2015, 2014, and 2013, respectively. Laureate's other U.S. institutions derive even less of their annual revenues from Title IV program funds.[2]

Walden supports higher education policies and regulations that promote high-quality educational programs and protect the interests of students and understands the Department's interest in amending many of the provisions relating to relief of borrowers' debt in certain instances, and relating to ensuring the financial soundness of institutions participating in Title IV programs. For example, Walden has never required pre-dispute arbitration of student grievances (even before this rulemaking), and we therefore have no objection to proposed regulations that would effectively prohibit mandatory arbitration clauses in student enrollment agreements.

However, we are filing these comments to raise several serious concerns we have with regard to these provisions. These comments focus specifically on concerns about the expanded general standards of financial responsibility, leading to letter of credit requirements that could harm successful institutions unnecessarily, and also on concerns regarding the Department's imposition of a new, flawed loan repayment rate only on the proprietary sector.

Borrower Defense Standards and Processes

Walden acknowledges the significant federal interest in providing debt relief to Direct Loan borrowers who are legitimately misled by their postsecondary institution regarding their educational programs in a manner that causes harm to the student. Walden agrees that a student should not be required to repay Title IV loan debt if he or she can show that the institution provided patently false information about the institution or program, on which the student then detrimentally relied. Therefore, we believe it is sensible for a non-default judgment regarding such a claim against an institution, reached by a court of competent jurisdiction following customary due process, to be a basis for borrower defense and student loan discharge.

We are concerned, however, with the Department's proposed 34 CFR § 685.222(c) under which any breach of contract regarding an institution's provision of educational services, regardless of materiality, may be the basis for a borrower defense claim and potential recoupment from the institution of discharged loan amounts. As the Department notes in the NPRM, breach of contract is commonly asserted in lawsuits by students against postsecondary institutions. In that regard, if a lawsuit alleging breach of contract results in a non-default judgment against the school, a borrower defense is established under other provisions of the proposed regulations (as discussed above). Outside of a lawsuit, however, the proposed rule

[2] Kendall College derived approximately 36%, 35%, and 43% of its revenues (calculated on a cash basis) from Title IV program funds in fiscal years 2015, 2014, and 2013, respectively. NewSchool of Architecture and Design derived approximately 43%, 47%, and 56% of its revenues (calculated on a cash basis) from Title IV program funds in fiscal years 2015, 2014, and 2013, respectively. St. Augustine derived approximately 49%, 46%, and 47% of its revenues (calculated on a cash basis) from Title IV program funds in fiscal years 2015, 2014, and 2013, respectively.

leaves it to the Department to determine both whether a breach of contract occurred, and whether the student suffered harm sufficient for either a partial or full loan discharge. This standard will require the Department to interpret and apply the common law of contracts from the applicable state. That appears directly contrary to the Department's expressly stated goal of establishing a single federal standard for borrower defenses in order to avoid "a significant burden for borrowers and Department officials to determine the applicability and interpretation of states' laws." (81 Fed. Reg. at 39339). To the contrary, this provision requires the Department to adjudicate questions of state contracts law. On that basis, the breach of contract claims should not be an independent standard for borrower defense to be determined by the Department, as presently set forth at proposed 34 CFR § 685.222(c), but instead be reserved for judicial determinations that in turn would be grounds for borrower defense under 34 CFR § 685.222(b).

With respect to proposed 34 CFR § 685.222(d), we agree that a "substantial misrepresentation" under 34 CFR part 668, subpart F is a reasonable basis for borrower defense, as that term is presently defined and requires detrimental reliance by a student. However, we strongly disagree with the proposed change in the definition of "misrepresentation" in 34 CFR § 668.71 to define a misleading statement as one that "includes any statement that has the likelihood or tendency to mislead under the circumstances" or "any statement that omits information in such a way as to make the statement false, erroneous, or misleading." Every student should have full information regarding his or her educational program options, but these proposed definitional changes create an unworkably vague and subjective standard of compliance. They further fail to distinguish between intentional acts to mislead as contrasted with inadvertent error or basic misunderstandings, potentially requiring institutions to prove a negative to rebut a claim of misrepresentation. The proposed changes also are unwarranted as the Department amended its definition of "misrepresentation" in 2011, and the NPRM does not provide any substantive justification for this additional change.[3]

[3] With respect to the NPRM's borrower defense standards and processes, we also disagree with the proposed removal of most time period limitations for borrowers to assert a defense to repayment and the Department to potentially recoup resulting losses. Those proposed changes essentially burden institutions to maintain nearly all information related to a student's enrollment and matriculation for an indefinite period. We disagree that the changes do not conflict with Title IV program records retention requirements of 34 CFR § 668.24(e). Additionally, we question the NPRM's allowance for borrower defense claims on a group basis and the related "rebuttable presumption" provisions in proposed 34 CFR § 685.222(f)(3). Section 455(h) of the Higher Education Act (20 USC § 1087e(h)) directs the Department to "specify in regulations which acts or omissions of an institution ... a *borrower may assert* as a defense to repayment" of a Direct Loan" (emphasis added). The proposed group claims process, and particularly the related rebuttable presumption and opt-out provisions, appear to be at odds with the statutory language requiring individual borrowers to affirmatively assert a borrower defense. We are also concerned that the calculation of a borrower's relief under the proposed 34 CFR § 685.222(i) and Appendix A do not consider that an institution, while able to counsel students against excessive borrowing, cannot prevent a student from obtaining their full amount of Direct Loan eligibility if the student chooses to incur that debt. The Department should not be able, therefore, to recoup discharged amounts from an institution where such amounts exceed what the institution appropriately recommended to the student to cover institutional charges or other reasonable educational expenses. Similarly, Appendix A should specify that partial or no relief is warranted when a borrower has already obtained a court judgment or settlement with the institution for amounts reflecting tuition and fees paid to the institution.

Financial Responsibility and Letter of Credit Requirements

As a preliminary comment, we note that neither of the Department's notices requesting nominations for the negotiated rulemaking committee (80 Fed. Reg. 63478 (Oct. 25, 2015) and 80 Fed. Reg. 79276 (Dec. 21, 2015)) specified that the rulemaking could include revisions to the Department's financial responsibility regulations set forth in 34 CFR part 668, subpart L.[4] Given that lack of notice regarding the Department's intentions, we respectfully do not believe the negotiated rulemaking committee was appropriately constituted with individuals possessing relevant backgrounds to evaluate the highly complex issues regarding financial responsibility determinations and letter of credit requirements. As noted below, to the extent the Department intended to make changes to its financial responsibility regulations in this rulemaking, it should also have reviewed the manner in which it applies its financial responsibility composite score requirements and not solely assess, in isolation, only those provisions from 34 CFR part 668, subpart L related to general financial responsibility standards.

Walden acknowledges the Department's interest in ensuring that institutions have sufficient financial resources to administer the Title IV programs with integrity, and to protect the federal treasury and students in circumstances when an institutional closure results in substantial borrower defense claims or other losses to the Title IV programs. As a preliminary comment, however, we believe that any reassessment of the Department's "financial responsibility" standards and requirements should include not only the general standards of financial responsibility, but also the manner in which the financial responsibility composite score is applied to institutions. Walden supports long-standing efforts by the National Association of Independent Colleges and Universities ("NAICU") to urge the Department's review of the composite score standards. In addition to a review of its accounting methodology generally, with regard to the proprietary sector, it is essential that the Department account not only for the financial soundness of a common parent entity, but also of its individual institutions. This approach would provide a more transparent financial picture of a proprietary educational organization, *better protecting students and the Title IV programs*, and perhaps even mitigate the need for the additional criteria proposed. As discussed further below, the Department also needs to ensure consistency in its financial responsibility standards—it cannot on the one hand choose to evaluate the composite score standard at only a parent entity level, and then under new general standards look at situations only at the institutional level.

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[4] Both notices requesting nominations for the negotiated rulemaking committee stated that the negotiators would address "(1) The procedures to be used for a borrower to establish a defense to repayment; (2) the criteria that the Department will use to identify acts or omissions of an institution that constitute defenses to repayment of Direct Loans, including the creation of a Federal standard; (3) the standards and procedures that the Department will use to determine the liability of the institution for amounts based on borrower defenses; (4) the effect of borrower defenses on institutional capability assessments; and (5) other loan discharges."

As provided in more specificity below, many of the proposed changes to the general standards of financial responsibility are highly subjective, overly broad, and penalize institutions of all types for circumstances that are unrelated to student outcomes and not indicative of potential risk to the Title IV programs. Furthermore, the proposed cumulative nature of the letter of credit requirements could, in certain circumstances, cause an otherwise financially strong and high-quality institution to have diminished financial resources leading to an untimely and entirely avoidable closure. To the extent that the Department's new standards and cumulative letter of credit requirements themselves create financial exigencies for institutions, they would seem contrary to the intent and purposes of the Higher Education Act.

Although the ability to use nine months of Title IV funding offsets to satisfy letter of credit requirements may be useful in many instances, it does not provide enough flexibility for institutions with significant letter of credit requirements relative to their typical cash flows and cash on hand. We also note that that the current financial responsibility regulations at 34 CFR part 668, subpart L generally provide the Department with broad discretion to require letters of credit of between 10 and 50% of prior-year Title IV receipts when an institution fails either the general standards of financial responsibility or the composite score (and chooses the provisional certification alternative). This existing authority, combined with the existing authority to review both parent and institution level financials, permit the Department to consider an institution's financial circumstances in a far more holistic manner than the NPRM's more rigid provisions.

Walden provides the following specific concerns on certain of the Department's triggering events that would deem an institution not to be financially responsible and to require a letter or letters of credit:

- *Lawsuits and other actions seeking amounts of more than 10 percent of an institution's assets (proposed 34 CFR § 668.171(c)(1)):* It is not unusual for lawsuits against colleges and universities to allege damages far exceeding any reasonable amount, or which feasibly could be obtained in either a settlement or final judgment. Indeed, it is a common litigation tactic of plaintiffs' attorneys to make extraordinarily high claims in their client's initial complaints as a means to maximize any final settlement amount (and any contingency fees to the attorney). Requiring a letter of credit based *solely on a claim* exceeding 10% of an institution's assets is therefore arbitrary and unwarranted, as claimed amounts often have little factual basis or legal support. Further, creating this new standard will likely ensure that every lawsuit will exceed the 10% threshold as it will create a new source of negotiating leverage for plaintiffs' attorneys.

- *Settlements exceeding 10 percent of institution's assets (proposed 34 CFR § 668.171(c)(1)):* We believe this proposed triggering event, if retained, needs to be modified in two respects. First, where an institution is operated by a parent entity and if only those financial statements have been evaluated by the Department for the purposes of a financial responsibility composite score determination, the triggering event should be 10% of the parent entity's assets rather than the institution's. Further, to the extent any settlement payment is covered by an institutional insurance policy, there is little if any impact on the institution's financial condition and it should not necessitate a letter of credit.

- *Repayments of borrower defense liabilities exceeding 10 percent of assets (proposed 34 CFR § 668.171(c)(2)):* If an institution has repaid the Department for successful borrower defense claims, and particularly where the institution's fiscal year composite score remains above 1.0 even after such repayments, the imposition of a letter of credit seems excessively and redundantly punitive. As with the above matter related to settlements, we suggest the Department instead consider whether the repayments exceed 10% of the assets of any parent entity whose financial statements have been provided to the Department, and not require any letter of credit if the borrower defense payments were covered by an institutional insurance policy.

- *Accrediting agency actions (proposed 34 CFR § 668.171(c)(3)):* As an institution with a strong compliance history with its accrediting agency, the HLC (similar to that of our sister U.S. institutions' histories with their accreditors), we are concerned about the scope of these proposed triggering events, which includes matters that do not necessarily pose any existential threat to the viability of an institution. For example, an accrediting agency's placement of an institution on probation or show-cause status is not, in all cases, an imminent threat to the continued viability of the institution that should automatically require a letter of credit. Indeed, in the tradition of accreditation, while these designations are still meant to identify and make public areas of concern at an institution, the goal remains one of self-improvement and correction.[5]

- *Disclosures by publicly traded institutions (proposed 34 CFR § 668.171(c)(6)(ii)):* The NPRM would mandate a letter of credit whenever an institution discloses in any SEC filing a judicial or administrative proceeding stemming from a complaint filed by any state, federal, or other oversight entity. We believe this triggering event runs counter to the long-standing practice of publicly traded institutions generally erring on the side of disclosing legal and regulatory matters to the public and their shareholders. More specifically, publicly traded institutions tend to over disclose such matters, particularly as the materiality of such matters often cannot be reasonably determined at their onset. Such transparency by public companies is also encouraged, if not required, by SEC regulations and extensive court precedents.

- *Withdrawal of owner's equity (proposed 34 CFR § 668.171(c)(8)):* As Walden is a subsidiary of Laureate and engages in customary intercompany funds transfers, we appreciate the Department's language at proposed 34 CFR § 668.171(d)(2) to permit an institution to demonstrate, in the case where the composite score is calculated based on

[5] On behalf of Laureate's other U.S. institutions that have physical campus locations, we note that the submission of a teach-out plan to an accreditor is required under 34 CFR § 602.24(c)(1) even when an institution plans a compliant and orderly wind down of a single campus location. In some cases, that orderly and gradual wind down of a location may take a year or longer, depending on the length of programs offered at the location and whether the institution seeks to complete the education of pertinent students itself or, alternatively, through a teach-out partner. Moreover, the decision to close a location may not reflect any serious financial challenges or potential risk to the Title IV programs, but might simply make financial sense for the broader institution based on the independent financial performance of the location. Requiring a letter of credit in all such circumstances penalizes an institution for making sound financial and operational decisions.

the consolidated financial statements of a group of institutions, that an amount of equity withdrawn from one institution in the group was transferred to another entity within that group. However, as the Department is aware of which institutions have composite scores calculated based on consolidated financial statements, we believe that requiring institutions in that situation to report every intercompany funds transfer is an unnecessary burden with little if any benefit to the Department's interests. We thus recommend amending proposed 34 CFR § 668.171(c)(8) to expressly exclude any withdrawal of equity that falls within the circumstances described in 34 CFR § 668.171(d)(2). In addition, we would note that calculating and understanding the financial responsibility composite scores at both the institution and parent level, as recommended above, would alleviate some of the Department's concerns regarding equity transfers.

In addition to the above, Walden also has concerns with certain of the Department's "discretionary" triggering events for letters of credit. We believe the proposed standard of "a significant fluctuation between consecutive award years, or a period of award years" (proposed 34 CFR § 668.171(c)(10)(i)) is overly vague. Noticeable year-over-year fluctuations can occur when institutions decide to discontinue individual programs or close campus locations, often because those campuses or programs are under-performing financially even where the overall institution is financially strong. Such sound business decisions made in the long-term interests of an institution, in our view, should not give rise to a letter of credit requirement.

With respect to citations by a state licensing or authorizing agency for failing state or agency requirements (proposed 34 CFR § 668.171(c)(10)(ii)), we believe this triggering event should be limited to instances where the state agency has initiated an action to suspend or terminate its authorization of the institution. The failure of an institution to meet any one, or even several, of what are typically extensive state agency requirements is not indicative of an institution that has financial viability concerns or might otherwise not endure. As with Department program reviews and other Title IV compliance audits, state agencies frequently cite institutions for findings of non-compliance that are appropriately and timely remedied. Requiring the reporting of every such instance for a potential letter of credit requirement, where the state has taken no action with regard to the institution's continued authorization, is unnecessarily burdensome to both institutions and the Department, and we believe is substantively unrelated to financial responsibility concerns. Similarly, we believe the discretionary trigger arising from "[a]ny adverse event reported by the institution on a Form 8–K filed with the SEC" (proposed 34 CFR § 668.171(c)(10)(vii)) is overly broad and includes any number of potential events that have little or no relationship to the institution's continued capacity to operate or to administer the Title IV programs.[6]

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[6] If the final rule adopts this proposed trigger, we also believe its application to distance education institutions needs to be carefully considered. Specifically, it should apply only when a distance education institution's home state takes an action to suspend or terminate its authorization. In a distance education context, there may be only a handful of students, or as little as one student, enrolled in a particular state. If that non-home state took an action to terminate the institution's authorization for distance education purposes, the Department's imposition of a letter of credit equal to 10% of the entire institution's Title IV receipts would be a disproportionate and excessively severe response.

As noted earlier in these comments, we believe that financial responsibility regulations should be focused on potential risks to the Title IV programs and, as a related matter, institutional outcomes that are indicative of that risk. To that end, rather than applying the proposed new general standards of financial responsibility in a one-size-fits-all manner, we urge the Department to consider other institutional metrics that serve to mitigate concerns about institutional viability and Title IV program risks. For example, the Department could presumptively exclude from many of the new letter of credit triggers those institutions that have low and stable cohort default rates, consistently low 90/10 ratios, a general lack of accrediting or state agency actions, or any combination of the foregoing. Particularly in the context of this NPRM, such attributes would generally indicate strong student outcomes and less likelihood of borrower defense claims arising from the institution. As an alternative to a general exemption, the Department could also decide that institutions with cohort default rates and 90/10 ratios below specified thresholds would not be required to post cumulative letters of credit under the new general standards of financial responsibility. Along those same lines, rather than requiring cumulative letters of credit for each of the triggering events, the Department should assess the circumstances of each such event and determine whether it reasonably requires additional protection to the Title IV programs, or if the event actually poses little risk relative to other institutional characteristics and is thus sufficiently addressed by an existing letter of credit. In taking these alternate approaches, the financial responsibility regulations could be tailored to assess institutional risk profiles on a more holistic basis, rather than in the blunt and generally non-discerning manner reflected by the NPRM.

Loan Repayment Rates

Walden University understands and supports the Department’s interest in exploring the use of a loan repayment rate as an outcomes indicator and accountability metric. However, based on its own research (conducted by a respected postsecondary research firm) and analysis of existing data and borrower behavior confirms how complicated it is to create an appropriate loan repayment rate and these comments raise several concerns about the metric proposed in this NPRM and its fatal policy flaws. While the methodology demonstrates some new thoughtfulness by the Department, the Department also fails to demonstrate any justification for this new rate, especially as applied to only one sector. The specific concerns raised below demonstrate that this latest proposed rate, like the others the Department has already implemented, are premature, pending further needed analysis and improvements to data systems.

<u>Lack of Justification</u>

In this rulemaking, which is otherwise applicable to all institutions, the Department has failed to appropriately justify why the loan repayment rate proposed should only apply to the proprietary sector and even so, why it would use an entirely separate methodology from the ones it is using already under gainful employment or under its College Scorecard.

During its initial rulemaking to define whether an educational program prepares students for gainful employment in a recognized occupation, the Department included a loan repayment rate metric and methodology that was determined by a federal court to be without any reasonable basis.[7] Even when invalidated for being arbitrary, those regulations did at least reflect statutory provisions that define gainful employment programs to include *non-degree programs at nonprofit and public institutions*, in addition to the proprietary sector. Consequently, the loan repayment aspects of those regulations (and the disclosure requirements since adopted) at least had some legal justification in the metrics' application to a set cohort of institutions and programs. In this current rulemaking, there is no statutory basis on which the Department can rely or justify limiting this metric to just the proprietary sector. Instead, the Department tries to rely on research and data to demonstrate that in some manner these metrics are needed as a consumer protection measure for the proprietary sector, but not for others. For the following reasons, the Department's reliance on these data and research do not serve as appropriate justifications:

- First, the Department incorrectly relies on a recent study published by the Brookings Institution and authored by Adam Looney and Constantine Yannelis that examines negative amortization to demonstrate that proprietary institutions are "far more likely" to have poor repayment rates than public or nonprofit institutions and therefore "pose the greatest risk to students and taxpayers." However, this is not at all the thesis or purpose of the Brookings study. A thorough read of the Brooking study indicates that negative amortization and repayment stress is increasing across *all* of higher education. To the extent the issue is more pronounced at certain institutions, the Looney/Yannelis research does *not* isolate for-profits and instead clearly indicates that borrower debt and behavior is *similar* at both for-profit *and* two-year/non-selective institutions. According to Looney/Yannelis, the reason relates to the rise in borrowing, and demographics and economic situation of the borrowers as "non-traditional" students, i.e., those who do not attend four-year, public or nonprofit selective.[8]

- Second, with respect to the Department's reliance on the Brookings' study, it is important to note that the analysis on which the authors relied was substantially flawed. Specifically, upon review of the report's analysis, it is clear (and the authors themselves have conceded) that they did not allocate a borrower's loans to the respective institutions attended. Instead, they attributed a borrower's entire loan debt to the last-attended institution. As one might imagine, this create a significantly inflated number for any significant graduate level institutions, like Walden. Upon revision, the authors still have not attributed the loans appropriately; this time they attribute loans to the first-attended institution.[9] In sum, the Department cannot appropriately rely on the Brookings study to justify the application of this metric to only one sector of higher education.

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[7] See 76 Fed. Reg. 34,386 (June 13, 2011); *Assoc. of Private Sector Colleges & Univs. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012).

[8] 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 Loan Defaults." Brookings Institution: http://www.brookings.edu/~/media/projects/bpea/fall-2015/pdflooneytextfallbpea.pdf. See pages 17-19, 26-27 for example, figure 4 and figures and tables 7 and 8. This paper was revised and republished in May 2016.

[9] Recently analysis performed by the American Institutes for Research at Walden's request demonstrates the hurdles created by the Department's current data systems and the difficulties with assigning and understanding loan debt and

- The Department's reliance on information provided through the College Scorecard's loan repayment rate to justify a new loan repayment also seems odd since the Department openly acknowledges that the Scorecard rate is based on an entirely different methodology (i.e., the original balance declining by $1) from the one they are imposing under this rulemaking. They reach the conclusion that there is a more specific problem with proprietary institutions by somehow equating a 50% rate under the Scorecard metric as being equivalent to zero under this new rate, but with no mathematical demonstration of how those two equate. Furthermore, the Department acknowledges that the rates in the scorecard are for undergraduate borrowers only, but this new rate would seem to include all borrowers, including graduate level borrowers.

- The Department cites that a high percentage of proprietary institutions with lower repayment rates and higher rates for nonprofit and public institutions, but the Department fails to demonstrate that this is a causal relationship, nor does it provide any details of its analysis. The Looney/Yannelis analysis (Table 9),[10] found that, after controlling for a few basic socioeconomic characteristics, borrowers who attended proprietary institutions had lower rates of default than those who attended two-year or nonselective four-year nonprofit institutions. It is well known that proprietary institutions serve greater numbers of non-traditional students who may struggle more to repay loans.[11]

- It is important for the Department to compare results of institutions with similar students enrolled, and even by degree level, before determining the scope applicability of a punitive accountability metric. [12] It is too simplistic and arbitrary to make blanket statements regarding entire sectors of institutions, without demonstrating the accuracy of such statements and without providing an adequate basis for imposing this requirement on only one sector of institutions.[13]

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therefore, also with creating an appropriate methodology. (Soldner, Matthew. "Student Loan Data Deficits: Improving Borrower Data for Institutional Decision Makers." American Institutes for Research.)

[10] See Looney and Yannelis, Table 9 (2016).

[11] For Example, Deming, David J., Claudia Goldin, and Lawrence F Katz. "Journal Issue: Postsecondary Education in the United States Volume 23 Number 1 Spring 2013." *Journal Issue: Postsecondary Education in the United States Volume 23.1 (2013).* *http:www.futureofchildren.org/publications/journals/article/index.xml?journalid=79&articleid=584*.

[12] See Looney and Yannelis (2016) data appendix: "institution balances by loan" for a selection of nonprofit and public institutions with high five-year negative amortization rates. To provide just a few as examples out of a larger list, Alabama State University at 91%, Jackson State University at 83%, Howard University at 73%, and Oakland Community College at 71%.

[13] See, e.g., *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 30 (1983) (holding, in part, that "NHTSA's rescission of the passive restraint requirement … was arbitrary and capricious; the agency failed to present an adequate basis and explanation for rescinding the requirement …); *Owner–Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C.Cir.2007) ("… the agency's failure to of explanation renders the restart provision arbitrary and capricious"; *Qwest Corp. v. FCC*, 258 F.3d 1191, 1205 (10th Cir. 2001) ("The FCC has not provided an adequate basis for us to review the rationality of the Ninth Order. It has not explained or supported its decisions adequately and therefore has acted arbitrarily and not in accordance with §

In addition to the lack of reasonable justification regarding the applicability of a punitive loan repayment rate to just one education sector, the Department also has not justified at all why yet another loan repayment rate methodology is warranted. Indeed, the Department even acknowledges that coalescing around one methodology is something it will be examining. Indeed, the Department's variety of loan repayment rate metrics seems to constitute an unjustified version of arbitrary and capricious methodology shopping whereby the Department may, by stroke of luck or by everyone's having thrown up his and her arms, arrive at a legitimate definition if it keeps trying long enough.

<u>Flaws in this New Methodology</u>

Inadequate Consideration of Income-based Repayment ("IBR") Plans

It is particularly concerning that the Department is proposing a new methodology that, like other existing repayment rates, includes so many fundamental flaws and that so clearly fails to appropriately take into account this Administration's very public policies and positions regarding borrower repayment plans. Below we outline our concerns more fully.

Under this Administration, the Department has been stalwart in its support of income-based repayment plans. The Department has taken significant steps to make it easier for borrowers to use income-based repayment plans—even creating a new recent new plan—"RE-PAYE." This has included better information to borrowers of these options and encouragement to institutions and servicers to better educate their students of these options.[14]

Walden has supported the Department's efforts, serving on the recent RE-PAYE negotiated rulemaking. As an institution focused on social change, Walden educates thousands of teachers, nurses, and mental health experts. These borrowers often benefit from the option of participating in income-driven repayment plans, at least for the first number of years after graduation. Eventually, many of them transfer into standard repayment, but having these options is very important to a graduate student's ability to pursue public service or public service-type professions, like teaching, mental health counseling, or nursing. Again, this is the Obama Administration's own policy.[15] And yet, under this proposed rate, borrowers who opt into such plans and are current on payments but have not reduced their principal balance are treated negatively under the rate's methodology and therefore the institution could be unfairly and inappropriately penalized when their borrowers independently, or with their servicer, choose

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254"; *Midwater Trawlers Co-Op v. Dep't of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002) (holding, in part, that the agency's action was arbitrary and capricious because "[a] plain reading of the proposed NMFS rule, and the undisputed history leading up to the allocation decision, demonstrate that the rule was a product of pure political compromise, not reasoned scientific endeavor.")

[14] See, e.g., https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven.

[15] https://www.ed.gov/news/press-releases/education-department-announces-new-data-showing-fafsa-completion-district-state; https://www.ed.gov/news/press-releases/new-student-loan-report-reveals-promising-repayment-trends.

these legitimate options. In other words, while the Administration has promoted income-based repayment plans to borrowers, it would at the same time penalize institutions with borrowers who opt into them.

We therefore urge that for any rate the Department establishes, especially one that is penal in nature such as this one, it must include positive treatment of any borrower in income-based repayment who is in good standing under the plan.[16]

Treatment of Military-Related and In-School Deferment

Walden supports the metric's appropriate exclusions for borrowers who had a loan in military-related deferment status or were enrolled in an eligible institution during the last fiscal year of the five-year measurement period. However, under the metric, it is unclear why the Department would only exclude borrowers who were in military or in-school deferment during the fifth year, but not also the borrowers who were also in that status at any time during years one through four of the five-year cohort period. A student who is in deferment at any time during the measurement period is justifiably more likely to be in negative amortization at year five and it is inappropriate to penalize an institution for that occurrence.

> Example: Student graduates with a bachelor's degree and goes into repayment. Student goes back for a master's in years two and three of the measurement period. During those years, the student's loans are in deferment and interest accrues. By the time the student completes the program and starts repaying in year four, they are going to have a much harder time making a dent on the original balance by year five.

This treatment requires correction.

The Metric's Treatment of Consolidation Is Unclear and Needs to Be Transparent

While the original outstanding balance ("OOB") under the proposed regulation indicates appropriate allocation of consolidation to the attended institution, the definition for current outstanding balance ("COB") does not include any reference to consolidations. It is essential that the Department's treatment of consolidated loans be clear to the institutions, students, and public, and also that the institutions have access to the same data systems as the Department so they can understand their own rates and to the extent possible mitigate. If the purpose of imposing this punitive rate is at least in some regard to create incentives for self-improvement, data transparency is essential.

The importance of these issues is demonstrated by the serious flaws made in the analysis within Looney and Yannelis's report published by Brookings Institute, which the Department cites. The American Institutes for Research ("AIR") recent study on Walden's behalf unpacks those errors and Looney and Yannelis have since acknowledged that their research—both the initial and revised versions—fails to appropriately attribute consolidated loans. Until the National Student Loan Database System ("NSLDS") is improved such that *<u>the Department</u> and institutions* have the ability to understand the allocation of consolidated or multiple loan

[16] An alternative would be to treat an IBR borrower who is appropriately paying "zero" as an exclusion, but all others paying interest positively.

payments (and interest) back to the originating institutions, it is difficult to imagine the accurate calculation of a loan repayment rate based on negative amortization.

The Treatment of Interest Is Unclear in the Metric

It is not clear what the difference in meaning is between "accrued interest" in the OOB definition and "capitalized interest" is in the COB. Does it mean that capitalized interest is not counted in OOB and accrued interest is not counted in COB? This is particularly relevant for institutions like Walden that primarily educate graduate degree students. The attribution of loan payments and the treatment of interest payments are both of significant relevance. Doctoral students, in particular, often accumulate large loan balances in pursuit of their degrees. Interest rates for graduate student loans are also higher than for undergraduate loans, and graduate student loans are not subsidized. The factors lead to large interest payments for graduate students. Therefore, it is critical for institutions to understand how interest is treated in the calculation.

<u>Walden Understands the Need to Understand Loan Repayment Behavior</u>

Walden University is studying the potential for a true loan repayment rate metric carefully. As demonstrated by AIR's recent work, along with the Institute for Higher Education Policy's and others', there is much more work needed both regarding analysis and data improvements. Given the arbitrary nature of creating yet another LRR methodology and assigning this new rate only to proprietary institutions, Walden respectfully urges the Department to pause on implementing this or any additional rate pending further analysis and justification. Walden recommends that the Department spend time to focus specific attention to 1) the treatment of consolidation and multiple loans at multiple institutions, 2) the application of any rate to graduate-level programs (or predominantly graduate-level institutions), 3) necessary improvements to NSLDS and other data systems, and 4) the fair treatment of IBR plans so that the treatment is consistent with existing repayment policies and options.

Conclusion

Walden University appreciates the opportunity to comment on the Department's proposed regulations. As stated in these comments, Walden is eager to work with the Department to protect student interests without creating unwarranted and unnecessary burdens or penalties on high-performing institutions. Our institution's deeply rooted mission of positive social change underlies our commitment to policy reform that benefits students, institutions, and taxpayers. We hope that the Department will consider the concerns and recommendations presented in these comments, and we look forward to the opportunity to work with the Department and Congress to develop policies that further our mutual goal of high-quality educational access and attainment.

Respectfully submitted,

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