February 10, 2023

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
[submitted electronically via rulemaking portal]

RE: Notice of proposed rulemaking: Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, Docket ID ED-2023-OPE-004

Dear Secretary Cardona,

The Department of Education (the "Department" or "ED") has published a notice of proposed rulemaking ("NPRM," "proposed regulation" or "proposed rule") that will amend the Revised Pay as You Earn (REPAYE) repayment plan as well as several other income-driven repayment programs. In fact, the action will create a new, ongoing entitlement program that will direct new federal subsidies to U.S. colleges and universities at massive taxpayer expense. There are serious problems with the proposed regulation, large and small, detailed in the following comment. In the main, the America First Policy Institute (AFPI) believes the Department lacks the authority to take this action. It would not only be an exercise of undelegated authority—and easy to identify as such under the emerging major questions doctrine—but it also claims the Secretary has the power to "cease charging" interest on federal student loans, which he does not. AFPI has four further major areas of concern. First, the Department's failure to produce a credible cost estimate makes the required cost-benefit analysis impossible. Related, by creating a repayment program that effectively discounts the cost of college for all but the wealthiest borrowers, the proposed regulation would change borrower behavior in profound ways; the Department must address them. Second, the Department has not established a reasonable basis for the NPRM's most consequential program changes. Third, the Department's regulatory impact analysis fails to consider how the proposed rule will adversely affect the higher education sector and the students it serves. And fourth, the proposed rule requires a federalism impact assessment that has not been conducted.

AFPI's Interest

The America First Policy Institute (AFPI) is a 501(c)(3) nonprofit, nonpartisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our

guiding principles are liberty, free enterprise, American military superiority, foreign-policy engagement in the American interest, freedom of conscience, and the primacy of American workers, families, and communities in all we do. To this end, AFPI affirms and celebrates the American experiment and works to promulgate American values in our educational institutions, laws, and culture. AFPI does this by disseminating the truth about the American Founding, our shared history, and the principles that underlie our constitutional republic. As part of its mission, AFPI seeks to ensure that American higher education remains faithful to its historic mission of pursuing truth, ensuring the free exchange of ideas, upholding academic rigor, advancing learning, and preparing students for success in a competitive workforce.

Author

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1. **The Department lacks the legal authority to "cease charging" interest when the sum accrued exceeds the borrower's monthly payment.**

Section 455(d)(1) of the Higher Education Act, under which the Department claims the authority to develop the new REPAYE plan, states that the "Secretary shall offer… a variety of plans for repayment of such loan, including principal and interest on the loan." The Secretary is permitted to develop plans "with varying annual repayment amounts based on the income of the borrower"[1] but nowhere is the Secretary given the authority to "cease charging"[2] interest (or, as it is put later in the discussion, "[n]ot charg[e] unpaid monthly interest after applying a borrower's payment").[3] The statute *requires* the Secretary to develop options "for repayment" of federal loans specifically "including principal *and interest*" [emphasis added]; it permits the cancellation of the remaining loan balance after a set number of payments. But it does not allow the Secretary to issue a regulation declining to charge interest on some loans in the first place.

Deciding to cease charging interest has personal tax and budgetary implications that differ from forgiving a balance, implications that are completely neglected in the proposed rule. For example, the IRS generally treats "canceled debt" under the current REPAYE and Public Service Loan Forgiveness plans as taxable income.[4] The American Rescue Plan Act (2021) included a provision

[1] Higher Education Act (1965) as amended, Sec 455(d)(1)(D). Retrieved Feb. 7, 2023, from https://www.govinfo.gov/content/pkg/COMPS-765/pdf/COMPS-765.pdf

[2] 34 CFR Part 685 (2023, Jan. 11). *Notice of proposed rulemaking: Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, Docket ID ED-2023-OPE-004*, Vol. 88, No. 7., p. 1897. Retrieved Feb. 7, 2023, from https://www.federalregister.gov/documents/2023/01/11/2022-28605/improving-income-driven-repayment-for-the-william-d-ford-federal-direct-loan-program

[3] 34 CFR Part 685 (2023, Jan. 11), p. 1918.

[4] IRS (n.d.). *Topic No. 431 Canceled Debt – Is It Taxable or Not?,* Tax Topics. Retrieved Feb. 7, 2023, from https://www.irs.gov/taxtopics/tc431

requiring the IRS to exempt student debt canceled between 2021 and 2025. If the new REPAYE program contemplated by the proposed regulation is in force when the educational loan forgiveness exemption expires, how will interest "[n]ot charg[ed]" be treated—as canceled debt or as revenue the Secretary has simply decided to forego? The question is not addressed. If it is the latter, the Department must establish that it has the authority to unilaterally forgo revenue owed to the treasury in abrogation of contractual obligations established by the Master Promissory Note signed by each borrower.[5]

It seems more likely that executive branch officials have financial management responsibilities that require them to collect debts owed to the United States. For instance, 31 U.S.C. §3711 (a) states that "The head of an executive… agency—(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." The implementing regulation requires agencies to "aggressively collect all debts arising out of activities of, or referred or transferred for collection services to, that agency."[6] It is one thing to waive, modify, or cancel a debt where a statute authorizes the executive branch to do so. That would be consistent with the Department's financial management responsibilities. The proposed regulation does something else entirely that is not permitted, however, by amending a repayment plan so that it simply "cease[s] charging any remaining accrued interest" when a borrower's monthly repayment obligations are less than the interest accrued on the loan. The action therefore appears to violate both the Higher Education Act (as amended) as well as financial management responsibilities established by law.

2. **The Department's failure to produce a credible estimate of the regulation's net budget impact makes a cost-benefit analysis impossible.**

Executive Order 13563 requires agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs" and to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[7] The Department estimates that the regulation will impose $137.9 billion in new costs "for taxpayers in the form of transfers to borrowers" over the next ten years.[8] Unbelievably, the Department acknowledges that its estimate "assume[s] that there will be no changes in the volume or quantity of loans issued due to the improved terms"[9] even though the proposal is designed to drive increased enrollment in the new REPAYE program (for example, borrowers will be enrolled automatically when they reach 75 days

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[5] Borrowers who sign a Master Promissory note commit to "pay to ED the full amount of all loans that I receive under this MPN in accordance with the terms of the MPN, plus interest and any other charges and fees that I may be required to pay under the terms of the MPN." Federal Student Aid (2020). *Master Promissory Note*. Retrieved Feb. 7, 2023, from https://fsapartners.ed.gov/sites/default/files/attachments/2020-04/SubUnsubMPN.pdf

[6] 31 CFR §901.1(a) Retrieved Feb. 7, 2023, from https://www.ecfr.gov/current/title-31/subtitle-B/chapter-IX/part-901/section-901.1

[7] The White House (2011, Jan. 18). *Executive Order 13563 -- Improving Regulation and Regulatory Review*. Retrieved Feb. 7, 2023, from https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review

[8] 34 CFR Part 685 (2023, Jan. 11), p. 1919.

[9] Ibid.

past due on their repayment obligations[10] and income certification—which is somewhat burdensome under the current plan and a barrier to participation—is streamlined under the proposal).

Beyond those changes, the revised REPAYE program will create powerful financial incentives that will inevitably change the behavior of borrowers and bring new borrowers into the student loan marketplace. Consider how generous the plan will be. The Department estimates that "[o]n average, borrowers with only undergraduate debt are projected to see expected payments per $10,000 borrowed drop from $11,844 under the standard 10-year plan and $10,956 under the current REPAYE plan to $6,121 under the proposed REPAYE plan." In other words, the proposed regulation will effectively discount the cost of college for the average borrower by 44% relative to the current REPAYE plan (and 48% relative to the standard 10-year plan).[11] For borrowers in the lowest lifetime income quintile, the revised REPAYE plan will effectively discount the cost of college by 90% relative to the current plan (borrowers will repay $873 for each $10,000 borrowed prior to cancellation of remaining principal).[12] Borrowers in the second lifetime income quintile will receive a 65% discount on the cost of college, and borrowers in the third lifetime income quintile will receive a 37% discount.[13] The Urban Institute estimates that under proposed changes to REPAYE, only 22% of those who complete a bachelor's degree with typical levels of debt will repay their debt entirely (49% will repay less than half).[14] Among those who complete associate degrees with typical levels of debt, only 11% will repay their loans entirely (69% will pay less than half of what they borrow).[15]

The proposed rule effectively creates a new means-tested entitlement program that will make college free for some borrowers while providing a significant discount for most. A gargantuan investment of taxpayer funds to create massive new subsidies for college attendance will change borrower behavior in profound ways—all of which drive up costs for taxpayers. For example,

- The provision that forgives outstanding loan balances after ten years for borrowers with original balances under $12,000 will make it essentially cost-free for students, including those underprepared to succeed, to enroll in college. If they fail to graduate and earn less than 225% of the Federal Poverty Line (FPL) for ten years, they will make no payments while they are ostensibly in the repayment of their loans. For those who attend college for only a few semesters, balances will be forgiven at the ten-year mark. Borrowers who earn modestly more than 225% of the FPL or borrow more than $12,000 will have a longer timeline to

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[10] 34 CFR Part 685 (2023, Jan. 11), p. 1910.

[11] Author's calculations based on Table 2—Projected Present Discounted Value of Total Payments per $10,000 Borrowed for Future Repayment Cohorts. 34 CFR Part 685 (2023, Jan. 11), p. 1915.

[12] Author's calculations based on Table 3—Projected Present Discounted Value of Total Payments for $10,000 Borrowed for Future Repayment Cohorts by Quintile of Lifetime Income. 34 CFR Part 685 (2023, Jan. 11), p. 1915.

[13] Ibid.

[14] Chingos, M, Delisle, J., and Cohn, J. (2023, January). *Few College Students Will Repay Student Loans under the Biden Administration's Proposal*, Urban Institute, p. 5, retrieved Feb. 7, 2023 from https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf

[15] Ibid., p.5.

balance cancellation, but they will still only repay a small fraction of the loan. Colleges and universities will seize on this fact to aggressively recruit students who are not sure what to do after high school—promising a low-cost opportunity to enjoy the campus's amenities while shopping for a major.

- Because the new program removes all financial exposure related to the decision to attend college from low- and middle-income borrowers, more students will enroll, some of whom will also be eligible for Pell grants. The regulation makes no attempt to quantify the cost of increased uptake of Pell grants in its estimate of the regulation's net budget impact.

- Because the new program would effectively cap repayment below the cost of college for most borrowers (even the average borrower in the highest income quintile would receive a small discount according to ED's calculations),[16] students will have an incentive to overspend on college, comfortable in the knowledge that REPAYE's cancellation provision effectively sets a repayment ceiling. This destroys individual incentives to be budget conscious and attentive to return on investment when selecting an institution and program.

- Because the new program effectively discounts the cost of college for all but the highest income borrowers, families with the wherewithal to pay for college out of pocket will have a strong incentive to enter the federal student loan market instead, further increasing the cost of the program. Even if parents have funded a 529 Education Savings plan to pay their children's tuition expenses, they would still derive benefit from taking out a student loan. If their child ends up with lower income in their initial working years, parents will be better off using their personal wealth to make subsidized loan repayments after graduation rather than having used their 529 to pay tuition at the time it was charged.

- ED's discussion acknowledges that "institutions may be more inclined to raise tuition in order to shift costs to students when loans are more affordable."[17] There is no need to speculate. Research has established that the cost of college rises when the financing available to the consumer increases.[18] Prices will go up to pay for amenities and personnel who make negligible contributions to student learning.[19] This will increase the outstanding loan debt subject to forgiveness, driving up the true cost to taxpayers. (This is addressed in greater detail below.)

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[16] 34 CFR Part 685 (2023, Jan. 11), p. 1915.
[17] 34 CFR Part 685 (2023, Jan. 11), p. 1916.
[18] Lucca, D. et al. (2017, Feb.). *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, Federal Reserve Bank of New York, p. 22-3. Retrieved February 7, 2023, from https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf?la=en
[19] American Council of Trustees and Alumni (2021, August). *The Cost of Excess: Why Colleges and Universities Must Control Runaway Spending*, Institute for Effective Governance. Retrieved Feb. 7, 2023, from https://www.goacta.org/wp-content/uploads/2021/08/The-Cost-of-Excess_2.pdf.

- The new REPAYE plan creates a powerful incentive for borrowers to spend time outside of the workforce in the ten years following graduation.[20] This is because forbearance and deferment generally count as time in repayment for the purpose of making progress toward the discharge of loan principal, including "periods of unemployment and rehabilitation training." Increased use of deferment and forbearance will also drive up the cost of the program.

Despite these factors, it is worth repeating that the Department has provided a cost estimate that assumes "no changes in the volume or quantity of loans issued due to the improved terms" of REPAYE—even though ED is required to use "the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible" under E.O. 13563. A static budgetary analysis of the NPRM that ignores the behavioral response of borrowers and higher education institutions is utterly insufficient to its function in this case, which is to permit a serious analysis of the proposal's benefits in light of anticipated costs, including by informing public commentary. Given that the new program is *designed* to change the behavior of millions of borrowers (and sure to affect the way thousands of institutions price a college degree), ED must develop a more sophisticated model to estimate total costs.

Organizations that do not have teams of government economists have managed to estimate the cost of the regulation anticipating some of the behavior changes that can easily be foreseen. For example, the Penn Wharton Budget Model (PWBM) estimates that the cost of the regulation will be two and a half times the government estimate, between $333 billion and $361 billion, depending on rates of uptake.[21] (Note that the PWBM estimate assumes static enrollment and unchanged rate of federal loans usage and adjusts only the proportion of borrowers who choose REPAYE instead of alternative repayment plans. It does not model the budgetary impact of a larger college population in an environment where the risk of noncompletion is largely borne by taxpayers or the associated cost of additional Pell grants. Nor does it model more rapidly rising tuition rates in an environment where credit is easier to access, reduced incentives for consumers to economize, increased use of forbearance and deferment, or the possibility that the administration's blanket loan forgiveness will be vacated by the Supreme Court and leave higher balances subject to forgiveness under this regulation.) A separate analysis conducted by an industry expert, who does estimate the cost of increased borrowing and accelerated tuition inflation under the more generous REPAYE plan, reaches a much higher estimate, pegging the anticipated ten-year cost between $824 billion and $1.14 trillion.[22]

The Department should reissue cost estimates for a range of scenarios. These include increased participation rates in REPAYE, increased rates of college attendance with and without higher rates of noncompletion, a range of effects on the rate of tuition increase which will almost surely rise an

[20] 34 CFR Part 685 (2023, Jan. 11), p. 1906.
[21] Penn Wharton Budget Model (2023, Jan. 30). *Budgetary Cost of the Newly Proposed Income-Driven Repayment Plan*. Retrieved Feb. 7, 2023, from https://budgetmodel.wharton.upenn.edu/issues/2023/1/30/budgetary-cost-of-proposed-income-driven-repayment
[22] Hornsby, T. (2023, Jan. 29). *New REPAYE Plan Could Save Borrowers Over $1 Trillion Over 10 Years*, Student Loan Planner, News. Retrieved Feb. 7, 2023, from https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/

at accelerated rate, increased borrower use of forbearance and deferment, and the additional cost the program will incur if the Supreme Court upholds a lower court order vacating the blanket bailout. These estimates should then inform a second opportunity for public comments so the public can comment on whether the benefits justify the true costs of the proposed regulation.

3. The Department has not established a reasonable basis for the program's most consequential changes.

As noted above, the Department's proposed income-driven repayment plan would effectively discount the cost of college by 44% for the average borrower (relative to the current REPAYE plan) at a cost to taxpayers of several hundred billion dollars. The Department's analysis establishes that the most significant cost drivers will be the new income protection rate (increased from 150% of the federal poverty line to 225%) and the reduced proportion of income that borrowers will repay (lowered to 5% of disposable income).[23]

Why did the Department choose these numbers? It derived the new income protection threshold from an analysis of the 2020 Survey of Income and Program Participation. 225% of the federal poverty line is the point at which the proportion of households that report food insecurity or delinquency on household accounts differs in a statistically significant way from the proportion living below the poverty line. How, exactly, does this rationale justify shielding the first 225% of income *for all borrowers*? The Department does not say. In fact, this seems to present an argument for *phasing out* the income shield altogether at an income level at which a household's experience of hardship diverges markedly from households living in poverty. The change that follows from ED's rationale is to eliminate income protection at the point borrowers have the wherewithal to repay the loan.

Nor does the Department provide a compelling rational for reducing repayments to 5% of "disposable" income except that "qualitative research shows that high numbers of borrowers on IDR plans still find their payments to be unaffordable."[24] The research ED points to in its footnote is an analysis that relies on a 2021 PEW survey of 2,806 people. According to that survey, 47% of "those previously or currently in [an IDR] plan reported that their monthly payments were still too high."[25] It would be reasonable to ask whether the subjective desire for lower loan payments expressed by 1,319 people justifies the creation of a new multi-billion-dollar entitlement program by executive fiat. But leave that question aside for now. If ED believes this finding—that 47% think their IDR payments are too high—justifies halving the repayment rate, why did it devise a plan under which the vast majority of the other 53% (who reported no such hardship) will also benefit from lower payments and balance erasure funded by taxpayers? Why not devise a plan targeted to the 47% whose experience is said to justify dropping the repayment rate in the first place? (Recall,

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[23] 34 CFR Part 685 (2023, Jan. 11), p. 1920.
[24] Ibid., p. 1902.
[25] Plunkett, T. et al. (2021, Sept. 24). *Upcoming Rule-Making Process Should Redesign Student Loan Repayment,* PEW. Retrieved Feb. 7, 2023, from https://www.pewtrusts.org/en/research-and-analysis/articles/2021/09/24/upcoming-rule-making-process-should-redesign-student-loan-repayment

according to the Department's calculation, the new REPAYE will be so generous that even households in the highest lifetime income quintile will benefit financially by enrolling in it.)[26] All of which is to say, ED has not established a rational basis for the main features of its proposal. That makes it an arbitrary and capricious exercise of undelegated authority (more on the latter point below).

The Department *could* have proposed a regulation tailored to the problem it sees. Over and over, ED justifies the changes it proposed by claiming they will "help[] borrowers avoid delinquency and default" or "significantly reduce the rate at which students default."[27] If this is the real goal—a laudable one, to be sure—why not begin with careful analysis of the characteristics of borrowers in default? ED provides no such analysis, so it is not surprising the reforms it has proposed are not carefully tailored to that purpose.

As we have observed elsewhere,

> Borrowers with the lowest balances have the highest rates of default (in fact, 66% of defaulters owe less than $10,000), suggesting that the problem is largely under-prepared students matriculating at schools with terrible graduation rates. Those who take on higher levels of debt tend to complete their degree, providing them with the wherewithal to repay it in most cases.[28]

A better approach would therefore be to focus on those who truly lack the wherewithal to repay their loans and would include reforms designed to discourage the origination of student loan debt where it is likely to be more burden than help for the borrower. It may well be that open admissions colleges with single-digit graduation rates and sky-high default rates are a part of the problem. As we explain below, this regulation will weaken accountability for institutions that are failing their students without making any effort to incentivize better student outcomes.

4. **The Department's regulatory impact analysis fails to consider how the proposed rule will adversely affect incentives in the higher education sector, harming students.**

A regulation that creates a massive new subsidy for college attendance will also affect U.S. colleges and universities. Several predictable consequences must be considered as part of the cost-benefit assessment required by E.O. 13563, which requires ED to "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives."

A. The cost of college will rise even faster.

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[26] 34 CFR Part 685 (2023, Jan. 11), p. 1915.

[27] 34 CFR Part 685 (2023, Jan. 11), p. 1916, 1918.

[28] Pidluzny, J. (2022, Sept. 1). *Seven Major Problems with the Biden Administration's Borrower Bailout.* America First Policy Institute Issue Brief. Retrieved Feb. 7. 2023, from https://americafirstpolicy.com/latest/20220901-seven-major-problems-with-the-biden-administrations-borrower-bailout

The Department issued approximately $84 billion in new loan financing for the 2020-2021 academic year.[29] The American people have every reason to expect the promise of new subsidies for college attendance—delivered by more generous indexing of payments to income and balance cancellation under the revised REPAYE—will increase the number of college attendees while making it possible for schools to increase tuition rates. American Economist Howard Bowen has posited that the cost of college is, in large part, a function of the revenues available to administrators. According to his "revenue theory of cost" (also known as "Bowen's law"),

> at any given time, the unit cost of education is determined by the amount of revenues currently available for education relative to enrollment. The statement is more than a tautology, as it expresses the fundamental fact that unit cost [i.e., the cost of college] is determined by hard dollars of revenue and only indirectly and distantly by considerations of need, technology, efficiency, and market wages and prices.[30]

Bowen's reasoning is that prospective students choose where to attend college based on a university's reputation rather than learning outcomes (which are hard to measure and rarely shared by institutions when they do).[31] Because reputation is as much a function of a school's prestige and the "college experience" it offers, universities will build amenities unrelated to learning—lazy rivers, sushi bars, movie theaters, luxury accommodations, policy centers headed by former vice presidents, etc.—if they can raise the money to pay for them. Unfortunately, much of this spending in unrelated to education. A recent analysis of total spending growth at 1,500 universities conducted by the American Council of Trustees and Alumni concluded that outlays on administrative and student services functions have grown faster than instructional expenditures since 2008—even though the latter is more strongly associated with improved student outcomes.[32] Other studies have traced an explosion in the number of administrators employed by U.S. colleges and universities far exceeding growth among the faculty or student body.[33]

The proposed regulation will have the practical effect of funneling more money into a broken system, driving prices up in the process. Research into the relationship between the availability of federal loans and the price of college bears this out. For example, a New York Federal Reserve analysis of "legislative changes in the maximum amounts students [were] eligible to borrow from the federal subsidized and unsubsidized loan programs" between 2001-02 and 2011-12 found that "a

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[29] The College Board (2021, October). *Trends in College Pricing and Student Aid 2021*. Retrieved Feb. 7, 2023, from https://research.collegeboard.org/media/pdf/trends-college-pricing-student-aid-2021.pdf

[30] Bowen, H. (1980). *The Cost of Higher Education: How Much do Colleges and Universities Spend per Student and how much Should they Spend,* Jossey-Bass Publishers, p. 19.

[31] Belkin, D. (2017, June 5). *Exclusive Test Data: Many Colleges Fail to Improve Critical-Thinking Skills*. The Wall Street Journal. Retrieved Feb. 7, 2023 from https://www.wsj.com/articles/exclusive-test-data-many-colleges-fail-to-improve-critical-thinking-skills-1496686662

[32] American Council of Trustees and Alumni (2021, August). *The Cost of Excess: Why Colleges and Universities Must Control Runaway Spending*, Institute For Effective Governance, p. 4. Retrieved Feb. 7, 2023, from https://www.goacta.org/wp-content/uploads/2021/08/The-Cost-of-Excess_2.pdf

[33] Delucchi, M. et al. (2021, June). *What's that Smell? Bullshit Jobs in Higher Education*, Routledge. Retrieved Feb. 7, 2023, from https://www.tandfonline.com/doi/pdf/10.1080/00346764.2021.1940255.

dollar increase in the subsidized [student loan] cap . . . resulted in a 58 cent increase in sticker price."[34]

This regulation will increase students' access to federally subsidized student loans in a different way—by creating a program that will reduce borrowers' repayment obligations (and the general risk to the borrower associated with taking on federal loans)—but it can likewise be expected to drive tuition rates up, and not just for those who participate in federal student loan programs.[35] The Department does not consider this in its assessment of costs and benefits, except to note the theoretical possibility in passing ("institutions may be more inclined to raise tuition in order to shift costs to students when loans are more affordable").[36] Given that higher tuition is not mere speculation, but instead a likely outcome of the regulation, further analysis is needed here, too, to inform the required assessment of costs and benefits. The Department should consider significant revisions to the program that would reduce incentives for wasteful spending by universities, as required by E.O. 13563's directive that agencies take every precaution to minimize new burdens imposed by their regulations.

B. The proposed regulation undermines accountability in higher education.

Cohort default rates and repayment progress rates on federal loans are important, if imperfect, indicators of whether a particular university (or university program) is preparing its graduates for success in the job market. The proposed rule will obliterate the value of these measures by creating a subsidy that "prevents" default by instead effectively recategorizing them as taxpayer losses. Thus, it will mechanically reduce the number of loans counted as not making progress toward repayment by not capitalizing unpaid interest. It will do so not because college graduates are emerging better prepared and better paid, and thus able to keep up with their payments, but because the federal government decides to simply pre-emptively no longer deem underpayment as a form of default.

At present, a very low cohort default rate is a sign that a university's graduates are able to earn sufficient income to remain current on their student loan repayments. Where cohort default rates are high, it is a signal of a serious problem or problems. Universities may be admitting underprepared students without providing necessary remedial education and wrap-around services, resulting in high rates of default on small loans when students fail to complete. It could also mean that a university is overcharging for programs that offer negligible rates of return on investment or that a university's program portfolio is ill-aligned to its service region's specific labor market needs.

Trends in an institution's default rates—in absolute terms over time or relationally to an institution's peer schools—are an important tool for university administrators, institutional research divisions, and governing boards. They are also an important metric university leaders can track over time to ensure a school is making continual improvement in regards to graduates' workforce readiness. And yet, there is no evidence that the Department consulted with university leaders to understand how

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[34] Lucca, D. et al. (2017, Feb.), p. 1, 23.
[35] Ibid., p. 22.
[36] 34 CFR Part 685 (2023, Jan. 11), p. 1916.

they use the statistic, nor whether other data could be collected to increase university accountability to their graduates and taxpayers. This is a major deficiency for a regulation designed to transform financial incentives.

College choice websites, including the Department's own "College Scorecard," point to cohort default rates and metrics describing the proportion of graduates making progress toward repayment as important quality indicators that can help families and matriculating students assess the likelihood that a particular institution offers a reasonably high return on investment.[37] The Department also uses the cohort default rate as a blunt accountability instrument, cutting off access to Title IV aid for institutions that have cohort default rates exceeding 30%. When borrowers who are unable to keep current on their full loan payments are no longer counted as delinquent because of their automatic enrollment in REPAYE, what will replace the use of cohort default rates as an accountability tool? The proposed regulation does not say. Worse, the new REPAYE will obscure important signals to the college-going market about program and institutional quality by artificially improving repayment rates and artificially reducing default rates at universities where graduates could not have repaid their loans based on the labor market access their educations provided. This will make it harder for families and individuals to identify the colleges and programs that offer the highest return on investment and easier for colleges and universities that are failing to prepare students for a family-sustaining careers to recruit new students to campus.

The NPRM presents no evidence that ED discussed new accountability mechanisms to replace those the revised REPAYE program will render obsolete. As such, the proposed regulation will set back efforts to improve transparency in higher education, a disservice to borrowers the Department should take seriously. This will have broader economic consequences too. ED should be working to create incentives that draw students to universities with proven records of delivering a high value education. By obscuring important market signals, however, the proposed regulation risks having the opposite effect by directing additional students and capital to poorly performing schools that do less to prepare graduates to create economic value during their working lives. By eliminating important measures of accountability, the proposed regulation also creates an environment that is highly conducive to predatory admissions practices, which are discussed below.

C. The program will create new incentives for unscrupulous admissions policies, negatively affecting underprepared students.

A 2022 Government Accountability Office (GAO) report found that "50% of colleges understate the net price" of attendance in the admissions offers they provide to families, by "subtract[ing] more

[37] For example, at the University of Texas-Austin, for the most recent cohort of graduates, 2% of loans are in default, 2% are delinquent, and 20% are in forbearance or deferment. Department of Education (n.d.) College Scorecard: The University of Texas at Austin. Retrieved Feb. 7, 2023, from https://collegescorecard.ed.gov/school/?228778-The-University-of-Texas-at-Austin

than just gift aid to estimate the net price."[38] As detailed in the report, colleges are already misrepresenting student loans, Parent PLUS loans, and work study funding as grant aid to entice students to matriculate by presenting financial aid offers as more generous than they really are. It is a virtual certainty that they will describe the new REPAYE program to prospective students in ways that portray matriculation as virtually risk-free, whether a student completes college or not. Once the most aggressive universities develop recruiting strategies that portray the new REPAYE plan as providing a substantial tuition discount, others will likely emulate the strategy to remain competitive. The rule will also allow admissions officers to encourage enrollment in disciplines with lower median salaries by presenting REPAYE as a *de facto* wage-subsidy for those who graduate with degrees in less lucrative fields. This could draw students who might otherwise have responded to labor market demand to learn a higher-paying skilled trade on an apprenticeship basis into low-paying careers that require a college degree.

The Department raises the possibility that "the updated REPAYE plan would result in more aggressive recruiting by institutions that do not provide valuable returns on the premise that borrowers who do not find a job do not have to pay." But it leaves the discussion at that single sentence. In fact, the outcome is likely to be much worse. What would prevent unscrupulous actors from creating and marketing new, low-value programs to underprepared students using the promise of $0 repayments whether students graduate or not (with full forgiveness at the ten-year mark)? This could ultimately pull some number of students—who often have the most to gain from a high-quality undergraduate education—into a segment of the higher education sector that markets aggressively to underprepared first-generation students who are viewed as potential sources of new revenue rather than as students who they have a responsibility to educate.[39] It has happened before.[40] If ED is of the opinion that a new, multi-billion dollar subsidy to higher education consumers will not lead to increased predatory behavior—not just by proprietary schools but also at struggling open-admissions public colleges—the Department should explain its confidence. One unanticipated consequence of a more generous REPAYE plan could be to reduce public concern when colleges fail to provide value to students. Schools that provide little value will nonetheless be able to grow thanks to these new subsidies, harming students who would benefit considerably from a higher quality education. However, they will have an easier time escaping public and regulatory scrutiny because the direct financial harm they cause will be borne by taxpayers, not sympathetic individuals. As a result, the greater harm of missed educational opportunity will persist.

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[38] U.S. Gov't Accounting Office (November 2022). *GAO-23-104708: Action Needed to Improve Information on College Costs and Student Aid*, p. 18. Retrieved Feb. 7, 2023, from https://www.gao.gov/assets/gao-23-104708.pdf

[39] Friedrich, M. (2020, Aug. 20). *'Misery Factories': At For-Profit Colleges, a Web of Predatory Behavior.* Arnold Ventures. Retrieved Feb. 8, 2023, from https://www.arnoldventures.org/stories/misery-factories-at-for-profit-colleges-a-web-of-predatory-behavior

[40] Shireman, R. (2017, Jan. 24). *The For-Profit College Story: Scandal, Regulate, Forget, Repeat.* The Century Foundation. Retrieved Feb. 8. 2023, from https://production-tcf.imgix.net/app/uploads/2017/01/31125439/the-for-profit-college-story-scandal-regulate-forget-repeat.pdf

Given that this Administration has shown high levels of attention to predatory admissions practices in other contexts,[41] it is surprising the regulation does nothing to discourage predatory practices the regulation will encourage and, if anything, make more difficult to detect by undermining important accountability mechanisms (discussed above). This also raises questions about the Department's determination that its proposal "will not have a significant impact to a substantial number of small entities." In reality, the economic impact of a new multi-billion subsidy will almost surely affect hundreds of schools (more than 3,000 colleges and universities qualify for the designation under the agency's enrollment-based definition).[42]

This rule could even set off a race to the bottom among smaller, less selective institutions—many of which are under severe financial pressure as a result of declining higher education enrollments[43]—to attract new students through aggressive recruiting tactics. The predictable result, the enrollment of higher numbers of students who are not college-ready, will inevitably create new pressures for those institutions, including to build additional remediation capacity, to shift the institutional program portfolio toward majors where underprepared students are more likely to succeed, and even to lower academic standards to keep persistence and graduation rates up. Whether the ten-year cost of this action is $138 billion or $1.1 trillion, the agency has erred in its judgment that it can direct such an immense sum into a competitive higher education marketplace without significantly affecting a number of the 3,000+ small players competing to serve those who are eligible for the new subsidies.

5. **The regulation raises questions of vast economic and political significance that should subject it to review under the major questions doctrine articulated in *West Virginia v. EPA*.**

This proposed regulation does not merely redesign income-driven repayment plans; it creates a new entitlement program to generously subsidize college attendance. This is by design. The administration has framed reforms to REPAYE in the context of forgiving student loan debt, [44] a high-profile campaign promise, rather than as an effort to better calibrate income-driven repayment programs so that they collect a reasonable proportion of a borrower's outstanding balance without

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[41] Department of Education (2022, Oct. 31). *Education Department Releases Final Regulations to Expand and Improve Targeted Debt Relief Programs.* Retrieved February 7, 2023, from https://www.ed.gov/news/press-releases/education-department-releases-final-regulations-expand-and-improve-targeted-debt-relief-programs

[42] 34 CFR Part 685 (2023, Jan. 11), p. 1923.

[43] Dickler, J. (2022, Oct. 15). 'Universities are going to continue to suffer.' Some colleges struggle with enrollment declines, underfunding. CNBC. Retrieved Feb. 8, 2023, from https://www.cnbc.com/2022/10/05/colleges-struggle-with-enrollment-declines-underfunding-post-covid.html

[44] The White House (2022, August 24). *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most.* Retrieved Feb. 23, 2023, from https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ See also Department of Education (2022, Aug. 24). *Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment.* Retrieved Feb. 7. 2023, from https://www.ed.gov/news/press-releases/biden-harris-administration-announces-final-student-loan-pause-extension-through-december-31-and-targeted-debt-cancellation-smooth-transition-repayment

causing undue financial hardship. Section 455 of the Higher Education Act clearly authorizes the latter; it does not permit the Secretary to appropriate hundreds of billions in taxpayer funds to forgive student loan debt now and in perpetuity.

The Department is proceeding with its proposal to transform incentives for millions of borrowers and thousands of U.S. universities—at a cost that could reach more than $1 trillion in the next decade. It is doing so even in the face of *West Virginia v. EPA*, which limits the power of agencies to adopt regulatory programs that "Congress has conspicuously declined… to enact itself."[45] Justice Neil Gorsuch offers guidance about "when an agency action involves a major question for which clear congressional authority is required" in his concurring opinion: "First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance,' …. [s]econd… when it seeks to regulate 'a significant portion of the American economy,'… [and t]hird,… when an agency seeks to 'intrud[e] into an area "that is the particular domain of state law."'"[46]

This regulation clearly meets the first two criteria and arguably the third.

First, Congress is actively debating reforms to federal funding of higher education, which this regulation will effectively preempt, including several proposals to forgive student loan debt outright.[47] For example, in July, 2019, Senator Elizabeth Warren and House Majority Whip James Clyburn introduced bicameral legislation designed to eliminate up to $50,000 in loan debt per borrower.[48] Additional relief proposals would provide targeted loan forgiveness to educators, create a new program to refinance some federal and private student loans at a 0% interest rate,[49] or authorize the Department of Education to repay up to $25,000 per borrower.[50] Bolder reform proposals contemplate structural changes to higher education funding systems. Senator Tom Cotton introduced the Student Loan Reform Act (2022) to create new accountability mechanisms, including financial incentives to keep wasteful administrative salary spending down and penalties for excessive rates of student default. A second proposal from Senator Cotton, the American Workforce Act, would establish a federal voucher program to empower employers to develop workforce education programs as an alternative to traditional four-year degrees. Congresswoman Virginia Foxx introduced the Responsible Education Assistance through Loan (REAL) Reforms Act to provide targeted student loan relief, limits on the interest certain loans can accrue, and an avenue to rehabilitate loans in default. Other proposals would completely phase out the Federal Direct Plus

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[45] *Virginia v. EPA,* No. 20-1530, 20. https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf
[46] Ibid., 9.
[47] For a list of the proposals, see the National Association of Student Financial Aid Administrators (NASFAA) tracker. National Association of Student Financial Aid Administrators (n.d.). *Legislative Tracker: Loans & Repayment.* Retrieved Feb. 7, 2023, from https://www.nasfaa.org/legislative_tracker_loans_repayment
[48] Senator Warren Press Office (2019, July 23). Senator Warren, House Majority Whip Clyburn Introduce Legislation to Cancel Student Loan Debt for Millions of Americans. Retrieved Feb. 7, 2023, from https://www.warren.senate.gov/newsroom/press-releases/senator-warren-house-majority-whip-clyburn-introduce-legislation-to-cancel-student-loan-debt-for-millions-of-americans
[49] S. 4344, 117th Cong. (2022). Retrieved Feb. 7, 2023, from https://www.congress.gov/bill/117th-congress/senate-bill/4344/text
[50] H.R. 6708, 117th Cong. (2022). Retrieved Feb. 7, 2023, from https://www.congress.gov/bill/117th-congress/house-bill/6708/text

loan program, under which students are permitted to amass the largest debt,[51] or create new repayment options, with Congress specifying the details of fixed repayment and income-based repayment plans.[52] Congressional leaders would not be debating *whether* to forgive loans—along with how much to forgive, who should benefit, and alternative policy proposals that would increase accountability—if a previous Congress had authorized the Secretary to make all of these decisions on their behalf.

Second, ED's proposal would affect "a significant portion of the American economy." In addition to reshaping incentives in the $700 billion per year higher education sector (discussed above), the regulation will affect the labor market in profound ways. After all, one of the main purposes of higher education is to prepare young people for workforce success. And yet, the Department does not discuss how its proposed regulation could affect the broader labor market.

It is easy to demonstrate how the rule will have far-reaching effects. Workers borrow money to enhance their skills or gain access to employment in many ways. An Uber driver finances a vehicle; a contractor invests in his workshop; an aspiring hair stylist or software coder uses a credit card to pay for training that is not eligible for federally subsidized financing under Title IV of the Higher Education Act. By artificially reducing the price of a college degree for most borrowers by shifting the burden to taxpayers, the executive branch is creating an additional financial incentive for future workers to choose college as a pathway to employment. Government interventions in the labor market can have downstream effects on everything from worker shortages, to consumer prices, to international trade, to immigration policy. Indeed, it is hard to imagine an argument that pouring between $138 billion and $1.1 trillion into higher education (or any sector) in the form of new subsidies would *not* have vast economic consequences.

All of which is to say the Department is using a statute that allows the development of income-driven repayment programs—which should be tailored to collect a reasonable proportion of student loan debt without unduly burdening low-income borrowers—to radically reshape the American workforce. That is an elephant-sized power discovered hidden in a mouse hole. AFPI's position is that the proposal to transform REPAYE therefore constitutes an impermissible exercise of undelegated authority. If the Department disagrees, it should at least provide a regulatory impact analysis that includes discussion of the proposed regulation's impact on workforce education and the broader labor market. It should do so because shaping the labor market is a dominant purpose of higher education, the very marketplace this regulation is designed to transform.

6. **The proposed rule has significant implications for the states and intergovernmental relations and requires a federalism impact statement.**

The proposed rule intrudes into an area "that is the particular domain of state law," namely education. If it does not also rise to the level of a major question under Justice Gorsuch's third criterion, Executive Order 13132 certainly applies. It specifies that "no agency shall promulgate any regulation that has federalism implications" unless the agency consults with state and local officials "early in the process of developing the proposed regulation" and provides a federalism "impact

[51] H.R. 7895, 117th Cong. (2022)
[52] H.R. 7288, 117th Cong. (2022)

statement" to the Director of the Office of Management and Budget.[53] The Department incorrectly claims that "the proposed regulations do not have federalism implications." In fact, they do in several ways. First, the proposal to "cease charging any remaining accrued interest each month after applying a borrower's payment" means that loan balances will not grow when payments do not cover accrued interest.[54] As a result, the balances subject to forgiveness under the new REPAYE plan will be smaller than they would have been under the status quo. Because several states treat forgiven student loans as taxable income, this regulation will have significant state-level budgetary implications. ED's cost estimate is almost surely much too low for reasons that have already been discussed and still, the price tag associated with the elimination of interest accrual alone—much of which would be forgiven and therefore not subject to state taxation under the current plan—is $14.9 billion.[55]

This should not come as a surprise. When the Biden Administration announced it would forgive up to $20,000 per borrower in August 2022, states were forced to review their tax rules to understand the implications and communicate them to concerned taxpayers.[56] This regulation will likely have the same consequence, something that could have been addressed in advance had the Department involved state-level stakeholders in the regulatory process. The Department has therefore erred in its judgment that the proposed regulation will not affect the states, which means a federalism impact statement is required.

State universities are also among the biggest employers in many regions of the country and often one of the largest state expenditures; the economic consequences for the higher education sector discussed above will therefore affect many, if not most, states in profound ways. Consider seven: States that have worked to develop alternative pathways to family-sustaining employment will see a new, massive, federal subsidy pull in the opposite direction. States that have developed performance funding formulas to create incentives to improve graduation rates and workforce preparation will be faced with new federal spending that weakens accountability. States that view relatively high levels of investment in higher education as a competitive advantage will find the talent development playing field with neighboring states suddenly leveled. States that have limited public investment in higher education may see residents lured out of state to take advantage of new federal subsidies at larger institutions across state lines. States that fund higher education on a per capita basis will see their expenditures rise when the new federal subsidy draws additional students into the higher education marketplace. State institutions already compete for out-of-state students by carefully calibrating in-state and out-of-state tuition rates and, in some cases, by extending favorable treatment to neighboring counties in adjacent states. For them, a massive new federal tuition subsidy will undoubtedly affect pricing for out-of-state students, students' choice of institution, and even inter-state migration related to college attendance.

[53] Federal Register (1999, Aug. 10). *Executive Order 13132: Federalism*, Federal Register Vol. 64, No. 153. Retrieved Feb. 7, 2023 from https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf
[54] 34 CFR Part 685 (2023, Jan. 11), p. 1895.
[55] 34 CFR Part 685 (2023, Jan. 11), p. 1920.
[56] Airi, N. and Hunter, A. (2022, Sept. 15). *Which States Tax Student Loan Forgiveness, and Why Is It So Complicated?* Retrieved Feb. 7, 2023, from https://www.taxpolicycenter.org/taxvox/which-states-tax-student-loan-forgiveness-and-why-it-so-complicated

The list of ways the proposed rule has a substantial effect on federalism and intergovernmental relations could go on and on. To remedy the Department's oversight, an assessment of the proposed rule's implications for the states—including how the behavior changes driven by the proposed regulation will interact with state higher education programs and priorities—should be undertaken and the resultant commentary should be published in advance of a second notice and comment period.

It is hard to think of a historical parallel to the proposed regulation—in terms of the expense imposed on taxpayers, its effect on incentives in an important sector of the U.S. economy, its significant impact on the states, and its lack of clear authorization in statute.

Thank you for considering the many serious concerns it raises.

Respectfully submitted,

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