STRAYER UNIVERSITY

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Ms. Hilary Malawer
U.S. Department of Education
400 Maryland Ave., S.W.
Room 6E231
Washington, D.C. 20202

Dear Ms. Malawer:

Strayer University submits the following comments in response to the Department's request for input regarding Department regulations that are appropriate for repeal, replacement, or modification. *See* 82 Fed. Reg. 28,431 (June 22, 2017). Strayer supports the Department's regulatory efforts that are designed to hold schools accountable and better protect students from financial and other harm. Strayer therefore encourages the Department to maintain close oversight over institutions of higher education. Regulatory change, however, is necessary to bring rationality and fairness to the disparate and discriminatory patchwork of regulations that often works against the best interest of student borrowers.

The Department should adhere to one overriding principle: Whenever the Department regulates, its actions should apply evenhandedly to all institutions of higher education. That way, student choices are not distorted and agency action does not arbitrarily single out any particular subset of institutions for special benefit or unfair detriment. In other words, the Department should apply a unitary standard to both existing and future regulations so that like institutions are treated alike. Many Department regulations fail to satisfy that legal and equitable requirement, producing inconsistent regulatory schemes to the detriment of students.

In July, Strayer offered suggestions for revising two Department regulations—the Gainful Employment and the Borrower Defense to Repayment regulations—to include a unitary standard. *See* Strayer University Comments, Docket ID ED-2017-OPE-0076 (July 12, 2017), http://bit.ly/2w6Be6z. We incorporate those comments by reference here, and encourage the Department to adopt a unitary standard in each regulatory reform it pursues moving forward.

The consistent application of a unitary standard to Department regulations is not the only change needed. The Department should also revise its regulations to include commonsense reforms that can help address the problem of student debt and the collateral effect of student-loan defaults. And the Department should also ensure that its regulations do not unnecessarily discourage competition among institutions or stifle innovation. Many Department regulations, though well-intentioned, produce unnecessary side effects that prevent institutions from providing meaningful financial and academic benefits to students.

These comments provide suggestions for accomplishing these goals. Part I offers five recommendations for commonsense reforms across a range of regulations that would help make institutions better stewards of financial aid funds, offer students increased protection from the risk of default, and hold institutions more accountable when defaults occur. Part II offers recommendations for revising portions of the 2015 Program Integrity and Improvement Rules, which discourage innovation and raise costs by imposing draconian restrictions on the use of institutional-purchase agreements (*i.e.*, bulk-purchase agreements) that allow institutions to provide books and supplies to students for cheaper prices in the aggregate.

I. The Department should implement commonsense reforms to encourage institutions to be better stewards of federal funds and to better protect students from financial harm.

As the Department looks to enforce the President's regulatory reform agenda, *see* Executive Order 17177, 82 Fed. Reg. 12,285 (Feb. 24, 2017), it should prioritize commonsense regulatory changes that will help ameliorate the twin problems of excessive student debt and student-loan defaults. For years, Strayer has advocated five such reforms, which should apply to all institutions regardless of whether they are public, non-profit, or proprietary institutions:

- Provide institutions with more leeway to consider student-loan default risk when enrolling students or when awarding financial aid funds;
- Provide institutions with greater flexibility to delay financial aid disbursements until students can establish their ability to succeed in school;
- Limit the growth of institutions with excessive cohort default rates;
- Require every institution to remit a risk-sharing payment to the federal government when its cohort default rate exceeds an unacceptable threshold; and
- Allow institutions to cap their students' borrowing at institutional costs, with additional borrowing for living expenses permitted only in cases of documented need.

These measures reduce the risk that students will be unable to pay back loans, hold institutions more accountable for the success of their students, and better protect taxpayer money.

A. Allow institutions to consider default risk during the enrollment process or when awarding financial aid.

When any student at a proprietary institution defaults on his loans, the institution is blamed almost reflexively. However, under the existing legal framework, schools are limited in their ability to consider whether a particular student is likely to default on his loans. That should not be. If institutions are to be held accountable for their students' loan defaults, they should have more ability to determine who gets loans in the first place.

The regulations codified in 34 C.F.R. §685.301 are a prime example of the dilemma schools face. One of those regulations explains that "[a] school may refuse to originate a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan or may reduce the borrower's determination of need for the loan," but the school may *not* deny "access to Direct Loans because of the borrower's ... *income*." 34 C.F.R. §685.301(a)(8) (emphasis added). In other words, schools may deny loans to borrowers on an individual basis, except when they consider the very factors that are relevant in calculating a risk of default. For institutions such as Strayer that attract many working-adult students, analyzing whether a student presents a risk-of-default is not a realistic option if income is shielded from consideration. Moreover, in some circumstances, schools are required to *encourage* more borrowing among their students, even if students have already expressly *declined* to request more financial aid funds. As the Department explains in one regulation, if a graduate or professional student "is eligible for a Direct Subsidized or Direct Unsubsidized Loan, but has not requested the maximum Direct Subsidized or Direct Unsubsidized Loan amount for which the borrower is eligible," then the school "must ... [n]otify the graduate or professional student borrower of the maximum Direct Subsidized or Direct Unsubsidized Loan amount that he or she is eligible to receive." *See id.* §685.301(a)(3).

None of this makes any sense, nor is it compelled by the law. The Higher Education Act of 1965, as amended ("HEA"), provides that schools may, "[o]n a case-by-case basis," provide "a loan that is less than the student's determination of need" so long as the school is not discriminating on the basis of "race, national origin, religion, sex, marital status, age, or disability status." 20 U.S.C. §1087tt(c). Absent from that statutory list is "income" and other factors that inform whether a borrower presents a risk of default. Yet the Department's regulations nonetheless prohibit consideration of income, generate confusion among schools, and encourage more borrowing in the process. Moving forward, the Department should modify 34 C.F.R. §685.301 to more closely resemble the statutory text that it purports to implement. The Department should eliminate restrictions prohibiting schools from considering income and other relevant factors that inform whether a student is likely to default on his loans, and the Department should scrap any requirement compelling schools to encourage more student-loan borrowing. Indeed, only if the regulatory regime that has enabled excessive student-loan borrowing is changed can the Department hope to correct that problem.

B. Grant institutions greater flexibility to delay financial aid disbursements.

Existing Department regulations require institutions to delay disbursements of federal financial aid funds in certain circumstances. *See, e.g.*, 34 C.F.R. §685.303(b). For example, for first-year, first-time borrowers of subsidized and unsubsidized Direct Loans, schools must delay disbursements for 30 days unless certain exceptions apply. *See* 34 C.F.R. §685.303(b)(5). Such regulation is designed in large part to discourage students from simply collecting student loan money before promptly dropping out of school. That makes good sense—so much so that the Department should expand on it.

Strayer recommends that institutions should be required to delay financial aid disbursements until a student can establish that he has the ability to succeed in a program of education. Accomplishing this goal can begin with revisions to 34 C.F.R. §685.303, which outlines the rules governing how a school processes a borrower's Direct Subsidized, Direct Unsubsidized, and Direct PLUS loan proceeds—including the circumstances under which an institution may not disburse financial aid funds *See id.* §685.303(b). The Department has broad authority to revise its existing regulations under its statutory rulemaking powers. *See* 20 U.S.C. §3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department."); *id.* §1221e-3 ("The Secretary … is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department."). That authority should be invoked here because disbursing financial aid funds to students who have not demonstrated any ability to succeed in school does not benefit the student, who will have little ability to repay his loans; does not benefit the school, which can suffer regulatory repercussions as a result of student-loan defaults; and does not benefit the government or taxpayer, who will ultimately be left to shoulder the financial burden of default.

C. Limit the growth of institutions with high cohort default rates.

The Department's recent regulatory measures require institutions that fail to meet certain standards to seek pre-approval before expanding their programs or campuses. That is laudable, as limiting growth is an essential component of any framework designed to reign in bad actors. However, it is only a half-step. Growth restrictions should be stronger—and tied to the congressionally created framework of "cohort default rates." *See* 20 U.S.C. §1085(a)(2)(A).

Strayer proposes that an institution with a cohort default rate in any given fiscal year that is equal to or greater than the national average of its peer institutions (based upon the risk profile of the students served) should be prohibited from receiving more funding under Title IV during the following award year than it did the previous year. Such a change can be implemented in 34 C.F.R. §668.206. That regulation sets forth the existing consequences of cohort default rates on Title IV eligibility. For example, the regulation provides that programs with a cohort default rate of greater than 40% lose their eligibility to participate in the FFEL and Direct Loan programs. *Id.* §668.206(a)(1). The Department therefore need only revise the existing regulation to provide that schools whose cohort default rates exceed the national average of their peer institutions will not receive an increase in funding under Title IV the next award year.

It is crucial, however, that a new growth limitation be based on a national-average cohort default rate, and not on a static percentage threshold. Such an approach accounts for many of the criticisms currently leveled against the existing cohort default rate framework—namely, that it does not properly account for macroeconomic factors that can negatively affect repayment rates. Even if an institution is providing a high-level education to students, graduates may have difficulty repaying loans in times of economic slowdown or recession, and cohort default rates may increase above the Department's static thresholds as a natural consequence. Basing growth limitation on a national average controls for these unexpected economic shocks.

D. Impose risk-sharing payments on institutions.

The Department also should require institutions to participate in a risk-sharing program. The idea behind risk-sharing is simple: Once an institution's student-loan default rate hits a certain threshold, then that institution should bear some of the financial risk if there are any additional defaults beyond that threshold. That is not how the system works now. Under the existing framework, the financial burden falls solely on the students and, in the event of default, on the government (and ultimately the taxpayer). *See, e.g.*, 34 C.F.R. §§682.102, 685.207.

Strayer's risk-sharing proposal is straightforward. Strayer submits that every institution should remit a risk-sharing payment when its cohort default rate (as measured by the total number of *borrowers* in default, as in existing regulations, *see, e.g.*, 34 C.F.R. §668.183) exceeds 15%. If more than 15% of borrowers in the cohort are in default, the Department should then examine the total number of *dollars* that are in default within the cohort. And if 15% or more of the total dollars disbursed to the cohort are in default, institutions should pay a risk-sharing payment to the federal government equal to 50% of the total defaulted dollars above the 15% threshold. An example illustrates the point:

- An institution's borrower-based cohort default rate hits 15%.
- The institution had disbursed $500 million in loans to students in that cohort. Fifteen percent of $500 million is $75 million. Therefore, if students within the cohort defaulted on at least $75 million in loans, the institution will be required to remit a risk-sharing payment to the government.
- Students in the cohort ultimately default on a total of $100 million, or 20% of the total dollars disbursed. Therefore, the institution is required to remit a risk-sharing payment.
- The risk-sharing payment is based on the difference between $75 million (15% of the total dollars disbursed) and $100 million (20% of the total dollars disbursed)—*i.e.*, $25 million.
- Because the institution is required to pay 50% of the total dollar amount in default above the 15% threshold, the risk payment to the government is half of $25 million—*i.e.*, $12.5 million.
- The government can then deploy the collected funds to offset defaults in the Title IV program.

The Department has a clear path to achieve this goal. As a condition of participation in Title IV programs, institutions must sign "program participation agreements" with the Department, which require institutions to comply with "any … conditions specified in the program participation agreement that the Secretary requires the institution to meet." *See* 34 C.F.R. §668.14(a)(1). Thus, the Department can mandate compliance with a risk-sharing regime as a condition of participation in Title IV programs.

This risk-sharing mechanism will help correct the current misalignment of incentives between educational institutions and the federal government, and will help to avoid the wealth transfer from the taxpayer to the educational institution, which occurs in the case of excessive student defaults. And if institutions have more skin in the game, they are more likely to take an interest in student outcomes, including by helping them secure employment that will allow them to avoid financial distress.

E. Allow schools to cap borrowing at institutional costs.

Finally, the Department should develop a financial aid system that presumptively caps borrowing at institutional costs only. As already noted, the existing student loan system allows students to borrow financial aid funds excessively. Students may take out loans not just for the cost of an educational program (*i.e.*, tuition and fees), but also for the cost of living. Such borrowing may make sense for traditional students who enter college at the age of 18 and who live away from home. But this model may *not* make sense for older, working-adult students who return to school later in life. Those students may have no need to incur debt for anything but the cost of the program, and yet they are nonetheless free—indeed, encouraged—to borrow more, *see* 34 C.F.R. §685.301(a)(3), even though unnecessary borrowing creates unnecessary debt.

The Department therefore should set a presumptive borrowing limit that caps financial aid disbursements at institutional costs. If students require access to Title IV funds for living expenses, institutions should have the authority to disburse such funds, but only upon request from the student and only upon a demonstration of documented need (such as banking records and expense-outlay records showing the need for additional financial aid). Under any such system, however, the Department should ensure that similarly situated institutions operate under the same borrowing-limit constraints. Were it otherwise, students may be encouraged to engage in financial-aid shopping—*i.e.*, choosing the institution that will provide the highest-dollar-amount financial aid package even if they have no need for such a package.

Existing Department regulations currently prohibit institutions from capping borrowing on an across-the-board basis at institutional-costs only, and instead allow limitations on student borrowing only on a "case-by-case basis." *See* 34 C.F.R. §685.301(a)(8)(i) ("A school may refuse to originate a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan or may reduce the borrower's determination of need for the loan if the reason for that action is documented and provided to the borrower in writing, and if … [t]he determination is made on a case-by-case basis."). The Department has previously taken the position that this approach is compelled by the HEA. *See* Dep't of Educ., GEN-11-07, Guidance on Participation in the William D. Ford Federal Direct Loan 2-3 (Direct Loan) Program (Mar. 22, 2011), http://bit.ly/2uUwwrA (citing §479A(c) of the HEA). That legal position is debatable. But there can be no debating that the existing system does not provide the most effective method for limiting unnecessary student borrowing: It places an undue burden on institutions and allows students to shop around for more generous financial aid packages at other schools, even if they have no need for additional financial aid. Accordingly, whether by working with Congress to amend §479A(c) of the HEA or otherwise, the Department should rescind 34 C.F.R. §685.401(a)(8)(i) and require institutions to limit financial aid packages to institutional costs except in cases of demonstrated financial need. Only then can the Department ensure that students are not borrowing (and incurring debt) simply because they can.

II. The Department should revise its restrictions on institutional-purchase agreements so schools may once again offer cost-savings to students

While it is imperative that the Department tackle the problems of student debt and student-loan defaults, that is not the only issue that merits the Department's attention. The Department should also revise its regulations in order to permit institutional-purchase agreements, *i.e.*, bulk-purchase discounts that institutions negotiate directly with providers of books and supplies. Institutional-purchase agreements benefit students and institutions alike: Students save money in the aggregate, and institutions reduce classroom inefficiency by providing required course materials directly to students as soon as instruction begins. For the system to work, however, institutions like Strayer must charge a uniform fee to each enrolled student in each course as part of tuition and fees. Yet in 2015, the Department effectively banned this pioneering practice in all but the narrowest of circumstances, thereby stifling innovation (again) and eliminating cost-savings for many students. That gets the regulatory approach exactly backwards. Either the Department should rescind this regulation entirely, or substantially revise it.

The Department implemented its restrictions on institutional-purchase agreements in the Program Integrity and Improvement regulations issued in October 2015. *See* Program Integrity and Improvement, 80 Fed. Reg. 67,194, 67,195-96 (Oct. 30, 2015). Those regulations included a provision—now codified in 34 CFR §668.164(c)(2)—that provides that an institution may include the costs of books and supplies as part of tuition and fees only in three limited scenarios:

(i) The institution—

(A) Has an arrangement with a book publisher or other entity that enables it to make those books or supplies available to students below competitive market rates;

(B) Provides a way for a student to obtain those books and supplies by the seventh day of a payment period; and

(C) Has a policy under which the student may opt out of the way the institution provides for the student to obtain books and supplies under this paragraph (c)(2). A student who opts out under this paragraph (c)(2) is considered to also opt out under paragraph (m)(3) of this section;

(ii) The institution documents on a current basis that the books or supplies, including digital or electronic course materials, are not available elsewhere or accessible by students enrolled in that program from sources other than those provided or authorized by the institution; or

(iii) The institution demonstrates there is a compelling health or safety reason.

34 CFR §668.164(c)(2). The second and third categories are particularly narrow. An institution can seek safe harbor under them only when books or supplies are not "available" or "accessible" other than through the institution, and when the institution itself must provide books or supplies for "compelling health or safety" reasons. *Id.* §668.164(c)(2)(ii)-(iii). That effectively leaves institutions with a single option when seeking to utilize institutional-purchase agreements. However, that option requires an institution to demonstrate that books provided through an institutional-purchase agreement are priced "below competitive market rates." *Id.* §668.164(c)(2)(i)(A). And on top of that requirement, institutions must provide students with a mechanism to opt-out if they do not want to receive books from the institution itself. *Id.* §668.164(c)(2)(i)(B). If an institution is unable to satisfy these restrictive conditions, then it must obtain specific authorization from a student to use Title IV funds on books and supplies, and the student may look "for better value" before providing such authorization. *See* 80 Fed. Reg. at 67,185.

The Department designed this regulation to provide financial benefits to students, and Strayer shares that goal. Unfortunately, in many cases, the Department's regulation accomplishes just the opposite. Institutional-purchase agreements often provide the best value for students in the aggregate, but the Department's regulations effectively prevent institutions from employing them altogether. After all, it is next to impossible for institutions to *guarantee* that *every* book and supply is "below competitive market rates" for *every* student. 34 CFR §668.164(c)(2). A regulation that requires such a guarantee ends up doing students a disservice because it does not account for the fact that institutional-purchase agreements provide the best bargain for the average student.

To take an example, imagine that the costs of books and supplies in a particular course range anywhere from $50 to $300 (a not uncommon scenario). While some students are able to purchase course materials on the lower end of the price range, the average student pays $120. Next consider an institutional-purchase agreement, in which an institution is able to provide all required course materials to each student for a flat fee of $85. The institution can secure such a discount because it has bargaining power with booksellers: It can provide a large pool of guaranteed customers. Thus, with an institutional-purchase agreement, the average student in this example saves $35. And from day one of instruction, schools can ensure that all students have required course materials, thereby providing significant pedagogical benefits. But those obvious advantages make zero difference under the Department's existing regulations. Because the institution cannot guarantee that *every* student received a below-competitive-market price for their course materials, the *entire* arrangement violates 34 C.F.R. §668.164(c)(2).

That regulatory approach makes no sense, and the Department should reform it moving forward. Most straightforwardly, the Department can simply rescind 34 C.F.R. §668.164(c)(2), and encourage institutions to utilize cost-saving institutional-purchase agreements. In the alternative, the Department should substantially revise 34 C.F.R. §668.164(c)(2) to allow institutional-purchase agreements when an institution can demonstrate that the *average* student will save money on books and supplies at a particular institution.

If the Department leaves a variation of 34 C.F.R. §668.164(c)(2) in place rather than rescinding it altogether, it should make at least three other modifications. First, the Department should eliminate the provision that allows students to opt-out of the institutional-purchase program. *See id.* §668.164(c)(2)(i)(C). Much like health insurance, the institutional-purchase model is economically viable only if a large number of students participate. When a large number of students opt out, institutions cannot guarantee sales to booksellers; booksellers are less inclined to offer discounts to institutions; and the entire plan unravels. Second, the Department should also issue regulatory guidance explaining that *used* textbooks are considered an inferior good compared to new textbooks, and thus do not factor into the calculation of "competitive market rates" under §668.164(c)(2)(i)(A). If booksellers are required to offer prices for new books that undercut the prices of used books, negotiations for institutional-purchase agreement will not even get off the ground. Finally, the Department should provide guidance regarding *customized* textbooks and materials. The Department should explain that when a school customizes a textbook to align with its own course objectives, that customized textbook is not considered "available elsewhere or accessible by students" under the meaning of §668.164(c)(2)(ii)(A), even when generic and/or used copies of the same book are available. That way, schools can ensure that the textbooks that are most appropriate for their courses are actually used by students.

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In sum, while the Department should maintain a regulatory regime that continues to hold institutions accountable and provides robust protections for students, there are areas where the Department's regulatory approach can improve. As an initial matter, the Department should implement reforms to ensure that institutions become more financially responsible with financial aid funds, and to ensure that students are better protected from the risk of over-borrowing. Apart from those commonsense reforms, the Department also should modify regulations that stifle innovation or unnecessarily increase costs for schools or students. The Department can start by providing institutions with more leeway to leverage cost-effective institutional-purchase agreements, which allow students to save on books and supplies in the aggregate. While these recommendations are not exhaustive, they will help ensure that the Department's regulatory approach improves in critical areas.

Respectfully submitted,

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