

UNITED STATES DEPARTMENT OF EDUCATION

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BORROWER DEFENSES AND FINANCIAL RESPONSIBILITY
NEGOTIATED RULEMAKING COMMITTEE 2017-2018

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SESSION 3

+ + + + +

WEDNESDAY
FEBRUARY 14, 2018

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The Negotiated Rulemaking Committee met in Barnard Auditorium, 400 Maryland Avenue, S.W., Washington, D.C., at 9:00 a.m., Ted Bantle, Moira Caruso and Rozmyrn Miller, Facilitators, presiding.

PRESENT

TED BANTLE, Federal Mediation and Conciliation Service, Facilitator
MOIRA CARUSO, Federal Mediation and Conciliation Service, Facilitator
ROZMYRN MILLER, Federal Mediation and Conciliation Service, Facilitator
ROBERT ANDERSON, President, State Higher Education Executive Officers Association
BRYAN BLACK, Attorney
MICHAEL BOTTRILL, CFO and CEO, SAE Institute North America
KIMBERLY BROWN, Vice President, Enrollment Management and Student Affairs, Des Moines University
MIKE BUSADA, General Counsel and Vice President, Ayers Career College

STEVAUGHN BUSH, Student, Howard University
School of Law

EVAN DANIELS, Assistant Attorney General,
Government Accountability and Special
Litigation Unit, Office of the Arizona
Attorney General

CHRIS DELUCA, Attorney at Law, DeLuca Law LLC

ALYSSA DOBSON, Director of Financial Aid and
Scholarships, Slippery Rock University

JOHN ELLIS, Principal Deputy General Counsel and
Division Chief, State of Texas Office of
the Attorney General

ROBERT FLANIGAN, JR., Vice President for Business
and Financial Affairs and Treasurer,
Spelman College

JULIANA FREDMAN, Bay Area Legal Aid

JOSELINE GARCIA, President, United States
Students Association

WANDA HALL, Senior Vice President and Chief
Compliance Officer, Edfinancial Services

ASHLEY HARRINGTON, Special Assistant to the
President and Counsel, Center for
Responsible Lending

WILLIAM HUBBARD, Vice President of Government
Affairs, Student Veterans of America

KELLI HUDSON PERRY, Assistant Vice President for
Finance and Controller, Rensselaer
Polytechnic Institute

GREGORY JONES, President, Compass Rose
Foundation

AARON LACEY, Partner, Thompson Coburn LLP

DALE LARSON, Vice President for Business and
Finance/Chief Financial Officer, Dallas
Theological Seminary

KAY LEWIS, Assistant Vice-Provost, Enrollment
Executive Director of Financial Aid and
Scholarships, University of Washington

DAN MADZELAN, Associate Vice President for
Government Relations, American Council on
Education

JULIANNE MARIE MALVEAUX, President Emerita,
Bennett College, President and Owner of
Economic Education

SUZANNE MARTINDALE, Senior Attorney, Consumers Union

MICHALE MCCOMIS, Executive Director, Accrediting Commission of Career Schools and Colleges

JEFFREY MECHANICK, Assistant Director-Nonpublic Entities, Financial Accounting Standards Board

SUSAN M. MENDITTO, Director, Accounting Policy, National Association of College and University Business Officers

LODRIGUEZ MURRAY, Vice President, Public Policy and Government Affairs, United Negro College Fund

BARMAK NASSIRIAN, Director of Federal Policy Analysis, American Association of State Colleges and Universities

JAY O'CONNELL, Director of Collections and Compliance, Vermont Student Assistance Corporation (VSAC)

WALTER OCHINKO, Research Director, Veterans Education Success

JOHN PALMUCCI, Interim President, Chief Business Officer, Maryland University of Integrative Health

KAREN PETERSON SOLINSKI, Executive Vice President, Higher Learning Commission

LINDA RAWLES, Rawles Law

ASHLEY ANN REICH, Senior Director of Financial Aid Compliance and State Approvals, Liberty University

SHELDON REPP, Special Advisor and Counsel, National Council of Higher Education Resources

DAWNELLE ROBINSON, Associate Vice President for Finance and Administration, Shaw University

RONALD E. SALLUZZO, Partner, Attain

ABBY SHAFROTH, Staff Attorney, National Consumer Law Center

VALERIE SHARP, Director, Office of Financial Aid, Evangel University

COLLEEN SLATTERY, Federal Contract and Compliance Officer, MOHELA

KAREN PETERSON SOLINSKI, Executive Vice
President, Higher Learning Commission
JONATHAN TARNOW, Partner, Drinker Biddle & Reath
LLP

STAFF PRESENT

CAROLINE HONG, Office of General Counsel
BRIAN SIEGEL, Office of General Counsel
JOHN KOLOTOS, Office of Postsecondary Education
JIM MANNING, Acting Under Secretary of Education
ANNMARIE WEISMAN, Federal Negotiator, Office of
Postsecondary Education

1 P-R-O-C-E-E-D-I-N-G-S

2 9:06 a.m.

3 MR. BANTLE: Good morning, everybody.

4 It is 9:06, and we should probably get started.

5 We do have a very busy schedule today. We are
6 going to start off, as I mentioned yesterday, with
7 Issue Paper 3. We have individuals from the
8 subcommittee here to help us with that issue paper.

9 After that, we'll return to Issue Paper
10 2 to kind of run through any final concerns we have
11 on 2. And then we have the intent and the goal
12 to get through 4 through 8 as well today. So we
13 could say tomorrow we'll come back, we'll revisit
14 1 and 2. So that is a lot to do today, I know.

15 Okay, so as I said, we're starting with
16 Issue Paper 3, we'll circle back to finish up 2.

17 And then we want to get through 4 through 8 as
18 well today, so we can circle back to 1 and 2
19 tomorrow.

20 We have a hard stop at noon, just so the
21 department can continue working on the suggestions
22 you all had from Issue Paper 1 and 2. But without
23 further ado, I will turn it over to Annmarie of

1 the department to take us through Issue Paper 3.

2 MS. WEISMAN: Good morning. Thank you
3 again for being back with us for your two previous
4 days of hard work and your anticipated hard work
5 in the next two. I don't think we need those lights
6 on. I heard several no's around the table. Thank
7 you, Scott.

8 Okay, so are we all okay with the
9 lights, the temperature, as best we can control
10 it, and the sound? Okay. I got some thumbs up,
11 so thank you.

12 We'd like to again, as Ted mentioned,
13 get into Issue Paper 3. We do have members of the
14 subcommittee here. So keep in mind, I am not only
15 not an attorney, but I am also not an accountant.

16 So when the questions get super technical beyond
17 where my reach is, I do have some help on the bench
18 behind me.

19 Starting off at the top, we've added
20 in some additional regulatory citations that we
21 will now be impacting. That includes 34668.91,
22 668.94, as well as 668.172. Both, again, also
23 including 668.171 and 668.175. This is financial

1 responsibility and administrative capability.

2 The new changes that we have here are
3 to update the actions of the hearing official to
4 identify actions or events that the secretary may
5 consider when determining if an institution is
6 financially responsible; providing that the
7 secretary may accept other types of financial
8 protection in addition to letters of credit; giving
9 a four-year transition period for operation leases
10 entered into before January 1, 2019.

11 Again, that one is very technical.
12 This is related to the Financial Accounting
13 Standard Board, or FASB changes that we tasked the
14 subcommittee with looking at.

15 And also, this paper also will update
16 the appendices to subpart L to account for changes
17 in accounting standards and terminology. So
18 again, related to the subcommittee's work.

19 So looking first at 668.91, Initial and
20 Final Decisions. We turn over to page three.
21 We've updated text in (iii), previously saying,
22 "Surety in the amount specified by the secretary."

23 We now clarify that by saying a letter of credit

1 or other financial protection under 668.15, or
2 668.171.

3 If the hearing official finds that the
4 amount of the letter of credit or other financial
5 protection established by the secretary under
6 668.15 or 668.175 was appropriate, unless the
7 institution can demonstrate the amount was not
8 warranted.

9 Continuing on in (iv), talking about
10 termination action. In a termination action taken
11 against an institution or a third party servicer
12 based on the grounds that the institution or
13 servicer failed to submit a required audit by the
14 deadlines established in 668.23, or otherwise
15 failed to comply with the requirements of 668.23.

16 If the hearing official finds that the
17 institution or servicer failed to meet those
18 deadlines or requirements, the hearing official
19 finds that the termination is warranted.

20 We've done some renumbering here in (v)
21 because of the addition of (B). The addition of
22 (B) reads, In the limitation or termination action
23 against an institution on the grounds that the

1 institution is not financially responsible.

2 We then continue on to say upon proof
3 of conditions in 668.174(a), the hearing officials
4 finds that the limitation or termination is
5 warranted, unless the institution demonstrates
6 that all conditions in 668.174(f) have been met,
7 or that the hearing official finds that the
8 limitation or termination is warranted unless the
9 institution demonstrates that all applicable
10 conditions described in 668.174(b)(2) or 175(g)
11 have been met.

12 So I'd like to stop there and take any
13 comments or feedback on that text.

14 MR. BANTLE: So we are looking at
15 668.91 in its entirety.

16 PARTICIPANT: I know this is skipping
17 around just a little bit, but I'd like it on the
18 record that in November of last year there was a
19 handful of members of the Senate that specifically
20 called on the department to provide full relief,
21 understanding the department's position is not to
22 provide full relief as a presumption. But I just
23 would like to flag that letter that was shared for

1 the record.

2 MR. BANTLE: And as noted, we will be
3 returning to 1 and 2. But right now, can we focus
4 on any comments or suggestions on 668.91. And just
5 a facilitator's note, because we do have a tight
6 timeline today, we're going to hold you to suggested
7 changes to the regulatory text, hold all
8 negotiators pretty firm.

9 Can we presume from the silence that
10 the group is comfortable with 668.91 as written?

11 Show of thumbs? Okay, I see no thumbs down.
12 We'll move on to the next section.

13 MS. WEISMAN: So moving on to 668.94,
14 Limitation. As we noted earlier, those three
15 asterisks that lead off this section show that the
16 language leading up to that has not changed.

17 But just to give you some context, this
18 is the section on limitation. And the stem that
19 leads into that is, A limitation may include as
20 appropriate to the title IV HEA program in question.

21 And then (h) becomes, "A change in the
22 participation status of the institution from fully
23 certified to participate, provisionally certified

1 to participate" under 668.13(c).

2 We then renumber, and I'd like to
3 continue on to 668.171. We've clarified some
4 wording here in (a)(2). Instead of saying,
5 "Administer properly the title IV HEA programs in
6 which it participates", because this is about
7 financial responsibility, that belongs more in
8 Administrative Capability, which is 668.16.

9 So we struck that text, and instead
10 we've added in the text, "Meet all of its financial
11 obligations." And then added in (3), "Provide the
12 administrative resources necessary to comply with
13 title IV HEA of program requirements."

14 And then (b), again, we're trying to
15 conform with our renumbering. And we say, "Except
16 as provided under paragraph (c) and (d) of this
17 section, the Secretary considers an institution
18 to be financially responsible if the Secretary
19 determines that."

20 The next change comes down in (i), where
21 we say the institution part of (4) is the
22 institution is able to meet all of its financial
23 obligations, including making refunds.

1 And then (i) becomes, Under its refund
2 policy and the returning title IV HEA programs for
3 which it is responsible under 668.22, which is the
4 R2TIV, or return of title IV regulations, and
5 provide the administrative resources necessary to
6 comply with title IV HEA program requirements.

7 An institution may not be able to meet
8 its financial or administrative obligations if it
9 is subject to an action or event described in
10 paragraph (c) of this section that has or is likely
11 to have an adverse material effect on the
12 institution's operations or ability to continue
13 as a going concern.

14 And then we've also updated (5) on the
15 top of page four, where we say, The institution
16 or persons affiliated with the institution are not
17 subject to a condition of past performance under
18 668.174(a) or (b).

19 And I'd like break it there.

20 MR. BANTLE: Comments on 668.94 and
21 668.171, up to and including number (5).

22 PARTICIPANT: I just have a question
23 for the department. It's just to make sure I

1 understand. Could you just repeat, Annmarie, I'm
2 sorry, but could you repeat the context of (h) on
3 page two.

4 MS. WEISMAN: Sure. So (h) on page two
5 is part of the limitation text. And so that text
6 begins, A limitation may include, as appropriate
7 to the title IV HEA program in question. And then
8 that would be a change in the participation status
9 of the institution from fully certified to
10 participate as provisionally certified.

11 PARTICIPANT: I understand, thanks.

12 MR. BANTLE: Suggested edits or
13 concerns?

14 PARTICIPANT: This is a follow-up
15 question that I had asked last time, and it doesn't
16 seem to have changed. So I just want to understand
17 the context. In (4)(ii), and then it goes on in
18 (c) and (d), we talk about debts and liabilities.
19 And that's our liabilities.

20 So I don't know that we need the extra
21 wording, unless they're meant to mean two different
22 things. So I would propose striking debts, and
23 --

1 MS. WEISMAN: I'm sorry, where are you?

2 PARTICIPANT: The top of page four.

3 And there's nothing stricken there, there's nothing

4 in red. But it goes on throughout the rest of the

5 paper to talk about debt or liability, or debt and

6 liability. And in my mind, it's the same thing.

7 So, unless it --

8 MS. WEISMAN: In our mind it is not the

9 same thing. Someone could owe funds from a fine

10 action, and a fine action is actually something

11 distinct from a liability. We categorize those

12 separately, so we would expect to see both.

13 PARTICIPANT: I'm sorry, but how do you

14 define a debt different from a liability? Because

15 in my mind, they are the same.

16 MS. WEISMAN: When we talk at the

17 department about liabilities, we're generally

18 talking about something that is a payment of the

19 result, for example, of a program review or an audit

20 resolution.

21 So when you have a liability, it is

22 specifically the amount where you were found to

23 be at fault. So if you didn't pay your return of

1 title IV funds in the amount of \$5,000, then you're
2 assessed that \$5,000 to repay back to the
3 department.

4 Contrast that with if you did not file
5 your iPads timely, we would issue a fine action.

6 And that fine action might be \$4,000. But we
7 wouldn't categorize that the same. We would
8 consider that to be a debt to the department.

9 PARTICIPANT: From the school's
10 perspective, they're both liabilities, though.

11 MR. BANTLE: Any other negotiator
12 comments on this, that question, debts versus
13 liabilities?

14 MS. WEISMAN: I would just also note
15 that it's existing text, that this is not text that
16 we've changed here within the context of this
17 rulemaking.

18 PARTICIPANT: Understood, but when we
19 get into (c) and (d), I think it complicates it
20 a little more. Because those, when you're talking
21 about you're assessing something based on a
22 borrower defense claim, that becomes a liability.
23 It's not a debt, it's a liability for the school.

1 So, it's just, when you said you're not
2 an accountant, for business officers reading this,
3 this is confusing because it's the same, they're
4 the same thing.

5 MR. BANTLE: Kelli, do you have a
6 proposal of how that could be clarified
7 incorporating the department's perspective that
8 they are different?

9 Any additional comments on this
10 section? Show of thumbs on 668.94 and 668.171,
11 up to and including (5)? William.

12 MR. HUBBARD: On (c), I propose that
13 there's a modification. Instead of saying --

14 MR. BANTLE: I think that's the next
15 section, yup.

16 MR. HUBBARD: All right.

17 MR. BANTLE?: So let's get that show
18 of thumbs, and then we can move on to William's
19 card.

20 I see no thumbs down, so Annmarie, can
21 you take us into the next section, and then we have
22 William's comment on (c).

23 MS. WEISMAN: Picking up then on page

1 four, (c), other factors or events, The secretary
2 may determine that an institution is not able to
3 meet its financial or administrative obligations.

4 Under paragraph (b) (4) of this section,
5 If after the end of the fiscal year for which the
6 secretary has most recently calculated an
7 institution's composite score, the institution
8 incurs a debt or liability from borrower defense
9 claims adjudicated by the secretary, and as a result
10 of that debt or liability, the institution's
11 recalculated composite score is less than 1.0 as
12 determined by the secretary under paragraph (d)
13 of the section.

14 (2) talks about the idea of a failing
15 score from the result of the withdrawal of owner's
16 equity. That would apply specifically just to
17 for-profit institutions, again, because of the way
18 their financials are structured.

19 Something I'd like to suggest, and it's
20 not reflected in this issue paper, but I would want
21 to move item (4) and replace that with (3), and
22 just reverse those. Because they both apply to
23 for-profit institutions, and so I'd like to group

1 them.

2 So I'd like to move (4) and make that
3 the new (3), where it says, For its most recently
4 completed fiscal year, a proprietary institution
5 did not derive at least ten percent of its revenue
6 from sources other than title VI HEA program funds,
7 as provided under 668.28(c).

8 Then what I would propose would be the
9 new (4) applies to publicly traded institutions,
10 and that would be the US Securities and Exchange
11 Commission, the SEC, notifies or warns the
12 institution that it may suspend trading on the
13 institution's stock, or suspends trading on its
14 stock.

15 (ii) is that the institution failed to
16 file a required annual or quarterly report with
17 the SEC within the time period prescribed for the
18 report, or by any extended due date under SEC
19 regulations.

20 Then (iii) is that the exchange on which
21 the institution's stock is traded notifies the
22 institution that it's not in compliance with those
23 exchange regulations, or its stock is delisted for

1 any reason. And I'd like to, because of the
2 importance of this section, I'd like to keep it
3 fairly narrow and just discuss those pieces right
4 now.

5 MR. BANTLE: William, then Aaron.

6 MR. HUBBARD: Thanks. On (c) under
7 (5), I propose that instead of a may, we modify
8 the language to read, "When the Secretary
9 determines that an institution." It may seem like
10 a minor change, but I just really think that's an
11 important one.

12 MR. BANTLE: Comments on that, or
13 Annmarie?

14 MS. WEISMAN: So essentially what that
15 does is requires the secretary to act, and it was
16 very important to us here that we make these
17 discretionary items. So I think the cadence of
18 keeping that as a may is important to us.

19 MR. BANTLE: Additional comments on the
20 proposed edit?

21 MR. LACEY: Yeah, I agree with the
22 department. I mean, there are, these are
23 indicators of potential financial stress, they're

1 not dispositive of financial stress.

2 There are lots of reasons that an
3 institution, despite experiencing one of these
4 items, could still be financially sound and in good
5 shape. And the secretary needs the discretion to
6 be able to dialog with the institution to determine
7 whether or not this actually means that the
8 institution is not financially responsible.

9 So I wholeheartedly support the
10 department's position.

11 PARTICIPANT: Linda.

12 MS. RAWLES: I wholeheartedly support
13 the department's position on that issue, and I have
14 another language change when you're ready. Should
15 I give it? First of all, I appreciate the changes
16 that were made since the last session. Very
17 appreciated that.

18 On (iii), where it reads, "The exchange
19 in which the institution's stock is traded notifies
20 the institution that it is not in compliance with
21 exchange requirements, or its stock is delisted
22 for any reason", I propose that instead of, "Or
23 its stock is delisted for any reason", we say, "And

1 as a result its stock is delisted."

2 I'm not an SEC lawyer, but I'm told by
3 many of them that your stock can be delisted for
4 legitimate reasons. And I think if your stock is
5 delisted for a legitimate reason, perhaps you're
6 going private, this shouldn't kick in. So maybe
7 the department has a valid reason for that, but
8 I'm open to hearing it.

9 PARTICIPANT: Annmarie.

10 MS. WEISMAN: Sure, and I think that
11 for that one, I can say that our reason is that
12 we did make these discretionary, with the idea that
13 we're taking a look. We're not making a final
14 determination just because of this. But it, to
15 us, signals that we want to take a look at it.

16 So we want to be clear that we're looking
17 at any delisting for any reason.

18 PARTICIPANT: Linda, did you have a
19 follow-up?

20 MS. RAWLES: Then I'm all right with
21 that, as long as the language stays discretionary.

22 PARTICIPANT: Michael, and then Chris.

23 PARTICIPANT: On that same item, I do

1 think it's useful to include the language, And as
2 a result. Because you want to take a look when,
3 not the legitimate claims, like we're going
4 private, but it's that they've been notified that
5 the institution's not in compliance with exchange
6 requirements.

7 And as a result, its stock, and I would
8 replace is with may be, because I think you want
9 to be looking at it before the delisting occurs.

10 So I would suggest that you consider the
11 institution is not in compliance with exchange
12 requirements, and as a result, its stock may be
13 delisted.

14 MS. WEISMAN: So I agree with that, but
15 I want to make sure that would still cover then
16 is delisted. May be or is delisted?

17 PARTICIPANT: Okay, sure.

18 MS. WEISMAN: Something that would
19 include both. And I'm not sure about the as a
20 result, because I think we want to know that they're
21 not in compliance with requirements, as well as
22 the idea that it's been delisted or could be
23 delisted. Yes, we are definitely looking for early

1 warning signs. But that's my concern with that
2 text.

3 PARTICIPANT: Well, then, you could
4 then keep -- Oh, I'm sorry. Sorry, Barbara, I
5 didn't see you there.

6 MS. WEISMAN: Thank you for your
7 patience. So the concern is that the delisting
8 of stock, whether it's a may be or is, is not
9 connected enough to the rest of (iii).

10 So we'd like to propose moving that to
11 become a new (iv), so that (iii) would remain, "The
12 exchange on which the institution's stock is traded
13 notifies the institution that it is not in
14 compliance with exchange requirements."

15 And then the new (iv) would say, and
16 we may need to wordsmith this a little bit, but
17 basically that the stock is delisted or may be
18 delisted for any reason. So once we see that up
19 on the screen, we can decide if that needs a little
20 tweaking.

21 MR. BANTLE: So we have the cards noted,
22 but comments on that suggested edit?

23 PARTICIPANT: So the challenge I have

1 with may is, as a practical matter, institutions
2 would never know when the notice requirement was
3 triggered. Because an institution's not going to
4 know if its stock may be delisted, and I don't think
5 that's a fair obligation to require of an
6 institution to try to guess as to what the exchange
7 may do.

8 So I would, you know, if you want to
9 include is delisted, I don't have a strong opinion
10 on that. As long as this remains discretionary,
11 I think that makes sense. But I don't think may
12 would work.

13 PARTICIPANT: Valerie, did you also
14 have a comment on this language? Okay. Barkmak.

15 MR. NASSIRIAN: This is not a line edit,
16 this is more of a substantive comment, on subsection
17 3.

18 I just want to bring to your attention
19 the ridiculousness of if these are supposed to
20 protect the taxpayers against possible collapse
21 of a publicly traded entity to which the taxpayers
22 are sending hundreds of millions of dollars of
23 public money, (i) and (iii) are basically

1 meaningless.

2 Because that's an entity that is at this
3 point going to crash. So (ii) is an administrative
4 screw-up, if they didn't file their paperwork
5 properly.

6 And the question I would encourage the
7 department to contemplate is if you hired a plumbing
8 company to come work on your house and it was a
9 publicly traded entity, and you wanted to assure
10 yourself that they do the job for the money you're
11 giving them, would you be satisfied with any of
12 these procedural safeguards?

13 Or would you ask other questions, like
14 does the entity's capitalization give me any
15 assurance that the amount of money I'm sending them
16 is going to be properly used?

17 MS. WEISMAN: So I think we tried to
18 find items that we were comfortable with. At this
19 point, rather than stating that these items are
20 ridiculous, I would challenge you to, or the rest
21 of the table, to suggest other triggers that you
22 might have in mind that you feel would do what we're
23 trying to accomplish here that we have not already

1 considered in previous regulations.

2 Because as we stated, we have had some
3 issues with ones that were used in the past. So
4 we've already considered those. But if people have
5 new ideas that we have not already entertained,
6 this would be the time to bring those us.

7 MR. NASSIRIAN: Market cap in
8 comparison to the cashflows that the entity derives
9 from the Department of Education. That'd be a
10 reasonable thing, right? If you have only ten
11 cents on you, you probably shouldn't receive, you
12 know, a million dollars of taxpayers' money.

13 MS. WEISMAN: Can you suggest some text
14 for us?

15 MR. NASSIRIAN: I shall.

16 PARTICIPANT: Thank you. Chris.

17 MR. DELUCA: Yeah. Just kind of
18 getting back to the question of you know, again,
19 just supporting that this is discretionary and not
20 the change that was proposed to make this mandatory
21 and the importance of that, and just recognizing
22 and just reminding folks we haven't gotten there
23 yet.

1 But you know, it tied in with (c) further
2 on in Issue Paper 3, or in this section, there is
3 s requirement for notice, so it all ties in together
4 again. So that the school still has to provide
5 a form of notice to the department for them to have
6 the information then to make their discretionary
7 determination.

8 PARTICIPANT: Aaron? Thank you.
9 Valerie. Okay, Linda.

10 MS. RAWLES: I just wanted to state I
11 agree with Aaron's point, and it's not fair for,
12 the school would never know if you have the word
13 may when they would have to give notice. So I
14 support the language that the department has, as
15 long as it remains discretionary.

16 PARTICIPANT: Michael, and then Will.

17 PARTICIPANT: So I'm still going to
18 advocate for the may, because I think that you can
19 get to the notice issue by using the same route
20 that you used in (iii), which is the exchange on
21 which the institution's stock is traded notifies
22 the institution that its stock may be delisted,
23 or the stock is delisted for any reason.

1 Now, you could say may be delisted for
2 the reasons identified in (iii) above. Or is
3 delisted for any reason. I just think that you
4 want to get to the, you might be kicked off of the
5 exchange earlier than is.

6 MS. WEISMAN: That is what our goal was
7 here, and I understand your position about the idea
8 of may be, that it would be helpful for us to know
9 if there was a thought from the SEC that they may
10 be delisted.

11 So I guess then I would say does that
12 satisfy those who had concerns that an institution
13 wouldn't know? Because what we are saying is that,
14 and again, I have to look at the language as we've
15 tweaked it. But we'd want it to be that they've
16 been notified that their stock is going to be.
17 So maybe we can play with what's there to kind of
18 bring us all together.

19 PARTICIPANT: So then, okay. So one
20 other way would be to do it -- in (iii) you've got
21 the notification, and you keep their, or its stock
22 may be, and as a result its stock may be delisted.

23 And then keep (iv), The stock is delisted for any

1 reason.

2 So that way you're getting your may and
3 you're getting your is. And the may is tied to
4 the notification of noncompliance with the
5 requirements.

6 MS. WEISMAN: For me, I think that
7 accomplishes what the department's goal was.

8 MR. BANTLE: Comments on that edit?

9 PARTICIPANT: Aaron?

10 MR. LACEY: So I still have the concern,
11 you know, as a result the stock may be delisted.

12 I don't do SEC stuff, but I deal with regulators
13 all the time. And it's just asking an institution
14 to sort of speculate and notify. But I have an
15 alternative language.

16 What if we said, and you know, the
17 exchange on which the institution's stock is
18 traded, notify them that you're not in compliance,
19 and that the stock has been or will be delisted.

20 I mean, if the SEC notifies you that
21 it will be delisted, maybe it hasn't happened yet,
22 you know, that would at least give you some looking
23 into the future, you don't have to wait until the

1 action's actually been taken.

2 But I just, I'm just telling you as a
3 practical matter, if you tell schools you've got
4 to speculate, you're going to have wild
5 inconsistency.

6 MS. WEISMAN: So --

7 MR. LACEY: I'm not going to die on
8 this.

9 MS. WEISMAN: I appreciate what you're
10 saying.

11 MR. LACEY: I'm not an SEC attorney,
12 but it's just a really hard thing.

13 MS. WEISMAN: No, I appreciate your
14 comment. But what I'm looking for is as much of
15 an early warning system as we can get. And what
16 I'm saying is I'm not asking the institution to
17 speculate. I'm saying if the SEC, let's assume
18 you're a publicly traded institution.

19 The SEC tells you that it may suspend
20 your stock or delist you. Then you know, you've
21 heard from them, and I want you to report that to
22 me. So if our language is not there yet, then I
23 think we can get there, and I think we would both

1 be comfortable.

2 MR. BANTLE: And I'm just seeing some
3 body language. Michael, do you have an idea of
4 how to do that?

5 PARTICIPANT: No, I don't, no. But I
6 do want to be mindful, I don't want that and to
7 be conjunctive, to be both of those things need
8 to be satisfied. So I got to think about that a
9 little bit more.

10 It's not that, well, they notified me
11 that we were out of compliance, but they didn't
12 say they might delist us. Right? So I don't want
13 those two things to have to be fulfilled. So I
14 think you need to just --

15 MR. BANTLE: So maybe we've gotten a
16 little too deep into the edits and we just need
17 to kind of get back to the concept that there seems
18 to be agreement on.

19 MS. WEISMAN: I think that's why I
20 wanted to have the idea of may be delisted down
21 with (iv) and is delisted. But I think we have
22 to add in some notification requirement, that the
23 institution is notified that it may be or is being

1 delisted. Again, we can play with that text a
2 little, but that's where I'm thinking.

3 PARTICIPANT: Linda.

4 MS. RAWLES: I was just going to say,
5 I could live with Annmarie's language, but I don't
6 know if she remembers it now because we've come
7 so far from. But what you said a few minutes ago
8 was fine, but I didn't write it down, you didn't
9 write it down.

10 PARTICIPANT: Any other suggestions
11 for this language?

12 MR. BANTLE: Barmak, is this a
13 suggestion on this language, or additional?

14 MR. NASSIRIAN: Yes.

15 PARTICIPANT: Okay.

16 MR. NASSIRIAN: I want to support
17 Aaron's point, because it really does make a
18 difference. Just as a matter of historical record,
19 the New York Stock Exchange began proceedings to
20 delist ITT on September 6, 2016. In other words,
21 on the day that the school shut down.

22 MR. BANTLE: So Barmak, you're
23 supporting the language as it is on the board right

1 now?

2 MR. NASSIRIAN: Is could be, at that
3 point, you know, you've already hit the iceberg,
4 it makes no difference.

5 PARTICIPANT: Any other comments on
6 this language? Okay, Will, you're next.

7 MR. HUBBARD: So I have some additional
8 proposed language. Is now a good time? Okay,
9 great. So this is kind of lengthy, so if you want
10 me to grab your email, I could send it on over.

11 But I propose an addition of a (5) to
12 this list, which would read, Debts and borrower
13 defense-related lawsuits. I've got a sub (a) and
14 (b) to that, but I'll just stick with this for
15 concept's sake for now.

16 As well as adding a (6) on, oh terrific,
17 on cohort default rates, except as provided under
18 paragraph (h) (3) of the section, An institution
19 is not able to meet its financial or administrative
20 obligations under paragraph (b) (3) of this section,
21 and the institution's two most recent official
22 cohort default rates are 30 percent or greater,
23 as determined under subpart (n) of this part.

1 Unless, and then there's some text under
2 that -- I'm just doing the high level concept, and
3 then I'll send this all to him.

4 MS. WEISMAN: Okay, but what I'm
5 hearing are items that were in the 2016 reg. And
6 so we have already considered those items at the
7 department, and for various reasons we have ruled
8 them out. So if they are from the 2016 reg and
9 are not already up on the screen, we've already
10 eliminated them from consideration.

11 MR. HUBBARD: Okay, I have (7) I believe
12 is new as well.

13 MS. WEISMAN: So if you have ones that
14 are new, I'd be happy to entertain them.

15 MR. HUBBARD: Okay. And then
16 potentially fluctuations in title IV revenue beyond
17 one standard deviation. I haven't, you know,
18 completely refined that language, but I think the
19 idea that if title IV funding is swinging wildly
20 left and right up and down, that is definitely an
21 indication of some potential concern. So we can
22 maybe flesh that out a little bit.

23 PARTICIPANT: Any other comments on

1 this section? Abby?

2 MS. SHAFROTH: Yeah, I was hoping to
3 hear more from the department about why those
4 wouldn't be considered. Because I also was, I had
5 also noted the lack of triggers for things like
6 lawsuits that could form the basis for, lawsuits
7 or even final judgments that would create a
8 liability on the school under these proposed
9 borrower defense regulations.

10 That seems like a really important early
11 warning trigger, and that's the sort of thing I
12 think that was highlighted in the Office of
13 Inspector General's report last year as being an
14 important improvement to the department's process
15 for protecting taxpayers and students from the
16 potential of schools not being able to make students
17 or taxpayers whole.

18 So I hear you saying that the
19 department's considered it and isn't willing to
20 entertain discussion, but I was hoping you could
21 give us a better understanding of why so that we
22 could help come up with other alternatives.

23 PARTICIPANT: Annmarie.

1 MS. WEISMAN: So the concern is that
2 there is not a close enough tie-in to borrower
3 defense from some of them, such as cohort default
4 rate.

5 Our feeling is that that is not
6 necessarily connected in any way to borrower
7 defense claims. Things like lawsuits, we've had
8 numerous conversation about the idea of lawsuits
9 or investigations that are pending. The feeling
10 is that anyone can file a lawsuit at any time for
11 almost any reason.

12 And they also may not be indicative of
13 anything related to borrower defense or anything
14 that would create borrower defense claims in the
15 future. We did not feel that they were good
16 predicative indicators of potential liabilities
17 that were connected enough to this regulation.

18 PARTICIPANT: Valerie.

19 MS. SHARP: Yeah, that's okay. Okay,
20 I do apologize, I know that we asked this question
21 before. Just, it's still not clear in my mind.

22 So on (c) (1), or the number one right
23 after (c) at the top of the page on four, where

1 you're talking about recalculating the composite
2 score after it's been calculated if you incur a
3 borrower defense debt or liability after that score
4 has been calculated, are you going to be, is this
5 just a recalculation kind of as a warning sign,
6 or are you actually recalculating the composite
7 score so that a school's composite score could then
8 change, the official score, change midyear?

9 And so that if they dropped below the
10 1.0, any of the penalties or impacts of that would
11 occur in the middle of a year?

12 MS. WEISMAN: So we're specifying here
13 that it's at the end of the fiscal year for which
14 we have the most recently calculated score. And
15 we are going to go back and recalculate if we have
16 claims, just to give us a sense of would you then,
17 as a result of those claims, would your score then
18 fail.

19 MS. SHARP: So let me just use a time
20 frame then. So normally, we turn in our audit end
21 of January. It's usually March/April, in that time
22 frame, May, where we get our score from the
23 department and we start conversations. It just

1 depends on the department, you know, where they're
2 at on their time frames.

3 And then so the discussion starts on
4 the scores, the school is notified. So as a part
5 of that calculation in the spring after our audit
6 is submitted, that's when you're also looking back
7 to borrower defense to say does that, if we didn't
8 have borrower defense, the score would be, the
9 official score, would be this. But since we do,
10 the official score is this.

11 It's not that you're going to send the
12 school a letter in March and say this is your score,
13 but then in May or June, you go back and say, oh,
14 now in May, we had some claims. So that it's now
15 in June, we're going to send them another letter
16 and say, I'm sorry, your official score is now this.

17 And you now, if you've dropped below a 1.0, there's
18 new impact and penalties.

19 I'm just trying to think from an
20 operational standpoint how that would work in the
21 timing if this scores changed. Because when you
22 drop below the 1.0, you know, there are impacts
23 as far as heightened cash monitoring or CERA.

1 Yeah, even if you don't.

2 So a school's score changing mid-, after
3 you've gotten that official score could be quite
4 a big switch that you operationally have to figure
5 out how to handle.

6 PARTICIPANT: Annmarie.

7 MS. WEISMAN: So we believe the
8 language is okay as it is. Our intention is that
9 we can go in at any time. So once you have a
10 composite score, if we've got a batch of claims,
11 we would go in and use the result of that claim
12 or those claims, look at the value of them, and
13 recalculate a composite score. And then determine
14 if there are consequences.

15 So in other words, if you fail as the
16 result of \$100,000 worth of claims, then we would
17 assign to you whatever consequences we would
18 typically assign.

19 If you have two claims and they're for
20 \$10,000 total, most likely it's not going to have
21 an effect on the institution. But we want to take
22 a look and say, once you have this liability to
23 us, what will that do, and do we need to collect

1 other surety, for example, to protect us.

2 PARTICIPANT: Clarification. Would
3 the claim be effective upon notification to the
4 institution, or would it be effective at the
5 beginning of the next fiscal year?

6 MS. WEISMAN: When you're talking about
7 a claim, we're talking about claims that have been
8 paid out that we've then come to the institution
9 and said, You have a liability to pay this claim.
10 So that could occur at any time.

11 We would look at it, my guess is once
12 we had a batch of them. I don't think we're going
13 to look after every claim. I think we would do
14 it when we felt we had a concern that there was
15 a large number.

16 PARTICIPANT: Other proposals or
17 suggestions for this section? Do you have a
18 question or?

19 MR. LACEY: Well, it's just a
20 follow-up. Am I allowed to follow-up?

21 PARTICIPANT: Okay, briefly.

22 MR. LACEY: I'll just reinforce
23 Valerie's point. The concern for me is not what

1 the department may do. The concern for me is that
2 there are creditors and states and so many other
3 entities that use the composite score for purposes
4 of authorization and their own determinations.

5 So I'll give you a hypothetical. Lots
6 of institutions in the country, many, many
7 nonprofit traditional institutions participate in
8 CERA. They offer online education, and the basis
9 for their ability to offer online education to all
10 of these students without having to have approval
11 from all those individual states is the fact that
12 they're CERA-authorized, right?

13 Part of being CERA-eligible is your
14 composite score. So if you guys calculate an
15 alternative composite score halfway through the
16 year and the school has enrolled all of these
17 individuals from 49 different states or around the
18 country, and the composite score drops below the
19 CERA threshold, suddenly they're not authorized
20 to provide title IV to all those students
21 potentially that are enrolled.

22 So I think there is real merit to
23 considering whether or not -- you know, I'm not

1 trying to undermine the department's ability to
2 act on this composite score.

3 But characterizing it as an alternative
4 composite score, you know, for the basis of actions
5 in this are just some way so that an institution
6 operationally isn't going to be hung out halfway
7 through the year having enrolled a bunch -- and
8 the students, by the way, also won't be hung out.

9 I mean, you could have who knows how
10 many students have enrolled, and the school might
11 say, well, look, we can't, we're no longer
12 authorized to enroll students in your state because
13 we lost the CERA authorization.

14 I just think this is a really important
15 point that's being raised by Valerie, and it may
16 be that it can be solved by the department by drawing
17 a distinction between your official composite score
18 you get based on your prior year financials, and
19 an alternative composite score that is calculated
20 for the purpose, you know, of dealing with these
21 borrower defense claims that have arisen.

22 I don't know if the department's
23 amendable to that, but Valerie's point is a very,

1 very important one.

2 PARTICIPANT: Okay, so I think the
3 department has heard that concern and point. Dan,
4 do you have language or a proposal?

5 MR. MADZELAN: I have a follow-up
6 concern. So you've said that, you know, you have
7 this kind of interregnum calculation of the
8 composite score. And if there's, your example,
9 \$100,000 of borrower defense claims, you want to
10 take that in consideration.

11 Would you also take into consideration
12 at that time if coincidentally there was a \$100,000
13 unrestricted donation to the college?

14 So I'm also asking this in the context
15 of the statutory provision that says, with respect
16 to financial responsibility, that there shall be
17 an audit of the institution's financial condition,
18 of the institution in its entirety. And so I think
19 that's what the ordinary composite score does,
20 because you're using an audited financial
21 statement. It's the entirety of the institution.

22 And now you're taking one element, one
23 factor in that formula, and modifying it. And

1 it's, at that point in time, I don't see how you're
2 looking at the institution, its financial condition
3 in its entirety.

4 PARTICIPANT: Michael and then Walter.
5 Okay. Walter, any proposals or suggestions for
6 this section?

7 MR. OCHINKO: I had a question.

8 PARTICIPANT: Oh, your mic's not on,
9 Walter. Oh, press and hold. There you go.

10 MR. OCHINKO: I had a question. I
11 don't want to beat a dead horse, but I understood
12 what you said, that you did not want to include
13 anything that was in the 2016 regulation. But for
14 example, Corinthian. Prior to its closure, the
15 department fined it \$30 million for falsifying job
16 placement rates.

17 Would something like that be taken into
18 consideration in the draft rules we have here?

19 MR. BANTLE: Walter, do you have a
20 proposal on how that, how you think that could be
21 quantified?

22 MR. OCHINKO: I mean, this is something
23 beyond my, you know, ability to I think make a

1 specific suggestion. Basically we were told we
2 can't suggest anything that's already been in the
3 prior regulation. But I'm asking if maybe I'm
4 missing something. Maybe in the way it's drafted
5 already, there is something that would capture
6 that?

7 PARTICIPANT: Okay, Michael.

8 PARTICIPANT: Can I wait to hear if
9 Annmarie's going to respond to William's? Well,
10 I've been kind of going back and forth as to whether
11 or not that would be a useful element to consider
12 when looking at financial responsibility. And
13 that would be the institution incurs a liability
14 from the department for noncompliance with HEA
15 regulations.

16 And so then the questions becomes, well,
17 if we want to do that, you know, I get program
18 reviews that have a liability for \$64, and you know,
19 some for \$30 million. So then you'd have to have
20 some kind of quantitative trigger that would mean
21 this is when it could be considered, when we want
22 to look at it to be tied to financial
23 responsibility.

1 Now, you may decide that doesn't really
2 matter, because we can take other enforcement
3 actions under other sections of the regulations.

4 We don't need to tie it to financial
5 responsibility.

6 We've determined that they're out of
7 compliance with HEA in other areas, and we can,
8 you know, take all kinds of other LS&T action.
9 So it may not really be necessary here to tie it
10 to financial responsibility, because we've already
11 got a determination of noncompliance.

12 PARTICIPANT: The only point I would
13 make about that is that back almost eight or nine
14 months earlier, ten months earlier, when the
15 department told Corinthian that because it was not
16 sharing the job placement rates with it, the
17 department said, Well, we're going to delay the
18 release of title IV funds to you.

19 And Corinthian's response was, If you
20 do that, we're going to go bankrupt. So the
21 institution already was, you know, in dire straits.

22 So it seems to me that something is directly
23 BD-related misrepresentation, which is what job

1 placement rates were about, deserves to be
2 acknowledged somewhere in this document.

3 PARTICIPANT: Thank you. Ashley,
4 Rich.

5 PARTICIPANT: I just, I have a
6 question.

7 PARTICIPANT: Is this for
8 (inaudible.)?

9 Ashley: Okay, it doesn't sound like
10 it is. So going back to Valerie's point about the
11 composite score, my question is could there be,
12 if the calculation was recalculated, or the
13 composite score was recalculated, you're almost
14 making it seem as though that's an instantaneous
15 thing, meaning you would, you know, go after
16 institutions for, you know, they'd be put on
17 heightened cash monitoring, whatever.

18 Could there be some sort of time period
19 for, not necessarily resolution's probably not the
20 right word. But for instances where we could lose
21 eligibility for groups of students halfway through
22 the year when it comes to a state authorization
23 item.

1 You know, to serve the students better,
2 could there be some sort of almost like resolution
3 on the institution's side in a time period allotted
4 to do that, so it wasn't just instantaneous, like
5 we do with a teach-out plan, for example? Does
6 that make sense?

7 That way, we would mitigate some harm
8 to students without having to report, like, to our
9 state agency saying we no longer meet these
10 requirements, they would say, you know, well, we
11 need to pull these students.

12 So I'm just wondering if there could
13 be any language in there about, you know, we would
14 follow through with regular teach-out plan or
15 something like that. I don't know how to craft
16 that just right, but I just wondered if there could
17 be, instead of it just being so instantaneous, that
18 there could be some sort of time period.

19 PARTICIPANT: Annmarie.

20 MS. WEISMAN: So I hear the concern from
21 our perspective that we're talking about debt or
22 liabilities that result from borrower defense
23 claims.

1 So at that point, the institution has
2 had some notice, is aware that they have these
3 claims, has had a recovery you know, hearing and
4 some back and forth as part of that process, and
5 the ability to provide evidence at that time.

6 So I think from our perspective, you've
7 had some notice along the way to what's coming,
8 and you can kind of prepare for that. You would
9 generally have a sense of whether this amount of
10 claims is going to impact your financial score to
11 the extent that it is.

12 This is, remember, it's discretionary
13 and we expect that you know, schools that have a
14 claim or two would not have a problem. That a claim
15 or two is mostly likely not going to impact a
16 financial score of an institution.

17 And if it does, then perhaps it should,
18 you know. Is a \$10,000 claim going to impact the
19 score of most schools? I would argue no. And that
20 if the impact is so significant that it does impact
21 the score, that I think the idea that a school cannot
22 continue to enroll new students, for example, might
23 be warranted.

1 PARTICIPANT: Right, I don't disagree
2 with that. I just, I'm concerned that it's
3 instantaneous. And I'm not going to necessarily
4 know when you're going to be recalculating that
5 score to assume should I stop enrolling students
6 now, or. Like, I don't know necessarily when you
7 have a group of claims that you decide, I'm going
8 to go ahead and recalculate.

9 MS. WEISMAN: But you know that we've
10 gone to you for recovery of those funds. So it's
11 not just we have claims. These are claims that
12 we have adjudicated, we've told the institution,
13 You owe us money for these claims.

14 So, you know when they've totaled such
15 an amount that they're starting to impact your
16 score.

17 PARTICIPANT: Okay, other proposals or
18 questions, or I'm sorry, or concerns for this
19 section. Abby, you have tent has been up. Abby,
20 do you have proposed language or a suggestion?

21 MS. SHAFROTH: I'm hoping to see if
22 there's some room for compromise on the sort of,
23 this idea that a, you know, discretionary trigger

1 could be something related to a borrower defense
2 judgment, you know. Something that happens before
3 the final adjudication of the claim by the
4 secretary, but that would I think reasonably make
5 us think that there is liability related to borrow
6 defense-type claims at issue.

7 And that would, I think if we're looking
8 for early warning signs and the department wants
9 to have some of the discretionary at least authority
10 to consider this.

11 So would something like, if the
12 institution is required to pay any debt or incur
13 any liability arising from a final judgment, sort
14 of as with a cross reference to the final judgment
15 standard from Issue Paper 1, in a judicial
16 proceeding or administrative proceeding or
17 arbitral proceeding that relates to the, on claims
18 relating to the making of a direct loan for
19 enrollment at the school or the provision of
20 educational services.

21 That seems pretty discrete, pretty
22 clearly related both to borrower defense and to
23 liability of the school, and strikes me as if there

1 is that sort of judgment, and we know that's a,
2 sort of, per se basis for borrower defense relief,
3 why not authorize the department to look at that
4 and consider that an early warning sign.

5 PARTICIPANT: Any other proposals or
6 suggestions? Aaron.

7 MR. LACEY: This is very specific to
8 Ashley and Annmarie's conversation. So I, and I
9 think maybe this would solve the issue, and also
10 address a concern I had.

11 So you all, and I appreciate the
12 department, and I'm going to skip ahead to number
13 three on page five, built in an opportunity for
14 institutions when they provide notice of one of
15 these events, to provide information, quote, "About
16 the conditions or circumstances that precipitated
17 the action," etc.

18 The challenge is the way this language
19 is written, it only, it contemplates that an
20 institution has an opportunity to communicate to
21 the department about extenuating circumstances,
22 etc., either when it provides notice, or in response
23 to a determination by the secretary that the

1 institution is not financially responsible.

2 Now, here's the concern. With regard
3 to borrower defense liabilities, right, you don't
4 provide notice. So the institution will not have
5 submitted a notice to the department. Which means
6 the first opportunity it has to communicate to the
7 department would be after the composite score has
8 been recalculated and there's been a determination.

9 I know there's been lots of back and
10 forth in the recovery action, but my concern is
11 the one that Dan brought up, right. So let's say
12 the institution has some sort of windfall with
13 regard to its financial position, right.

14 So I'm an institution and I've gone this
15 borrower defense claim process, and I've got
16 \$100,000, right, in borrower defense liability.
17 But I don't think there's going to be a basis to
18 recalculate my composite score, because I just got
19 a gift for a million dollars. But the department
20 doesn't know that. Because you got last year's
21 financials, and all you have is the information
22 on the liability from the borrower defense
23 proceeding.

1 And under this provision, there's no
2 opportunity for me, before you recalculate the
3 deposit score and reach a determination, to provide
4 you with information. Because I don't give you
5 notice about borrower defense actions, you've
6 already got that.

7 So what I would suggest, in the way of
8 very specific language, is to say in number three,
9 it should read, and I'm going to go all the way
10 down. I'm here in its notice to the secretary, I'm
11 skipping all the way down to the third line. Under
12 paragraph (c) of this section, or I'll just read
13 the whole thing, make more sense.

14 In its notice to the secretary under
15 this paragraph, or in response to a determination
16 by the secretary that the institution is not
17 financially responsible because of an action or
18 event under paragraph (c) of this section, but
19 before the secretary takes action, the institution
20 will be afforded an opportunity to.

21 And then you get down to (iii). Which
22 means in a borrower defense circumstance, if you
23 all determine to do a recalculation of the composite

1 score, but before you would act on that recalculated
2 composite score, there is a guarantee that the
3 institution will at least be afforded an
4 opportunity to provide additional information to
5 the department.

6 Which could be, as Dan pointed out, any
7 host of information that you don't have available
8 regarding finances or changes that may have
9 occurred since the last financial audits were
10 submitted.

11 For me, it is also important, I think
12 that helps resolve Ashley's concern. But it also
13 is important because I want to make sure that
14 institutions -- I know the department needs to act
15 quickly, I'm not suggesting a particular time
16 frame.

17 But I think institutions should at least
18 have a change in every circumstance to provide,
19 if there is relevant information regarding their
20 financial circumstances, to provide that before
21 the department acts on its recalculated composite
22 score or what have you.

23 MR. BANTLE: Okay, I see Chris and

1 Michael have cards up. Are they proposals on (c)
2 one through four? Okay.

3 PARTICIPANT: Chris.

4 MR. DELUCA: So my proposal is for some
5 clarification. And I think it gets back to the
6 point that Valerie and Ashley were making as well.

7 But it's really important to know whether or not
8 this recalculated composite score is an official
9 composite score.

10 And the concern that I've got,
11 particularly for small institutions, is you may
12 have a situation where, so for example, massage
13 therapy school, five students in a class. They've
14 got a borrower defense claim because of a rogue
15 administrator, rogue admissions director or
16 something. Okay, the school corrects it, but
17 they've got a BDR claim, it could be \$50,000.

18 For a small school, that may move their
19 composite score. Now, it may not move it from,
20 and the issues is it may not even move it down to
21 1.0, right. So it could move it from a 1.6 to a
22 1.4. For you, for the department, there's no,
23 okay, that's fine, because you've got that cushion

1 there, as long as it doesn't go below a 1.0.

2 But if it's an official composite score
3 and now it's been recalculated. And again, not
4 to put you on the spot, Michael, but I'd love to
5 get your thoughts on this. Now does the school
6 have, you know, some accreditors have an
7 obligations to report to, require that their
8 schools report to them if there is a, you know,
9 material finding or change of position or, and
10 notification from the Department of Education.

11 Well now do they, are the accreditors
12 going to get notice of this recalculated composite
13 score? Or does the school have an, the school may
14 have an affirmative obligation to do that?

15 Now is the school, even though the
16 department doesn't say they're not financially
17 responsible, but they technically haven't, now
18 they've got a 1.4 instead of a 1.6. And does that
19 mean that, okay, they're fine for the feds, but
20 now they've got an issue with their accreditor?

21 So I think, you know, that this is, you
22 know, it becomes important in how this is
23 classified. Again, if it's just, if the language

1 here is that for purposes of this section, we
2 calculate the composite score to see if there's
3 an issue, but it's not, you know, but it's not
4 restating the school's official composite score
5 for fiscal year 2017, that's one thing.

6 Versus saying, Oh, we're going to update
7 your official composite score for fiscal year 2017.

8 And now, you know, instead of a 1.6, you're a 1.4,
9 and even with, so with the Department of Education,
10 the department says, We're not going to take any
11 further action. But now the school has other
12 repercussions because of that.

13 PARTICIPANT: Michael.

14 PARTICIPANT: Well, frankly, I think
15 that a recalculated composite score is the least
16 of the school's worries at that point. They've
17 been found to have misrepresented. As an
18 accrediting agency, we want to know that. Now,
19 whether, you know, it triggers -- you know, our
20 agency would not be interested only because it
21 triggered a different composite score trip.

22 I mean, we would be interested to know
23 that a claim was being adjudicated by the

1 department, and that the institution was found to
2 have misrepresented to the student. That's, as
3 an initial matter, that's going to initiate our
4 review, regardless of, you know, the financials
5 is another piece of it, another consideration as
6 to whether or not.

7 But our concern is at that point we'll
8 be, okay, well, can they can continue to operate.

9 So I'm not concerned about whether or not, you
10 know, it trips, or it. Because we're already
11 initiating a process at this point for review.
12 And financials is going to be part of that, and
13 financial reporting's going to be part of that.

14 We're going to ask, what is the
15 financial impact of the department's action. Give
16 us all the information about it, explain, you know,
17 what the misrepresentation was and so, you know.

18 I just, I'm not persuaded that that is an issue
19 for accreditors. And in fact, to the contrary.

20 You know, we're going to want as much
21 of that information as we can. And I don't want
22 to do, you know, put into place things that would
23 restrict our ability to get that information. But

1 how we use the composite score I think is not really
2 material.

3 PARTICIPANT: Okay, so the time is now
4 10:17, and we still have to get to the subcommittee
5 meetings, or their report-out. So unless this is
6 a proposed language to correct your concerns, I'm
7 going to open it back up to Annmarie. Michael.

8 PARTICIPANT: So, yeah, to go to what
9 Aaron, Ashley, and Valerie were saying, maybe, to
10 go back to Issue Paper 2, it fits, and I know, I'm
11 sorry.

12 But under number nine, under recovery
13 from the school, when it talks about the secretary
14 may initiate a proceeding, to Aaron's question or
15 point about notification and having the
16 opportunity, I'm sorry that I don't have the
17 specific language that would be helpful, because
18 it just popped in my head. But maybe that's where
19 we can give some notice and opportunity for the
20 institution to provide, you know.

21 Because, again, what we're trying to
22 get to is, you know, the early warning. And
23 remember that this is only when they incur a

1 liability, not when they may incur a liability.
2 This means that it's already happened.

3 So again, I'm not as concerned about,
4 you know, what the impact will be because you might
5 take it. You've already taken an action, you've
6 already initiated a proceeding, you've already
7 issued a requirement for them to repay at that
8 point. They've incurred the liability, and now
9 you're going to recalculate.

10 So we're pretty far down the road. The
11 institution had plenty of notice and opportunity
12 probably up to this point, but if we wanted to make
13 sure, then it could go under recovery from the
14 school and a little bit of language about notice
15 being provided there.

16 PARTICIPANT: Okay. Annmarie, do you
17 want to open up the paper to other suggestions,
18 or (Simultaneous speaking.).

19 MS. WEISMAN: I'd actually like a
20 moment to confer with staff first, and then we can
21 continue on.

22 PARTICIPANT: Okay, thank you.

23 MR. BANTLE: Annmarie, it is 10:15.

1 Should we just take the 15-minute morning break?

2 Perfect.

3 (Whereupon, the above-entitled matter
4 went off the record at 10:15 a.m.)

5 MR. BANTLE: Okay, I would like to just remind
6 everyone, well, first, thank you all for the discussion. It has been
7 a good discussion. It has been necessary discussion.

8 But I would like to remind you, we all do have a bit
9 to get through today, so as facilitators, we will be jumping in to
10 kind of hone points and understand concerns, and to try and
11 move the conversation along. So you will all probably be
12 frustrated with us in due time here. We apologize in advance.

13 I want to turn it over to the Department, as they
14 had kind of requested some time there to discuss.

15 PARTICIPANT: So I think we've gotten some
16 good feedback on some of the paper, as we've gotten so far.
17 We left off at D, at the bottom of page 4. Are we ready to pick
18 up there, or do we have other —

19 PARTICIPANT: Suzanne?

20 MS. MARTINDALE: Just a very quick suggestion
21 before we move on to D, understanding the concern that the
22 Department has about, you know, anyone can bring a lawsuit for
23 any reason, so that may not be connected to financial

1 responsibility. However, could we consider language that
2 captures, you know, attorney general investigations, enforcement
3 actions, as a compromise position, a multi-state attorney general
4 enforcement action, because those are typically brought after
5 years of investigation, evidence gathering and are not based on
6 nothing, and if they're connected to borrower defense, I think that
7 is a very, very relevant early trigger.

8 PARTICIPANT: Thank you. Ann Marie? Or
9 Juliana, did you also have a point on that?

10 MS. FREDMAN: I was going to make a similar
11 point about attorney general actual filed lawsuits, as opposed to
12 investigations, not being something that gets filed willy-nilly. And
13 I also wanted to echo what Michael was saying about a fully
14 adjudicated borrower defense claim being a potential
15 non-mandatory trigger.

16 Given what we've heard here from some of the
17 smaller schools saying that even a single borrower defense claim
18 filed could destroy their business, I think one that's been through
19 the full adjudication process would at least be something the
20 Department might want to look at in some circumstances, if it
21 really is going to impact the business that much, in terms of
22 financial responsibility and diligence for the taxpayers.

23 PARTICIPANT: Any last comments before we

1 move on?

2 Will? Make it a good one.

3 MR. HUBBARD: Oh, this will be a great one.
4 So I think in a similar vein, understanding that the Department
5 doesn't necessarily have a palette for some of the previous stuff,
6 I think to the point that's been made, multi-state actions, in terms
7 of settlements, so any settlements that go across state lines I
8 think would be relevant in this case. This indicates a larger
9 action versus a one-off settlement with a single student, which I
10 could understand the relevant concerns with some schools on
11 that, but I think larger settlements that do cross state lines, I think
12 would indicate an issue that would be worth looking into as it
13 relates to BD.

14 PARTICIPANT: Just a correction on what's up
15 there. It would be state attorney general, like, complaints filed,
16 or lawsuits, as opposed to bare investigations. So we've heard
17 the concerns of the AGs about investigations.

18 PARTICIPANT: Thank you. Ann Marie?

19 MS. WEISMAN: So I just want to thank people
20 for coming up with additional suggestions. I feel like I asked,
21 and you delivered, so I do want to thank you for that.

22 These are all items that I'd like to take back for
23 consideration, so if we can kind of move on from here, but

1 knowing that we will revisit this, I've been — I think, pretty firm
2 with our facilitators that we've got to get through these papers
3 today, so we have time to come back to one and two tomorrow,
4 so being mindful of time, I don't want to deviate from that too far,
5 but I do think that we will end up revisiting some of these
6 suggestions tomorrow again.

7 PARTICIPANT: I know Evan — quick, very quick,
8 okay, just because I think it will probably be in relation to —

9 MR. DANIELS: Yes, it is. So appreciate what
10 some have suggested about state attorney general actions.
11 There's probably going to be some differences in position from
12 the state attorney generals on this, as it concerns my office,
13 anyway, we have publicly filed a comment as it related to the last
14 rulemaking, we would be opposed to the use of an attorney
15 general individual state or multi-state investigation, or even the
16 filing of a lawsuit, for the reasons already stated. Those things
17 are uncertain. The results are uncertain, and that's why we
18 would oppose it.

19 However, I think we would support the idea that a
20 final judgment, or some final resolution, as the basis for looking
21 at these things more closely.

22 PARTICIPANT: So could you — just to impose
23 on you just for a minute, could you help us to amend the

1 language up there to something that might help you to be more
2 comfortable, that you think would be more applicable, generally?

3 MR. DANIELS: Yes, I think we would oppose the
4 complaints filed, and we would support a final judgment or final
5 resolution. But anything regarding just complaints filed, or
6 investigations, you know, initiated, we would oppose that. Does
7 that help?

8 PARTICIPANT: So I think what he was saying
9 was to strike 11, but can you undo that and go back? I think you
10 struck 11 and 12, and I want to see 12 again.

11 So then the question I would have for our — I
12 believe you were referred to yesterday as our AG friends, the
13 question I would have for our AG friends is, would we be aware
14 of the settlements, or would they be private?

15 MR. DANIELS: Generally, at least the practice of
16 my office is that settlements like this come in the form of consent
17 judgments, which have to be approved by a court, and they are
18 publicly announced.

19 PARTICIPANT: Juliana, did you have a question
20 or a comment to that point?

21 MS. FREDMAN: Just a brief one. I understand
22 that the AGs wouldn't want investigations or even complaints
23 filed to serve as a basis for a borrower defense. I understand

1 the reasoning behind that.

2 But these are early trigger warnings, which the
3 Department can, at their discretion, take a look at. So I think
4 that our position would be that a complaint filed, that's gone
5 through the vetting process to be filed in a court, would be an
6 appropriate potential trigger to investigate, to look at the issue
7 further, if the department thought that that was warranted, as
8 opposed to being something more — some sort of more
9 concrete action.

10 MR. DANIELS: And I understand that. And
11 ultimately, the issue we have with that is given that some kind of
12 trigger could result in — not an action against an institution, but
13 a concrete result that does have effects on the ability of an
14 institution and how they operate, we just — we have due process
15 concerns about the filing — the mere filing of a complaint or
16 presence of an investigation as a trigger, if you will.

17 PARTICIPANT: Okay. Just, Chris, is it another
18 suggestion, or —

19 MR. DELUCA: So I think the numbering might be
20 off. I think the numbering is — I think that those are all subs
21 under what was then 3 — or now 4, those are all numbers under
22 publicly-traded institutions, right?

23 So aren't we talking about adding like 5, 6, 7, 8?

1 Aren't we looking — I mean, as far as — I'm not saying that I agree
2 with everything on there. I'm just saying, as far as
3 understanding it, these are other facts — these are starting at —
4 whatever, 5, sub 5, Romanette 5, right. Those are all — or is that
5 marking tabulations public —

6 PARTICIPANT: So Romanette 5 I believe should
7 be numeral 5.

8 PARTICIPANT: Well market cap, and compared
9 to cash flow, market cap — that would — no, that would be for
10 publicly traded, right?

11 PARTICIPANT: Yes, Romanette 6.

12 PARTICIPANT: Market cap? Yes, Romanette 6
13 should be —

14 PARTICIPANT: Numeral 5, yes.

15 PARTICIPANT: Okay.

16 PARTICIPANT: Okay. So I think we have some
17 food for thought for the Department there, and let's move on to D.

18 And we'll let Ann Marie kind of give us the guide of how much the
19 Department would like to consider at this time.

20 PARTICIPANT: So we're picking up at the
21 bottom of page 4, with D, recalculating the composite score.
22 The Secretary recognizes the actual amount of the debt or
23 liability incurred by an institution for borrower defense claims

1 under paragraph C (1) of this section as an expense, and it
2 accounts for that expense by — and the new text that was
3 inserted here, at 1, 2, and 3; 1, for the primary reserve ratio,
4 increasing expenses and decreasing adjusted equity by that
5 amount; 2, for the equity ratio, decreasing modified by that
6 amount; and 3, for the net income ratio, decreasing income
7 before taxes in the net income ratio by that amount.

8 Our next change occurs on page 5, with number
9 3. In its Notice to the Secretary under this paragraph, or in
10 response to a demonstration by the Secretary, that the institution
11 is not financially responsible because of an action or an event
12 under paragraph C of this section, the institution may
13 demonstrate that the reported withdrawal of owners' equity under
14 paragraph C (2) was used exclusively to meet tax liabilities of the
15 institution or its owners for income derived by the institution;
16 show the action or event has been resolved, or demonstrate that
17 the institution has insurance that will cover all or part of the debts
18 and liabilities that arise from borrower defense claims under
19 paragraph C (1); or explain or provide information about the
20 conditions or circumstances that precipitated that action or event
21 that demonstrates that the action or event has not or will not have
22 a material adverse effect on the institution.

23 So I think that those three conditions under 3, on

1 page 5, may address some of the concerns that Dan and Aaron
2 and possibly Chris had raised earlier.

3 PARTICIPANT: The screen doesn't match.
4 Scroll down a little.

5 PARTICIPANT: I apologize. I'm just not sure
6 what function the screen is playing right now, whether these are
7 things we're considering, or this is just stuff that — you know, but I
8 just want to make sure — okay. Okay, well, that reflects my
9 earlier comment.

10 PARTICIPANT: Are we breaking there,
11 Ann Marie, or are you opening it up to questions?

12 Okay, Kelli and then Chris.

13 MS. HUDSON PERRY: Okay. In D, on the
14 bottom of page 4, I'm not going to beat a dead horse, but I still
15 think that it should be liability, even based on the Department's
16 description of what a debtor's liability is. But saying that, in your
17 — in the 1, 2, and 3, where you talk about the ratios, these ratio
18 calculations are only listing the ones for for-profit entities, and I
19 believe that this applies to both for-profit and not-for-profit.

20 And so in one, it needs to be changed, increasing
21 expenses or decrease in adjusted equity amount for for-profit
22 institutions, or expendable net assets for not-for-profit institutions.

23 In the second one —

1 PARTICIPANT: I'm not sure that our editor has
2 caught all that.

3 MS. HUDSON PERRY: Okay. I can go slower.
4 Sorry.

5 PARTICIPANT: Thank you.

6 MS. HUDSON PERRY: Decrease in adjusted
7 equity for for-profit institutions, or expendable net assets for
8 not-for-profit institutions.

9 In number 2, for the equity ratio, decreasing
10 modified — I believe you're missing a word there, that should say
11 modified equity, for for-profit institutions, and modified net assets
12 for not-for-profit institutions.

13 And then in the third one, decreasing income
14 before taxes in the net income ratio for for-profit institutions, and
15 changes in assets without donor restrictions for not-for-profit
16 institutions.

17 PARTICIPANT: Excuse me, Kelli, let me clarify.
18 Should it be net assets, or assets, in the last one?

19 MS. HUDSON PERRY: Sorry, changes in net
20 assets.

21 PARTICIPANT: Thank you.

22 MS. HUDSON PERRY: Yes. It's without donor
23 restrictions.

1 PARTICIPANT: Oh, sorry.

2 PARTICIPANT: Okay. Chris?

3 MR. DELUCA: Under D (2), the equity ratio for
4 for-profit institutions, and again, the catch as far as you know,
5 modified equity, but I think it should also be a decrease in both
6 modified equity and modified assets for for-profit institutions,
7 because what we're saying here is based on the BDR claim,
8 we're going to reduce the amount of equity by \$10,000. But then
9 also, if we're going to do that, the denominator should be
10 decreased as well, because they're saying, okay, if we're going to
11 go back and re-state where the school was, then they had
12 \$10,000 fewer of assets as well, so I think it should be an
13 adjustment in both the numerator and the denominator to make
14 the math consistent.

15 PARTICIPANT: Chris, how does that affect the
16 assets?

17 MR. DELUCA: Because if the school is saying,
18 oh, we've got — well, it seems like there should be a similar
19 adjustment. If we're saying that a school—

20 PARTICIPANT: The ratio that this really has an
21 effect on is actually the equity ratio. In the primary reserve ratio,
22 it's affecting the numerator and the denominator. So the equity
23 ratio is where it's actually going to have an effect in that

1 calculation, because you're going to be increasing your — sorry,
2 decreasing your equity, but your assets aren't going to change.

3 Because the concept of this is that the
4 Department is saying, okay, you owe us money, so an institution
5 is going to an expense and a liability on their books until they
6 actually pay it. So because of the fact that they haven't paid it
7 yet, they're not affecting their assets.

8 PARTICIPANT: Other proposed language or
9 comments on this section?

10 (Pause.)

11 Ann Marie, has the Department heard enough on
12 this section? Can we open up to the next section? So are we
13 at F, public institutions?

14 PARTICIPANT: We do not have any new
15 changes in that section that I can see. We don't have anything
16 shaded with new information. So if people want to just take a
17 quick glance at that, I think that — yes.

18 PARTICIPANT: So any — take a quick glance.
19 We're looking at F all the way down to where 668.172 would
20 begin on the next page, on six. Is that correct?

21 PARTICIPANT: I'd like to pick up with 668.172,
22 with financial ratios.

23 PARTICIPANT: Any comments prior to 668.172?

1 O kay.

2 PARTICIPANT: Ann Marie?

3 M S . W E I S M A N : So this is where the work of our
4 subcommittee comes in, and we'll have them at the table for
5 questions related to this, where applicable. We've inserted new
6 text, which is 668.172D, about the transition period that we
7 mentioned related to leases.

8 "D(1) states, as a result of changes to the
9 accounting for leases, required by FASB, for an institution's four
10 consecutive fiscal years beginning on or after July 1, 2019, for
11 which the Secretary calculates the institution's composite score,
12 the Secretary also calculates a transition score by excluding from
13 the calculation operating leases that the institution entered into
14 before July 1, 2019, provided that those leases are properly
15 disclosed in the supplemental schedule required under Appendix
16 A or B of the subpart.

17 "For each year of the transition period, the
18 Secretary uses the higher of the composite or transition score in
19 determining, in part, whether the institution is financially
20 responsible."

21 We then continue at the top of page 7, "For the
22 transition period described in paragraph D(1), the Secretary
23 suspends the conditions in section 668.175D(1), Romanette 1(B);

1 and two, under which an institution continues to qualify for the
2 zone alternative.

3 "For any fiscal year following the transition period,
4 the institution's transition period scores have no bearing on
5 whether the institution qualifies under an alternative standard in
6 668.779.175 C, D, or F."

7 And because of the significant discussion we had
8 last time about this section, I'd like to close that off there, and just
9 have the discussion about this section on the transition period for
10 leases.

11 PARTICIPANT: Opening it up to the committee?
12 Chris?

13 MR. DELUCA: So at our last meetings, there
14 were some questions and requests for some additional
15 information, and perhaps some additional proposals with respect
16 to both the transition period, as well as perhaps even looking at
17 are there other ways to look at accounting for the affects of the
18 lease changes under the FASB rule changes.

19 And so one of the things that I had mentioned at
20 the last meeting was that there are schools that signed leases
21 before the FASB rules were published. Those leases will extend
22 beyond the transition period. And so seeking additional
23 transition period for those, with respect to those leases, and

1 again, under just a fairness idea of that, schools making financial
2 decisions, i.e., entering into a lease under a current set of rules in
3 2014, that they should not have an adverse impact — have
4 something that was going to adversely affect their composite
5 score in 2022 or 2023 when they're still under that lease.

6 So I want to stop there, and just understand — and
7 well, follow up with that, some of the information that was
8 requested by the subcommittee that we provided. We've got
9 information from nearly 200 schools that indicated about 15
10 percent of those schools responded back to us saying, oh, we
11 have leases that fall within that time frame. So 15 percent of a
12 sample size of about 200 schools.

13 So wanting to know, just kind of the thought
14 process of why that request was not granted, or what the thought
15 process is for not extending a transition period for schools with
16 leases in that circumstance.

17 PARTICIPANT: So I'm going to ask one of the
18 staff members from the Department, Chris Vierling, to come to
19 the table to address that issue. He worked more specifically
20 with the subcommittee, and can better respond to that.

21 MR. VIERLING: This is Chris Vierling. I hope I
22 can give a good explanation. There was a lot of discussion on
23 the subcommittee concerning the transition period, and one of

1 the aspects of what will happen in the transition period is that a
2 school will be identifying all of the leases that exist at the
3 beginning of the transition period.

4 And as the transition period is moving along, the
5 balance of those leases is going to go down. And as those
6 leases go down, the impact of the business decisions that the
7 institution is entering into, after — I mean, while the transition
8 period is occurring, will be reflected in the composite score.

9 So the thought was, that we've got the four-year
10 transition period, and then an institution would hopefully be in at
11 least the zone at the end of the transition period with the leases,
12 and that we are basically giving a waiver to the zone requirement
13 for an additional three years. So that if an institution is in the
14 zone for the entire transition period, they've still got an additional
15 three years after the transition period to remain in the zone.

16 And I can say that the members of the
17 subcommittee actually thought that that was a pretty good idea
18 that we had all come up with.

19 PARTICIPANT: So my concern is that there — so
20 even if a school is in the zone at the end of the transition period,
21 and recognizing that the way the math works, that the accounting
22 works, is that the value of the lease, liability, and assets is going
23 to go down as you get further in the lease.

1 Now we haven't talked about options. So if we've
2 got a school that has signed a ten-year lease, and it's got a
3 five-year option under the terms of that lease, there's a whole
4 other issue that the school has to determine of whether or not
5 they get the benefit or if there's an impact for the fact that they
6 negotiated for favorable terms under an option. But that's a
7 whole other issue.

8 But even with that, in the transition period, and
9 this gets back into an issue raised earlier, is that I work with
10 schools that are in the zone for Department of Education
11 purposes, but that puts them into financial monitoring under their
12 accrediting standards. And so it may not be an issue with the
13 U.S. Department of Education for that extra three years, but it
14 can be a very material issue for them in connection with their
15 accretor.

16 And as I said, I work with schools that have a 1.2,
17 and that's an issue for them with their accretor. So there's still
18 an issue with a negative impact on them for a business decision
19 they made under a set of rules that — they're being judged on
20 rules that didn't exist at the time they made their business
21 decision.

22 I understand going forward, these are the new
23 rules, but you know, in 2014, these weren't the rules.

1 PARTICIPANT: Other comments or concerns on
2 this section?

3 Abby?

4 MS. SHAFROTH: I was just wondering if you
5 could talk us through sort of how you came up with four years,
6 and four years from the effective date of this regulation.
7 Presumably schools already know about the change and the
8 accounting standards now, and so operating leases — if they
9 entered into operating leases between now and July 2019, they
10 would be doing so with sort of awareness of those
11 consequences. So I wondered whether in light of that, it would
12 be — make sense to have a slightly shorter transition period, like
13 three years.

14 PARTICIPANT: Well, in actuality, because this
15 applies to the world, the world has known that this accounting
16 standard was going to be coming into effect since 2016. We did
17 some research as a subcommittee, and what we determined was
18 that it was about an eight-year period, that that was on the
19 outside, was eight years.

20 And so we looked and we said, okay, you've got —
21 what is it, the three years — well, I guess at this point, it's two
22 years — from 2016, and then you've got the four year transition
23 period. And then because we do want schools to be able to

1 continue to participate, we said, okay, well, we'll do the zone for
2 an additional three years.

3 So it was very reasoned to try to allow as many
4 schools to remain participating in the title IV programs as we
5 could.

6 PARTICIPANT: Chris DeLuca?

7 MR. DELUCA: So the second issue I wanted to
8 discuss was there was another proposal that we had put—we, at
9 the bequest of members of the subcommittee, to think about
10 other ways to approach the lease amortization issue, and the
11 change in at least accounting issues is that we submitted a
12 proposal, the idea being, that under these rules, under the new
13 FASB rules, when you sign a lease, a ten-year lease, you're
14 going to have a very large asset at the beginning of the ten-year
15 lease period. You're going to have a very small asset at the end
16 of the lease period. And so it's a self-amortizing number. Each
17 year that number goes down.

18 And so the negative impact of the lease on a
19 school's composite score calculation is going to be reduced, if
20 nothing else changes, just by fact that you've gone further into
21 the lease. If all the numbers stay the same, your composite
22 score's going to gradually get better.

23 So we had put a proposal to say that what if we

1 booked at a different way and used an averaging of that, so that
2 we're not overstating the impact of the lease up front, we're not
3 understating the impact of the lease on the back end, but to try to
4 come up with, if it's a ten-year lease for \$100,000 a year, the
5 average lease payment is \$500,000. So for purposes of the
6 composite score calculation, can we value the asset and the
7 liability at \$500,000, for each of the years under the lease, so that
8 it's not fluctuating so wildly between the front of the lease and the
9 end of the lease.

10 So that's not — again, that was submitted to the
11 committee at the request of proposing different ideas. I see that
12 that idea is not included in the proposal, and so I just want to
13 understand the reasoning why behind that.

14 PARTICIPANT: Well, one of the primary
15 objections to the proposal was that it was proposing to not follow
16 GAAP for the composite score going forward. And for the
17 composite score, we follow GAAP.

18 And as a result of that, if it had been something
19 involving transition period, but the way that the proposal came to
20 us was that it was going to be going forward, that we would be
21 using the averages — that that would be the regulation, and that
22 we would never be actually implementing the accounting
23 standard and taking it into consideration.

1 PARTICIPANT: Aaron?

2 MR. LACEY: Can I just ask? I mean, I
3 understand the — how you all came up with the four years as the
4 transition period. What I don't understand is, what is the harm to
5 the Department to extend that transition period further in an effort
6 to try to keep those institutions that might have just signed
7 ten-year leases, or might not be as sophisticated, smaller schools
8 that may not be as up-to-date on the accounting changes, from
9 being unintentionally caught?

10 I mean, I just — what I don't — I understand why
11 you got the four, you know, this sort of trying to shoot the middle
12 here. But what I don't understand is the risk to the Department
13 or the downside to the Department to allowing a longer transition
14 period.

15 Because the harm is clear. But what is the
16 downside to extending?

17 MR. FENLEY: So this is Steve Fenley from the
18 Counsel's Office. Transition periods, as we view them, at least,
19 are of limited duration. And some of the proposals for treating
20 the operating leases differently were to either go on in perpetuity,
21 or for longer periods.

22 And what we think is a reasonable proposal to
23 combine a break on being in the zone, after the end of the

1 transition period, with a transition period that's already coming
2 after, as Chris mentioned, after a period where there's been
3 pretty broad notice to everyone that this change was coming.

4 And also as Chris noticed, the regulations
5 themselves are contemplated on having the financial statements
6 be evaluated in accordance with GAAP. And GAAP is changing,
7 and people should be planning to be evaluated under those
8 change standards going forward.

9 PARTICIPANT: Can I just — I understand that.
10 But I mean, we're not talking about perpetuity. We're talking
11 about the difference between four and eight, or four and six.
12 Because folks who have just signed a ten-year lease, I mean,
13 there comes a point where that's no longer an issue.

14 So I totally appreciate that there has to come a
15 point where folks need to be in compliance with GAAP, and that
16 we don't want to give them forever, although, this is a completely
17 separate concept that is an invention of the Department, in a
18 sense. But I guess again, my question, and I'll put a finer point
19 on it, what's — we know that there is potential harm to institutions.

20 Maybe they should have known better, right? We're talking
21 about a marginal group of schools, probably the smallest and
22 least sophisticated, right?

23 But we know that there's a potential harm there for

1 those folks. And it's possible that it's really just due to the fact
2 that they're not as sophisticated or well resourced, and had the
3 bad luck to just sign a lease. But I think we have to allow there's
4 some potential harm.

5 What is the harm to the Department or the
6 taxpayer if we go from four to eight?

7 PARTICIPANT: I think you're looking at their
8 proposal on the table, and that's the — I've tried to answer the
9 question you asked. Right? What would be the harm if it went
10 on in perpetuity, or for 20 years, or for 10 years?

11 We know that schools may have the opportunity in
12 some circumstances, especially with related parties, to have
13 incredibly long leases, right? The period you see in front of you
14 is what we think is the reasonable recommendation based on the
15 discussions with the subcommittee.

16 PARTICIPANT: Are there proposals for
17 modifications to 668.172?

18 PARTICIPANT: Okay, Aaron, and then Chris, do
19 you have a proposal? Okay, so we'll go down the line, Aaron,
20 Chris, and then Linda.

21 (Pause.)

22 Shall we go to Linda? Linda.

23 MS. RAWLES: Well, I just want to share the

1 concerns that Aaron had, because even though I'm here
2 representing the large for-profits, as an attorney, I have some
3 small schools who, as much as you think they should know this,
4 they are relatively small and unsophisticated. They were taken
5 by surprise.

6 And I know at least one that its score would
7 change by .9. So I just want to add my concern to Aaron and
8 Chris, and suggest that we have a longer time period of
9 transition.

10 PARTICIPANT: Do you have a suggestion on
11 that time period?

12 MS. RAWLES: I'd like to hear what Aaron and
13 Chris say, but maybe eight.

14 PARTICIPANT: Chris?

15 MR. DELUCA: My proposal on extending the
16 transition period is not for every school. So I'm not boking at —
17 it wasn't going from four to eight for everybody, and delaying it.
18 But boking at that, I mean, it's a relatively small group, again,
19 based on an informal survey, but still of a substantial number of
20 approximately 200 schools, 15 percent of the schools that fell into
21 that circumstance.

22 And so again, boking at not changing what's here,
23 but adding an additional period for those schools that fell into that

1 circum stance . I mean , again , I respect where the Departments
2 coming from . Again , I thought the proposal for averaging the
3 leases , I still like that , but I'm not going to die on that hill for
4 today .

5 But I do think that for schools — again , for that
6 subset of schools , that signed a lease before February of 2016 ,
7 and it at least extends beyond the transition period , they should
8 be able to use — they should account for those leases through
9 the end of their lease . Now , if we need to put a qualifier on
10 there , that it can't be a related party lease , I mean , I'm not trying
11 to provide protection or create loopholes for people to abuse the
12 system .

13 I mean , I'm looking at clients of mine who are
14 family-owned , trade and career schools , who signed a lease in
15 2014 , who are going to have a negative impact on this when they
16 do their composite scores for 2023 and 2024 and 2025 .

17 PARTICIPANT : Aaron ?

18 MR . LACEY : And look , I support that proposal .
19 And the reason is because I understand the rationale and the
20 thinking that schools need to get into gear here . Again , I'm not
21 suggesting that we should let this go into perpetuity . But if
22 there is no harm to the Department and the taxpayer that we can
23 identify , I cannot understand the public policy reason for

1 penalizing a small percentage of schools when it is easy to
2 accommodate them .

3 And we're still taking about a fixed period of time ,
4 when we're going to be calculating an alternative score . They
5 are still subject to the composite score . I mean , we're taking
6 about a very specific accommodation for a limited period of time
7 to avoid an identified harm , when there is no harm identified .

8 PARTICIPANT: Aaron, do you have a proposal
9 that differs from Chris's?

10 MR. LACEY: No, I'm just expressing my support
11 for Chris's proposal .

12 PARTICIPANT: Okay, so Kelli's name tent is up .
13 And can you turn those towards — it's Chris and Mike Busada .

14 So before we move on, I just want to say that the
15 time is 11:20 . There is a hard lunch break at 12:00 , and we still
16 have to get to the report out from the subcommittee . So we
17 have to finish this section , because we're still in 668.172 .

18 So Kelli?

19 MS. HUDSON PERRY: So mine is actually a
20 question for Chris , and I'm trying to maybe help with this a little
21 bit . So in those schools' instances , that have these long term
22 operating leases , what will be their plan when those leases are
23 done , right?

1 Because ideally, they're still going to need that
2 same space, or whatever they're leasing, right? And so if they
3 have to buy it, they in essence are then going to have to put an
4 asset on the books, and potentially a debt on the books. So
5 what's their plan past this transition period, I guess?

6 MR. DELUCA: Well, the plan past the transition
7 period is that they have the transition period to figure it out.
8 These schools don't have the resources to buy a building. They
9 don't have — and nor would they necessarily need to. But again,
10 it's going to be looking at, are there going to be options for them
11 to get — will they have to do five-year instead of ten-year leases?
12 How much can they invest for their schools if they can only
13 commit to five years rather than ten?

14 What conditions are landlords going to put on
15 them, if they can only get a five-year lease, or a ten-year lease,
16 because a five-year lease, they may have to pay more than they
17 might have had to pay if they could get a ten-year lease.
18 There's going to be substantial issues with that. But that's going
19 to be part of what these schools, over the transition period, will
20 have to figure out. Okay, under the new reality, what they can
21 afford to do.

22 But again, I think that at least for the period of the
23 lease that they've already signed for these schools, that they

1 should not be penalized under their current base.

2 MS. HUDSON PERRY: So I think — and this kind
3 of came up in some conversations, this change in accounting, for
4 those of you that aren't accountants around the room, which is
5 most, is a really big deal. It's been something that FASB has been
6 working on for years and years and years. And when the
7 financial responsibility composite score was developed, this
8 wasn't a concept, right?

9 So outside of the term of this regulation, there's
10 the concept of, does that calculation need to be re-baked at,
11 right? Do those weights still have the same concept, with the
12 fact that this accounting pronouncement now exists? Because it
13 changes the landscape for some schools.

14 For some, it doesn't affect it enough that it's going
15 to change their score. But is it something that those weights in
16 the composite score potentially need to be baked at.

17 So I think the idea was that with the adoption of
18 this accounting pronouncement, nobody really knows what's
19 going to happen to the scores. Nobody knows at the end of the
20 four-year transition period, how many schools are still going to be
21 affected by that.

22 So it can't be done within this rulemaking. But
23 does it give the Department the potential to say, you know,

1 there's a number of schools that are being affected by this, and
2 we're going to get to year four, and there's still a number of
3 schools that are being affected by this. Do our composite
4 weights then need to change? And potentially look at it years
5 down the road, once there's some data available, as opposed to
6 making that determination right now.

7 PARTICIPANT: And that's something that I
8 agree with, and I think that that's something there's — as far as
9 looking at the composite score in general, and recognizing that
10 you know, again, I assume that when the composite scores were
11 calculated, that the folks that did it knew how to account for
12 leases, and knew what lease liabilities were, and they chose not
13 to make any adjustment to the composite score calculation for
14 leases. I mean, that was part of the landscape at the time.

15 Again, we've got this new accounting lease, and
16 it's my understanding, we're not getting into the particulars of the
17 actual composite score and the rates here. But that's certainly, I
18 think, you know, open for further discussion.

19 One of the things I'd even like to propose as a
20 modification to my proposal here, from an administrative
21 standpoint, is that recognizing the point that as we get to the end
22 of a lease, the impact on the composite score is going to
23 decrease, because the value of the asset is going to decrease.

1 And so you know , even among this 15 percent of
2 schools that I'm taking about, they may all pass under the new
3 GAAP rules. It may not be an issue. So even if it's just an
4 option for the school, so it's not like they're mandatorily doing
5 multiple composite scores, and the Departments doing multiple
6 composite scores, but a school, if they're in that circumstance,
7 we've got — we're creating a situation right now during the
8 transition period where there's a mechanism to report this
9 information. So for a school that has a pre-February 2016 lease,
10 that if they choose to do so, that they can submit an alternate
11 composite score calculation.

12 So again, from an administrative standpoint,
13 there's even fewer schools that would fall into this gap, and
14 again, looking to reduce the burden on the Departments as far as
15 how many alternate calculations they'd have to look at.

16 PARTICIPANT: Okay, I see Danny's tag up, and
17 Mike's tag up. Are these additional proposals?

18 Yes?

19 Okay. Danny, and then Mike, and then, I think,
20 just for the sake of time, I think we need to move onto the next
21 section.

22 MR. MADZELAN: I just want to address
23 something that Chris said. And Aaron. They talked about a

1 small number of schools that would be really impacted by this
2 lease, and the ratios that we would derive thereof.

3 There are many schools out there, some large,
4 medium, small, sophisticated, unsophisticated, that signed leases
5 prior to June 2016. And some of those leases are for \$25 million
6 and \$30 million, and they go on for like 20 years. So my only
7 proposal is that if this committee sees some benefit in extending
8 the transition period, it's not for select member schools, it's for all
9 schools.

10 PARTICIPANT: Proposal, Mike?

11 MR. BUSADA: Just to really kind of piggyback
12 off of that, I just want to make sure that as we discuss this, we
13 keep saying, it's the school. You know, will this ham the
14 school? If the school has to close because of this, will it ham
15 the school?

16 At the end of the day, it's not about the school.
17 It's about those students. And a lot of schools, they're the only
18 providers of a lot of in-demand things, like welding, truck driving,
19 pharmacy technicians. It's — I mean, this is not about the
20 school. It's about the students. And when a school closes,
21 every single student that graduated from that school is affected.

22 So you know, I appreciate everybody caring about
23 us and the schools. I want to care about the students, because

1 when a school closes, it hurts the students, and we need to — if
2 there is no downside, if there is no harm to the Department or the
3 taxpayer, then we need to protect the students and make sure
4 that we don't have schools in rural areas closing where there is no
5 other providers.

6 PARTICIPANT: Thank you. I think now we're
7 ready to move on. So can we open up the next section?

8 PARTICIPANT: So at this point, I'd like to bring
9 the subcommittee up, if we're ready for that, instead of continuing
10 on in this paper.

11 PARTICIPANT: Well, and that's — my question is
12 I've got a significant procedural issue, as well as just a
13 substantive issue, but with Appendix A, the ratio methodology for
14 proprietary institutions that is referenced in 668.172. So I'm not
15 sure if the subcommittee is going to be addressing that, and if
16 that's the proper time for me to raise these issues, or if we need
17 to raise these now.

18 PARTICIPANT: The subcommittee is going to
19 walk through the appendices.

20 MR. VIERLING: Okay, let me say, I'm Chris
21 Vierling.

22 MS. PEPPER: I'm Rhonda Pepper.

23 MS. MENDITTO: Sue Menditto.

1 PARTICIPANT: And all of us were working on
2 the subcommittee, and Sue was one of the non-federal
3 participants, and Rhonda and I were both federal participants.
4 So we'd like to start with Appendix A.

5 What you see shaded is all of the changes that
6 have been made from the original regulation, not from what was
7 presented at the committee the last time. So what we're going
8 to go over is only going to be those aspects that were changed
9 from when we previously reported to you.

10 And Rhonda is going to start that.

11 MS. PEFFER: One of the areas that we did
12 additional work on was the financial responsibility supplement
13 schedule requirement, and the example with that. We actually
14 put a definition in on what the sample schedule would require.
15 However, in the handout that you guys got, it was not included,
16 so we will be getting you a new handout that shows what that text
17 would be.

18 But the text actually says, "A supplemental
19 schedule must be submitted as part of the required audited
20 financial statement submission. The supplemental schedule
21 contains all the financial elements required to compute the
22 composite score. Each element in the supplemental schedule
23 must have a reference to the financial statements, or the notes

1 for those." And its worded just a little bit different, but if you're a
2 proprietary school or a non-profit, to actually match up, and we
3 state the actual statements there.

4 And then the amounts in the supplemental
5 schedule will tie directly back to one of those. And then they will
6 actually state when the amount is zero, they will enter an N/A on
7 this schedule, as in not applicable. And the auditor's opinion
8 letter must contain a paragraph that references the additional
9 analysis that was done on the financial responsibility statements.

10 In the sample that we'll be giving you, it will have
11 the exact texts of what statements and the different options, and
12 how that can be put into play with that.

13 In addition to that, we clarified on the non-profit
14 side, we had just total expenses. There's always been some
15 confusion there. We went ahead and defined total expenses
16 and bss. Sue may want to add something to that, if she wants,
17 on the expenses and bsses section on that.

18 Is there anything you want to add on that?

19 M.S. MENDITTO: We just made the definition
20 more comparable between non-profits and for-profits. And so
21 that was a slight change from what we reviewed a couple of
22 months ago, or a month ago, time flies.

23 And bsses on endowment investments and

1 defined benefit pension plans, other post-employment plans, and
2 the like, would not be included, because those are prone to
3 market fluctuations and bear no — have nothing to do and are not
4 a proxy for the operating size of an institution, which is what
5 we're trying to measure.

6 PARTICIPANT: An additional area that we
7 looked at was the long-term debt for long-term purposes. We
8 had discussions there, and kind of redefined that, and made
9 clarifications on that, from when we were here in the last. That
10 is the information that we handed out, how that would be looked
11 at now, so we wanted to make sure that everyone was aware that
12 that was a change.

13 Most of the other changes was in the last
14 supplement. We're happy to go over those, if you want us to,
15 but they're really not any different from what we had when we
16 were here before. But we would be happy to go over them, if
17 you want us to.

18 MR. DELUCA: So I have significant procedural
19 concerns with this committee and the changes that were made to
20 the definition of long-term debt. And again, as a preface, again,
21 some of you have heard me say this, but for the record, I'm going
22 to say this again, I'm on this committee because I was nominated
23 by the American Association of Cosmetology Schools.

1 My constituency schools, the vast majority of
2 them , are accredited by the National Accrediting Commission of
3 Career Arts and Sciences. I have been at a number of
4 presentations from the executive director of NACCAS , where he
5 has said to his member schools that most schools, the trouble
6 they get into with NACCAS , the predominant reason , is because
7 of financial responsibility. Not from an operations standpoint,
8 but from financial responsibility.

9 There's also a statement in the Government
10 Accounting, the GAO report, there's a GAO report from August
11 2017 about education oversight and gaps in monitoring the
12 financial conditions of schools. There's a statement in that
13 report from the GAO that says, we previously found that
14 accreditors most frequently sanction schools for failure to meet
15 standards on financial capability, rather than standards on
16 academic quality or administrative capability.

17 I say this as a preface to underscore how
18 important it is that any issues that affect the composite score and
19 that affect the calculation of financial responsibility for schools
20 are properly vetted and we understand the impacts of that.

21 And I applaud the committee, the subcommittee,
22 for the work that they've done on the leases. We've had a lot of
23 discussion on the leases. We've gone back and forth, submitted

1 proposals. You were very kind enough to answer my questions
2 and concerns and consider things that we proposed, and
3 understand the reasons why in response to that.

4 And it was my understanding that the
5 subcommittee was created for purposes of addressing changed
6 FASB changes that might impact the composite score, and how
7 the U.S. Department of Education would factor those FASB
8 changes and incorporate those into the composite score.

9 This change in the definition of long-term debt has
10 nothing to do with recent changes from FASB. This change was
11 not brought up in the issue papers. It was not brought up as an
12 issue when we discussed — when we met in November. We met
13 and had additional information, we had actual issue papers that
14 we negotiated for four days in January. This issue was not
15 brought up.

16 Now, as a member of this committee, I'm invited
17 to participate in the financial subcommittee meetings. And the
18 third subcommittee meeting that was scheduled for the end of
19 January was cancelled, in lieu of — and replaced by a conference
20 call that we were invited to.

21 But it's my understanding, from folks who
22 participated in that subcommittee call, that this change on the
23 definition of net income — I'm sorry, the definition of long-term

1 debt, was not discussed on the meeting that I was invited to.
2 And now , when we get the issue papers , a week before we come
3 here , there's a substantial change in the definition of what is
4 long-term debt that's going to have — that may or may not, I don't
5 know , but may or may not have a material impact on the
6 calculations of the composite scores , for schools that participate
7 in title IV .

8 And I'm not here to provide cover for schools that
9 are looking for ways to abuse the system . I don't know if there is
10 a legitimate reason for why this change was made , if there was a
11 legitimate , you know , concern or manipulation . I think that's
12 subject to a further discussion .

13 But it seems to me that at this late hour , without
14 us having to — had an opportunity to review this , one , I think it's a
15 violation of the protocols . I certainly think it's not in the spirit of
16 open negotiation to have such a material change thrown on us at
17 the last minute . And certainly , I'm not in a position where I could
18 ever agree to making this change in a regulation without having
19 had a full opportunity to vet this , understand the impact , go back
20 to my constituency group , and understand what affect this is
21 going to have .

22 PARTICIPANT: Chris , understanding — or
23 understanding your procedural concerns , could you point the

1 group towards the substantive aspects that you are discussing?

2 MR. DELUCA: What I'm taking about is at the
3 bottom of that — the bottom of draft appendix A, ratio
4 methodology for proprietary institutions. So at the bottom,
5 there's the three asterisks, and it's where the last — so after the
6 first sentence, all of that additional information, "So if an
7 institution wishes to include debt obtained through long-term lines
8 of credit," etcetera, etcetera, through that.

9 So I think that should be stricken.

10 PARTICIPANT: I'll just add that — I mean, I'm not
11 an accountant, but it appears to me there's a conforming change
12 in Appendix B, for non-profit institutions. And I will also add
13 that I have worked very hard throughout this process to get my
14 constituency involved and engaged and try to get feedback. And
15 with some success. I got calls about this provision from for
16 profits and non-profits alike, so this got a lot of attention.

17 It's clearly again, and I'm not an accountant. This
18 isn't something I do, but it is clearly something that is concerning
19 to schools that it has shown up at this point in time. So you
20 know, if it is accurate to say that this is not a change that is being
21 made to conform to FASB changes, it does strike me that that is
22 outside of the scope of what we were told the subcommittee was
23 created to do and that that would be in addition that would

1 require consensus by the committee to add for consideration
2 which I don't think has happened.

3 MR. BANTLE: Comment from the subcommittee
4 and then Linda.

5 PARTICIPANT: I certainly, as a member of the
6 subcommittee understand the concerns being raised this
7 afternoon. So let me try to provide some background into the
8 subcommittee's thinking.

9 We were addressing components of the ratio
10 holistically that touched some of the FASB changes. So
11 because we were revisiting long-term liabilities, long-term debt
12 because of the leasing standard, we looked at long-term debt
13 holistically.

14 The first presentation we gave to you all, I don't
15 know, a month ago where we had handouts, the long-term line of
16 credit issue was noted on the supplemental schedule and I
17 realize that it is probably difficult for everyone around this table
18 other than maybe Kell, who I know is an accountant, and Danny,
19 to kind of go through those schedules. We did enumerate it on
20 the supplemental schedule. So I just wanted to say in the
21 interest of transparency, we weren't really trying to hide it and
22 that was our thinking that long-term liabilities were part of the
23 discussion because leases and the right of use asset in the lease

1 liability is a type of long-term liability.

2 We were asked to look at it because and this
3 happens in both the non-profit and the for-profit sectors. There
4 are institutions that take out lines of credit and I think this was
5 discussed in our issues paper as well with some potential
6 solutions that we talked about. There are institutions that take
7 out a long term line of credit that draw on their long term line of
8 credit facility before their financial statements are issued, before
9 the fiscal year ends or the calendar year ends.

10 After their audited financial statements are issued,
11 they then pay back the line of credit. Because you can deduct
12 all debt, long-term debt up to the amount of property, plants, and
13 equipment, it can cause your composite score to go up. So we
14 were looking at possible manipulations to composite score.

15 I'm not insensitive as a subcommittee member to
16 what you are all saying. I just wanted you to understand that we
17 didn't hide it. It was addressed in the issues paper. It was
18 addressed on the supplemental schedule earlier and it did touch
19 holistically this notion of long-term debt and liabilities which we
20 were looking at as a result of the lease standard.

21 MR. BANTLE: Linda's card — Chris, I just wanted
22 to come back to you because an edit was made on the screen.
23 Is that in line with your proposal? Okay.

1 Linda.

2 MS.RAW LES: Now I'm not an accountant. And
3 I've tried really hard to understand this. I was on the one call
4 that was referenced and I do not recall this being discussed.
5 Now it could be because I don't understand it. But the bottom
6 line is that I didn't understand what the subcommittee was doing
7 on this until Friday before we came because I think it was very
8 low-keyed. I'm not saying it was deliberately low-keyed. It was
9 low-keyed. So I understood the impact of this to my
10 constituencies Friday.

11 I haven't had time to talk to anyone to see what
12 the effect is. I understand from learning as much as I can
13 about it since Friday when I finally understood it that I don't think
14 most people on this committee and it's no offense, people have
15 said they're not accountants. I think all of us on this committee
16 really don't know what we're doing here and for us to vote for this
17 when we don't even know what the impact is. We don't
18 understand it. Just found out Friday it hasn't been emphasized,
19 would be very irresponsible and wrong and so I support Chris'
20 change wholeheartedly.

21 MR.BANTLE: Chris, then Kelli.

22 MR.DELUCA: So the element of the composite
23 score that long-term debt can affect is the primary reserve ratio,

1 right? That's the ratio we're talking about so that's where — so if
2 it's an issue of to the point that was made that there was concern
3 that schools borrow on a line of credit, then they have their at the
4 end of the year and then they pay it back at the front of the year,
5 that that can increase their composite score. But it's through the
6 primary reserve ratio, right? You're nodding your heads right.
7 Yes, okay.

8 So the primary reserve ratio, as I understand it,
9 and as it was explained in the August 2017 GAO report that I
10 referenced, the primary reserve ratio is does the school have
11 sufficient resources to cover its expenses. Is that a fair
12 characterization as what the primary reserve ratio? That's in the
13 GAO report, so I just want to make sure that we're — that we, as
14 for taking points, recognize that that's what that ratio is looking at
15 is does the school have sufficient resources to cover its
16 expenses?

17 MR. BANTLE: Yes.

18 MR. DELUCA: Okay, so this gets into the
19 question why again I think it's open to debate. There's been a
20 characterization that a school drawing on a line of credit is
21 somehow manipulating the composite score. And maybe there
22 are abuses out there that I'm not aware of, okay? But I think it's
23 at least open to debate to discuss if a school has a line of credit

1 that is access to cash. That is a benefit to the school and that
2 seems to me that that could at least arguably be included in a
3 conversation of does the school have sufficient resources to
4 cover its expenses.

5 So without further discussion, research, debate, I
6 can't sign off on the concept that using a line of credit or the fact
7 that you've drawn out a line of credit is somehow a manipulation.

8 Again, that would take much further discussion and much further
9 debate because again I look at it and I think that a line of credit —
10 that is a resource that the school can use to cover its expenses.

11 MR. BANTLE: Then Kelli, William, and Michael
12 and I'm not hearing additional proposals other than Chris's, so
13 let's keep the tags to those that are up and evaluate after those
14 tags.

15 PARTICIPANT: That GAO report cited this very
16 issue and went and spoke with schools about what they were
17 doing with lines of credit. And they had a whole series of schools
18 say that the entire reason that they took out these lines of credit
19 was in order to manipulate their composite score. And the GAO
20 told the Department of Education that it needed to do more about
21 eliminating that type of manipulation of the composite score.

22 We also an Office of Inspector General report
23 which cited us for not doing enough to try to eliminate the

1 manipulation of the composite score.

2 Rhonda, who has worked in this for years, has
3 seen that this is not a small issue with the Department of
4 Education.

5 PARTICIPANT: Steve, was your tag up? Did
6 you want to say more to that?

7 PARTICIPANT: Yes, I just want to point out to
8 the — I understand what you were saying about they may not
9 have been aware that this was an issue that was being
10 considered by the subcommittee, but it certainly — the treatment
11 of long-term debt and the primary reserve ratio was explicitly
12 mentioned in the Federal Register notice about the kind of things
13 that would be discussed there. So I mean there is a foundation
14 for it to be there and in the overall presentation from the
15 committee, the goal here is that these documents are going to
16 simplify and provide much more consistency in how these items
17 are looked at for all the institutions.

18 And long-term debt is an issue where when the
19 Department is looking at this issue in detail with the school,
20 there's a lot of work papers that are requested, underlying
21 documents, and that kind of process would be, we think, greatly
22 simplified by these clarifications that are in the appendix.

23 PARTICIPANT: Kelli.

1 MS. HUDSON PERRY: Two things. I want to
2 try to help a little bit with how this actually, what this means. And
3 then I do have some changes to the other appendix.

4 So this concept of this debt, the lines of credit,
5 they're already in the financial statement. They already exist.
6 So they're already being considered by the Department when the
7 calculations are happening. The idea behind this added text
8 here is that if a school chooses to use a line of credit for
9 long-term purposes, that they simply disclose what those
10 long-term purposes are. It's not changing financial statements.
11 It's just adding more context around what those lines of credit
12 are for. Because what's happening, as Steve just said, is that
13 the Department is evaluating that long-term debt whether it be
14 issued — stated as long-term debt or stated as lines of credit in
15 the financial statements. And they're going back and forth with
16 schools to try to say okay, what are those lines of credit for?

17 So the idea behind this isn't really changing
18 anything, it's just trying to provide clarity as to what schools are
19 using that debt for.

20 In Appendix B, I just have a couple of potential
21 changes. In the definition of total revenue with donor restriction
22 and gains without donor restriction, the first one there where it
23 says equals total revenue including amounts released from

1 restriction plus total gains, I think the parentheses should start
2 with investment returns because that language is trying to explain
3 investment returns as it relates to total gains. It's not part of the
4 definition, so if you start the parentheses there for the rest of
5 what's included there.

6 At the bottom of this page where it talks about
7 unsecured related party receivable as required by 34 CFR, one
8 of the things that Annm are said that if it's important enough to be
9 in a preamble or something, it's important enough to be in the
10 regulation. And I really think that there should be a definition of
11 what unsecured related party receivables are. The
12 subcommittee did provide something that explained this because
13 there are some inconsistency with pledges as it relates to board
14 members and whether or not those constitute unsecured related
15 party receivables, so I think it's important that that definition be
16 here.

17 And then on the actual supplemental schedule as
18 it relates to Appendix B, in the category of total expenses and
19 losses, one of the losses that's actually excluded here is
20 supposed to be the concept of annuities which would be change
21 of value of split interest agreements would be considered
22 annuities. So that should be listed as a separate line item on the
23 supplemental schedule.

1 And then lastly, we talk in instructions here that if
2 something is zero it should be noted as N/A, so I think in your
3 example on the supplemental schedule where you're showing
4 zeros, you might want to say N/A as opposed to saying it's zero.
5 So for example, where we say in the first section expendable net
6 assets, it says related party contributions receivable net, we have
7 a zero listed. Maybe that should show as N/A because that's
8 what the definition is asking to do.

9 PARTICIPANT: Yes, Rhonda.

10 MS. MENDITTO: Kelli, to your point on the
11 changes in value and split interest agreements, we do agree we
12 are changing that in the additional supplemental schedule that
13 we hand out and we can change that to N/A for that part, too.

14 MR. BANTLE: Okay, noting our hard stop in
15 eight minutes, there are a number of tags up. Do we have —
16 and noting the procedural concerns that have been raised, do we
17 have proposals to change Issue Paper 3 or the related
18 documents from those that have their cards up?

19 PARTICIPANT: In addition to the proposals that
20 have been made.

21 MR. BANTLE: Correct, in addition to the
22 proposals that have been made.

23 No additional proposals? Okay. Will, I think

1 your card was up next. And again, we have about eight minutes
2 until the stop for lunch.

3 MR. HUBBARD: I'll keep it very brief. Kelli,
4 thank you for your explanation and description. I thought that
5 was tremendously helpful and certainly providing, I think, some
6 level of clarity and transparency. This process is important.

7 I also want to thank the members of the
8 subcommittee for your many hours of service on this. It's
9 tremendously appreciated. Doesn't sound necessarily like, you
10 know, maybe that's coming through, but I just want to share that
11 specifically.

12 Additionally, I think this might be an opportunity to
13 perhaps bifurcate this issue from the current context. It sounds
14 like there is a bit more study that's needed, so I would perhaps
15 offer that as a proposal to consider.

16 MR. BANTLE: Linda.

17 MS. RAWLES: I guess I understand it more than
18 I thought because I'm not sure I agree with the explanation of it
19 that was given because I do think it's directing schools how they
20 can use their lines of credit, but they must use it for capital
21 expenditure. So I think it's more than a clarification. It's a
22 directive. But that illustrates my point which is none of us — I have
23 not had time to consider this, talk to people about it. I think it's

1 outside the scope of this committee. I think if the Department
2 wants to revisit the composite score, we should have a separate
3 committee do that. And I really think this is an inappropriate
4 discussion to even be having under the directive of this
5 committee and the subcommittee.

6 PARTICIPANT: So Mike Busada and then Abby.

7 MR. BUSADA: And I want to say as well and as
8 we've all been akin to say, and I am not an accountant. I
9 couldn't tell you what a lot of this means. I do want to say thank
10 you because I know that this is not an easy thing and you all put
11 a lot of time in it.

12 As an LSU grad, I would rather cheer for the
13 University of Alabama than be on this committee and have to
14 learn some of this stuff that you all have had to dig through. It's
15 phenomenal. So I appreciate it tremendously.

16 I cannot in good — all that being said, and this
17 may be a great idea. I just don't understand what effect it would
18 have. In good conscience, I can't support including this because
19 I feel like will — that I have a moral obligation to the people I
20 represent to at least understand what I'm voting on. So all that's
21 to say this may be a very good idea. But I think that it would be
22 — I think the best option would be as Will said, let's take this out.
23 Let's move this. Let's consider everything else and then let's

1 find a procedure that we can get full buy in from where we can
2 discuss this that may be absolutely necessary and important.

3 MR. BANTLE: Thank you. And finally, Abby.
4 And we have like four minutes.

5 MS. SHAFROTH: I hear people's procedural
6 concerns. Those are frankly similar to concerns I've had about
7 agreeing with much of what was put into Issue Paper 1 this
8 round, but I'm not clear on how those things would impact the
9 constituencies that I'm supposed to represent, so I have those
10 very same sorts of concerns. So I hear you.

11 I did, however, want to voice some support for that
12 language, based upon the explanation of the members of the
13 committee that it sounds like they feel that this would be closing a
14 loophole that has been identified by the Department over the
15 years as being a major area of manipulation by certain schools
16 that needs closure and to the extent this committee was
17 convened in part to address the financial responsibility standards.

18 This seems to be part and parcel with that, so I'm afraid that if
19 we kick the can down the road too much that we're not going to
20 do what is needed in order to really ensure that we have good
21 standards that protect the taxpayers and protect students. And
22 that makes sense.

23 So I don't know procedurally what the next step is,

1 but I don't want to just take this language completely off the table.

2 PARTICIPANT: So it's 11:57. Are there any
3 more comments from the subcommittee? Why don't we break
4 for lunch now and let's be back at 1:10. Thank you all.

5 MR. BANTLE: And just to note, as we've said
6 many times today, we have a significant amount of work to do in
7 the afternoon. If you get back a minute or two early, please look
8 at the rest of Issue Paper 3 and Issue Paper 4 and have your
9 concerns ready to go. And as Rozmyn, Moira, and I have said,
10 we are going to hold you to proposals, language edits.

11 (Whereupon, the above-entitled matter went off
12 the record at 11:57 a.m. and resumed at 1:10 p.m.)

13 MS. WEISMAN: All right. I'm going to
14 play Ted and me. So, we are ready to get started
15 again on Issue Paper 3. We will be picking up
16 shortly with page seven of that issue paper.

17 But before we continue, I would like
18 to report out that we actually have some results
19 from our lunch meeting.

20 There was a proposal on the table to
21 delete text from Appendix A on the ratio methodology
22 for proprietary institutions. And someone
23 enlighten me. I thought that we were talking about

1 that also being in B. But I could be wrong. Where?

2 PARTICIPANT: On the back.

3 MS. WEISMAN: Ah, the back side.

4 Okay. So, the proposal was to delete
5 the section on the first appendix, on Appendix A,
6 begins with, if an institution wishes to include.

7 Aaron, can you bring that text up.

8 It's on the way.

9 And then the similar language in
10 Appendix B as well on the reverse side of that
11 document. The Department agrees to withdraw that
12 language in the interests of meeting consensus.

13 As I mentioned before, we have a
14 significant interest in meeting consensus. And
15 we are trying to work toward that goal. That said,
16 this is being done for the purposes of this session,
17 meaning, not too subtly, that if we do not meet
18 consensus we certainly reserve the right to put
19 it back in.

20 Additionally, we talked before the
21 break about the idea of leases. And what we heard
22 was that people were not satisfied with the idea
23 of the four-year transition period with the

1 addition of the three-year zone alternative
2 proposal that we had put out on the table.

3 So, what the Department would like to
4 propose now is to have a six-year transition period
5 with no zone alternative option available, so we've
6 moved from four to six years.

7 MR. BANTLE: Okay, not seeing any
8 action at the table, a show of thumbs on 668.172
9 with those changes.

10 (Show of thumbs.)

11 MR. BANTLE: I see no thumbs down.

12 Take us into the next section.

13 MS. WEISMAN: In the next section we
14 are on page 7, again, of Issue Paper 3, looking
15 in Section 668.175, alternative standards and
16 requirements.

17 The only change that we made on page
18 seven here is within (c). And we just provided
19 a clarification, as we had been requested to do
20 that basically makes it clear that the letter of
21 credit provision does not apply to public
22 institutions.

23 Moving on to page eight, under the zone

1 alternative we talk about the Secretary basically
2 instituting some reporting requirements for
3 various events that we have already talked about.

4 These are items that we would not necessarily know
5 about but feel we have a need to know about or,
6 again, have talked about within other regulations.

7 So we've added (A), (C), and (D). And
8 then I believe we, because we struck (E), we would
9 need to renumber the current, currently listed item
10 that's listed as (F) we would need to renumber as
11 (E).

12 So, what we have added would be
13 basically notifying the Department of these various
14 financial events, which would include any adverse
15 action, including a probation or similar action
16 from an accrediting agency; a violation by the
17 institution of any institution of any loan
18 agreement; a failure of an institution to make
19 payment in accordance with its debt obligations
20 that would result in a creditor filing suit to
21 recover funds under those obligations; and also
22 the need to report, again, what would become the
23 new (E).

1 (E) would be any extraordinary losses
2 that are unusual in nature or infrequently occur,
3 or both, as defined in accordance with Accounting
4 Standards Update. And we've then added those
5 numbers.

6 So, I have been informed that (A), (C),
7 and (D) are not new items, that they were shaded
8 incorrectly, that they are currently in existing
9 language. So disregard that shading.

10 So the update here then would be on what
11 is the new (E) and updating the standard number.

12 And then picking up on page two.

13 MR. BANTLE: Nine.

14 MS. WEISMAN: I'm sorry, nine, yes.
15 On page nine. We are making better progress than
16 that.

17 Let's hold it right there. Let's go
18 to that point.

19 MR. BANTLE: So, I believe we are going
20 up to and including (f) on page eight; is that
21 correct?

22 Thank you. So, 668.175 up to and
23 including (f) on page eight. Proposals for

1 modifications? Aaron?

2 MR. LACEY: I have a question for the
3 Department because I'm not sure I understand
4 something.

5 So this language has been added in the
6 middle of nine, two-thirds of the way down that
7 it says if you've got an institution some
8 provisional certification it says under two --
9 we're there; right? I didn't skip ahead, we're
10 on provisional certification?

11 MS. WEISMAN: You skipped ahead a
12 little.

13 MR. LACEY: I thought you said through
14 (f). Okay, I'll stop.

15 MR. BANTLE: Oh yeah, sorry, there's
16 two F's.

17 MR. LACEY: Oh.

18 MR. BANTLE: Sorry. My apologies.

19 So (F), (F) on page 8. Any questions
20 or proposed modifications?

21 (No audible response.)

22 MR. BANTLE: Seeing no action, a show
23 of thumbs.

1 (Show of thumbs.)

2 MR. BANTLE: And I see no thumbs down.

3 And that is just to confirm going up to and
4 including (F) on page eight, which is where we are
5 starting from right now.

6 MS. WEISMAN: F on page nine.

7 MR. BANTLE: Okay, that was not my
8 understanding.

9 MS. WEISMAN: Okay. There's, I mean
10 there's no changes through that section, so.

11 MR. BANTLE: Okay. We're good.

12 Let's allow Aaron to talk then. My
13 apologies.

14 MS. WEISMAN: Aaron's comment goes, I
15 believe, to below (f). But if I'm wrong, that's
16 fine. I thought he was looking at two.

17 Let's let Aaron go ahead and we'll go
18 with it wherever it is.

19 MR. LACEY: Okay. I have a question,
20 so here it is.

21 So, for an institution that's
22 provisionally certified we say pursuant to Arabic
23 two under (f). Under this alternative, the

1 institution must. And then we've added, then we've
2 added under Roman numeral at (iii), comply with
3 the provisions under the zone alternative, as
4 provided under paragraph (d) (2) and (3) of this
5 section.

6 And back in the prior section one of
7 the things that's in gray, but I know has been there
8 before, is that you have to report if you have a
9 violation of a loan agreement.

10 My concern is it is not atypical for
11 institutions, particularly those that may be
12 experiencing some level of distress, but even those
13 simply that aren't, to have covenants in loan and
14 debt agreements that may relate to performance in
15 other things. And that, and sometimes those
16 agreements were struck two or three years ahead;
17 right?

18 And so, you can have a situation where
19 an institution might not hit a performance metric
20 or something that they had agreed to with a lender,
21 and so they would violate, technically speaking,
22 the loan agreement.

23 My concern would be if what we were

1 saying is a provisionally -- what I don't understand
2 is if that happens, if I've got an institution
3 that's provisionally certified and it has a some
4 item or metric in its loan agreement or a loan
5 agreement that it doesn't satisfy, so it's
6 technically in default, it now has an obligation
7 not only to report that but it looks -- what I don't
8 understand is what's the outcome, because this
9 says, under this alternative, the institution must.
10 And we've added these three criteria.

11 So, if it has a breach of a covenant
12 there doesn't seem to be anything contemplated that
13 will allow the school to say that's not material,
14 or we cured it, or the lender has allowed us to
15 cure it. I just need to understand what the
16 mechanics is to make sure that we're not suggesting
17 that if that happened you're done, for example.

18 MS. WEISMAN: Well, any time there's
19 a letter of credit the institution can certainly
20 go back to the Department and request that they
21 review it. So that wouldn't necessarily change
22 here.

23 MR. LACEY: My, I guess my concern is

1 how does this play into their eligibility? Because
2 they're eligible by virtue of being on provisional.

3 And this makes it sound like if you are on
4 provisional, a criteria or a requirement of being
5 on provisional is that you comply in theory at all
6 times with Roman numerette (i), (ii), and (iii).

7 And (ii) and (iii) are new.

8 And (iii) ties into all of the altern
9 -- zone alternative requirements.

10 So if I'm reporting that I've violated
11 the debt agreement, am I automatically in violation
12 of my provisional participation agreement or is
13 there some sort of dialog now with the Department?

14 I'm just unclear on the mechanics.

15 MS. WEISMAN: Okay. So, I have
16 confirmed that if there is a waiver from your
17 creditor, that we do have that back and forth.
18 So, if there is some condition that you can explain,
19 that you go ahead and explain that and you remain
20 provisionally certified.

21 MR. LACEY: What I would love to see
22 would be something that would say if at any time
23 an institution is not satisfied to (i) through

1 (iii), you know, then the Secretary may request
2 information or take further action, or whatever.

3 But my challenge is there's nothing here that
4 suggests if you are not complying with (i) through
5 (iii) what happens next.

6 And I think it would be a meaningful
7 addition here to clarify if you, for some reason,
8 aren't able to satisfy one of these three Roman
9 numerettes what happens next. Because I read (iii)
10 to talk about the end of the period. So there's
11 really nothing that says in real time if you report
12 non-compliance, what happens.

13 MS. WEISMAN: So, I think let's work
14 up some language.

15 MR. LACEY: Okay.

16 MS. WEISMAN: So, in terms of
17 placement?

18 MR. LACEY: I would probably put it
19 between where -- because (iii) seems to speak again
20 to the, you know, the end of the period. So I would
21 think after (ii), before (iii) you'd probably have
22 a new Arabic. And it would say something like,
23 you know, if an institution is or reports to the

1 Secretary, you know, that it is, you know, unable
2 to satisfy the criterion or criteria -- somebody
3 can help me with that -- in Section (2), you know,
4 (i) through (iii), then the Secretary, you know,
5 -- I don't know -- you know, may take action is
6 probably too vague. But the Secretary, you know,
7 may or will evaluate whether the institution is
8 financially responsible or remains financially
9 responsible.

10 I'm clearly spitballing, but you get
11 the idea.

12 MS. WEISMAN: Yeah, I do. But I think
13 what we're looking for is not so much to say that
14 you're financially responsible, because I think
15 that's a -- that's quite a cliff for you. I think
16 what you're really looking to say is that you've
17 resolved the issue.

18 MR. LACEY: Well, yeah. I mean, I
19 would like to build in -- fair enough. I mean,
20 I think it would be very positive to have a back
21 and forth, you know.

22 The Secretary may request further
23 information regarding the institution's financial

1 responsibility.

2 MR. BANTLE: So we'll look at getting
3 something back specifically on that.

4 But I will say in general when this comes
5 up and we've seen a violation of a loan covenant,
6 during the fiscal year covered by the audit the
7 question I'm going to ask when I'm working with
8 the reviewers is whether that breach was cured
9 during the period covered by the audit. Because
10 a lot of times these audits come in, as you know,
11 six months after the end of the fiscal year.

12 PARTICIPANT: Yeah.

13 MR. BANTLE: And anything that happens
14 after the fiscal year in some sense is too late
15 to address if that institution was at risk of a
16 debt being accelerated based on a breach in the
17 covenant, or some other action during that period.

18 So we look at information from an
19 institution that comes in along with the audit or
20 to supplement the audit showing that a possible
21 triggering event mentioned in the audit has already
22 been resolved satisfactorily. We're going to be
23 looking to see if it happened during the fiscal

1 year.

2 MR. LACEY: So, and here's a question
3 for you. So my understanding is if you're in the
4 zone alternative or provisional, now you have to
5 report this within ten days of the event occurring.

6 So you might be outside the cycle of the review
7 of previously-submitted audited financials.

8 So I guess that's really and what I'm
9 conceiving of as a situation where, you know, maybe
10 you've reviewed the last round of audited
11 financials. We, you know, an institution reports
12 that something has occurred so they're in violation
13 of a debt covenant. And just to ensure that in
14 that instance there's some mechanism to say, okay,
15 if that happens and you report it and you're
16 provisionally certified, you know, there would be
17 a dialog that would occur.

18 MR. BANTLE: You know, I think that
19 sounds -- I think that's a reasonable suggestion
20 that the institution, when it's bringing this to
21 the Department's mind, you know, attention timely,
22 is also bringing into the discussion the steps it's
23 taking to resolve any concerns about it.

1 MR. LACEY: I would certainly agree
2 that would behoove the institution.

3 MR. BANTLE: Ashley.

4 MS. HARRINGTON: I have a question
5 going back to page seven. It would be under 668.175
6 little (d).

7 So, I believe when we first started you
8 said the Department took away the zone alternative
9 for what we talked about in 668.172 for financial
10 ratios. But we're still referencing the zone
11 alternative for that section which, I believe if
12 I'm understanding correctly, no longer exists.

13 MS. WEISMAN: Yeah, we still need to
14 do new cleanup.

15 MS. HARRINGTON: Okay.

16 MS. WEISMAN: We're going to be
17 presenting you a new Issue Paper 1 and 2 for tomorrow
18 morning. And that will reflect any of those
19 changes that are associated with those changes.

20 MR. BANTLE: Okay. Any additional
21 comments on 668.175? We're looking at pages seven,
22 eight, and nine.

23 MS. WEISMAN: I think I can also then

1 add on page 10, since it's only one minor change.

2 MR. BANTLE: Yes.

3 MS. WEISMAN: When we had talked about
4 the idea of doing offset as an alternative form
5 of providing surety to the Department in lieu of
6 a letter of credit, we talked about doing an offset
7 that would be completed or satisfied at the end
8 of a 10-month period.

9 So we've moved that language from 10
10 months, what we had talked about at the last session
11 as the idea of doing a range, so, to give some
12 flexibility and to allow for the consideration of
13 the vast differences in what we see in the amount
14 of aid being disbursed at institutions. We have
15 changed that to now reflect a six- to 12-month
16 period.

17 So that is the only change that is
18 contained that's different from the last session
19 on page 10.

20 MR. BANTLE: Okay. Seeing no tags
21 going up, can we see the show of thumbs on 668.172
22 -- or 175. I apologize. Page seven through the
23 end, which is on 10, noting Ashley's cleanup change

1 and Aaron's proposal in concept that I think I would
2 suggest still needs some words missing, but in
3 context.

4 Show of thumbs.

5 (Show of thumbs.)

6 MR. BANTLE: Okay. I see no thumbs
7 down.

8 Okay, that takes us to the end of Issue
9 Paper 3.

10 As discussed before, we are going back
11 to Issue Paper 2 to wrap up Issue Paper 2 now.
12 And then we will go to four through eight today
13 so we can get back to the changes on one and two
14 tomorrow. We have a lot to do but and so please
15 pull out Issue Paper 2.

16 And if anyone can remind the group where
17 we left off, I think I have us on page seven. Is
18 that correct? And I'm open to being corrected.

19 PARTICIPANT: I think we stopped before
20 cooperation by the borrower. Is that right? Yes.

21 MS. WEISMAN: That was my
22 understanding. So we, I believe, left off after
23 the end of six, Romanette (iii) (C), right before

1 cooperation of the borrower, which is number seven.

2 MR. BANTLE: Yeah, we were on Arabic
3 seven at the bottom of page six.

4 MS. WEISMAN: Correct. And that's
5 where we'll pick up.

6 PARTICIPANT: We had proposed or
7 offered up some draft language for the voluntary
8 claim resolution. And I didn't know if that's for
9 tomorrow or today or what you all wanted to do.

10 MS. WEISMAN: That process will be
11 covered in the edits that we provide you with
12 tomorrow.

13 PARTICIPANT: Got it.

14 MS. WEISMAN: So, anything up to this
15 point? It's not that we are ignoring you. That
16 is coming soon to a location near you.

17 So, picking up on seven cooperation by
18 the borrower, we have just changed some text in
19 there to reflect our referencing. So we're saying
20 now that the Secretary may revoke any relief granted
21 to a borrower who fails to cooperate with the
22 Secretary in any proceeding under paragraph, we
23 now have (d) (9) of this section or under subpart

1 G, which is referencing the hearing locations of
2 our regulations. Such cooperation includes, but
3 is not limited to providing testimony regarding
4 any representation made by the borrower to support
5 a successful borrower defense claim.

6 So we've changed that from request for
7 discharge, noting that we would only request that
8 for a successful claim, which would be when we would
9 be collecting from an institution.

10 Moving over to page seven under recovery
11 from the school, we've inserted under (9) we now
12 have Romanette (i), changing the text a little bit
13 here, now saying the Secretary may initiate an
14 appropriate proceeding to require the school whose
15 misrepresentation -- changing that from omission,
16 or after omission, now to say a misrepresentation
17 resulted in the borrower's successful borrower
18 defense claim with respect to a Direct Loan to pay
19 the Secretary the amount of the loan to which the
20 defense applies, in accordance with 34 CFR 668
21 Subpart G.

22 We then continue on with additional new
23 text about full recovery. The Secretary initiates

1 a recovery action against the school no later than
2 three years after the date of the final
3 determination of the borrower's defense to
4 repayment claim.

5 The school must repay the Secretary for
6 the amount of the loan which has been discharged
7 and amounts refunded to a borrower for payments
8 made by the borrower to the Secretary unless the
9 school demonstrates that the Secretary's decision
10 to approve the borrower defense claim was clearly
11 erroneous.

12 And then closing out that section we've
13 added the school may present relevant evidence in
14 the recovery proceeding.

15 And I think we can break there.

16 MR. BANTLE: Okay. Linda, I see your
17 card up. Do you have a proposal for changes?

18 MS. RAWLES: Quick background. In
19 Issue Paper 1, the, I call them affirmative
20 defenses, but the evidence that a school could
21 present to mitigate against a claim were removed.

22 That was on page six, number (4), Romanette (i)
23 through Romanette (iv).

1 And I believe that they -- and I
2 understand the reasoning for removing them because
3 some of them had to do with, say, a potential rogue
4 employee. And there was some thought that if the
5 standard remained intent for the schools, that that
6 would be intent for the school and not intent for
7 the rogue employee.

8 But I think that is so unsettled at this
9 point as to how that's going to come out or if the
10 Department would actually not consider intent of
11 a rogue employee as intent for the school, that
12 I would like to propose we return four Romanette
13 (i) through (iv) into this section where the school
14 may present relevant evidence in the recovery
15 proceeding.

16 Do I need to say all that again?

17 MR. BANTLE: That would probably be
18 helpful.

19 MS. RAWLES: I know we're all tired.
20 And going back to one, I apologize for that. But
21 if you have Issue Paper 1 with you, and look at
22 page 6. And these were a list of the types of
23 evidence that the school could provide to the

1 Department. For instance, to correct a
2 misrepresentation prior to the borrower enrolling.

3 These were all -- at first we thought they were
4 moved. But they were not moved, they were removed.

5 Right?

6 And I'm not sure everyone here
7 understood that, that they weren't moved. Because
8 we were going to find them again in Issue Paper
9 2. But then when we went to Issue Paper 2 we
10 realized they had not been moved, they had been
11 removed.

12 And because I still think they are very
13 important pieces of evidence that a school can use
14 to give to the Department more information, I
15 propose that they be added back in this section
16 where the school is presenting relevant evidence
17 in the recovery proceeding.

18 MS. WEISMAN: So I think I can respond
19 to that. Our feeling was that by listing out in
20 the standard the idea of reckless disregard, it
21 would negate any of these items, that they just
22 wouldn't apply.

23 MS. RAWLES: I'm not sure we can -- this

1 is one of these problems where we're taking things
2 in isolation. And they all work together. So we
3 don't know how that standard is going to come out.

4 But even if we -- as my preference would
5 be -- to keep intent and reckless disregard, I
6 thought -- and correct me if I'm wrong, Annmarie
7 -- but I thought that the rationale for taking them
8 out was that we would not hold a school accountable
9 for the intent of, say, a rogue admissions officer.

10 I'm not sure I can count on that
11 interpretation in the future. So I still think
12 it's important that the school be allowed the
13 opportunity to mitigate some of these things. And
14 that would be: do you show whether there was
15 reckless disregard or not?

16 But I can't, I can't know we're going
17 to end up with reckless disregard.

18 MS. WEISMAN: So I think then let's just
19 put that on hold until tomorrow when we have the
20 new proposed language for both one and two.

21 MS. RAWLES: Okay. I'm willing to
22 hold, yeah.

23 MR. BANTLE: Okay.

1 MS. RAWLES: I just don't want it to
2 drop.

3 MR. BANTLE: Okay. I have William and
4 then Michael.

5 MR. HUBBARD: Thanks a lot.

6 In Romanette (iii) at the end where it
7 says unless the school demonstrates that the
8 Secretary's decision to approve the borrower
9 defense claim is clearly erroneous, I propose
10 striking that language. I think by this point if
11 the Department has approved a borrower defense
12 claim, sufficient evidence or substantial weight
13 of the evidence, or evidence write large has been
14 presented at this point.

15 And this strikes me as kind of a gotcha
16 moment that would potentially present a claw-back
17 to a student who's already had their claim approved.

18 So it's unclear. And maybe I'm not
19 clear on this. So perhaps some clarity would be
20 appreciated.

21 PARTICIPANT: I'm sorry. Well, I'm
22 just, like, reading the entire and I'm just, like,
23 that's not right.

1 So, well, I think I don't quite
2 understand how you're reading the language. So
3 I guess I'll say here we are saying that, so, the
4 school must repay the amount of the loan unless
5 the school demonstrates the decision to approve
6 the borrower defense claim is clearly erroneous.

7 So it already presumes that the
8 Department in the borrower defense claim already
9 had -- I mean, we'll see, we'll talk more about
10 the changes to Issue Paper 1 and Issue Paper 2
11 tomorrow. But the language as drafted in this
12 issue paper before you all today envisions having
13 evidence from the school and from the borrower.
14 And the decision here to recover will only occur
15 if the borrower defense claim is approved. So,
16 the decision about the approval then would be upheld
17 by the -- in the recovery action, that those
18 findings would then lead to the recovery action
19 against a school only, and it will be upheld unless
20 the hearing official then finds that decision
21 clearly erroneous.

22 So, I feel like it's a little different
23 from what you're getting at. But let me know if

1 I'm wrong.

2 MR. HUBBARD: That makes more sense.
3 I mean, as I read it, though, it just strikes me
4 that if potentially the claim has been already
5 approved and then evidence is presented, it would
6 pull it back.

7 If I'm not reading that right, that's
8 fine as well.

9 PARTICIPANT: We're not talking here
10 about a claw-back from the student or from the
11 borrower. We're just talking about is the school
12 obligated to pay? And if by some chance the school
13 can at this point show that the claim is erroneous,
14 then we're going to give them that opportunity that
15 they wouldn't need to pay for it. But we're not
16 saying then we would go back to the borrower and
17 take the money back.

18 PARTICIPANT: And just, just to
19 clarify, in the written decision section of this
20 issue paper we do note that the decision in the
21 initial claims process, that passes the initial
22 determination bar. And then it goes on to
23 determination, the final decision. So that would

1 be the final decision from the borrower's
2 perspective.

3 MR. BANTLE: Does that address your
4 concern, Will?

5 MR. HUBBARD: It does.

6 MR. BANTLE: Okay. Michael, then
7 Kelli.

8 MR. BOTTRILL: So, in reading this and
9 listening to Caroline's comments, it feels like
10 there may be some process and some steps that are
11 involved in this recovery action. So, as I'm
12 looking at Romanettes (i) through (iv), they don't
13 really describe this as a process whereby there
14 is written notice that's given to the institution
15 that the Secretary will initiate the proceeding.

16 And the word proceedings itself, the
17 word proceeding itself indicates to me there's a
18 process.

19 That the school is going to have an
20 opportunity to demonstrate either -- well, to
21 demonstrate that the Secretary's decision was
22 erroneous. Or that the school will have an
23 opportunity to present relevant evidence.

1 So I just think sequencing here is more
2 along the lines of the Secretary may initiate.
3 If it does, then the school, the Secretary will
4 provide its decision to do so in writing and the
5 school will have an opportunity to submit its
6 response or any evidence that it believes supports
7 any claim that the Secretary's decision was
8 erroneous. And that that claim, that recovery
9 action has to be done within three years.

10 So I'm just suggesting that in the
11 sequencing there maybe it can put forward what steps
12 of a process you're envisioning. Is that --

13 PARTICIPANT: So, I think much of that
14 is what we reference with 668, within Subpart G.
15 So the idea of a hearing, for example, is outlined
16 in 668.89. I think our goal here was not to repeat
17 all of those steps that would be afforded to an
18 institution that are already outlined elsewhere
19 in regulation.

20 PARTICIPANT: And just to follow up on
21 that. In January of last year we published a
22 procedural rule that modified Subpart G to
23 accommodate borrower defense provisions. And

1 because that was purely a process issue, that didn't
2 go through. It was in the Federal Register but
3 it didn't have to go through negotiated rulemaking
4 like what we've got here.

5 And certainly, depending upon what is
6 the outcome of these proceedings and the
7 regulations that result, modifications to that
8 process could, could be made. But there, but we
9 do have a reference for the Subpart G, and that,
10 that was intended to sort of reference those
11 changes. And those changes did go into effect,
12 I think, January 19, 2017. So they are, they are
13 there.

14 MR. BOTTRILL: Right. So, next time
15 just stop me and tell me that I'm rambling on
16 inappropriately and that I haven't fully done all
17 my homework.

18 PARTICIPANT: Mike, you're rambling.

19 (Laughter.)

20 MR. BOTTRILL: Thank you.

21 MR. BANTLE: Was that --

22 MR. BOTTRILL: How do I get called out
23 for that, given what we've experienced over the

1 last three weeks?

2 (Laughter.)

3 MR. BANTLE: Because you just set
4 yourself up for it.

5 Okay, Kelli and then Abby.

6 MS. HUDSON PERRY: Roman number (ii)
7 up at the top of page seven, there's a reference
8 to any sworn statement. Is that different, is that
9 a different sworn statement based on this section,
10 or does that relate to the application? Because
11 I feel like we've changed the terminology
12 throughout the rest of the papers.

13 PARTICIPANT: I think that is really
14 us saying the application, but also any other sworn
15 statements. So it's kind of conserving the option.

16 If someone, for example, can't appear
17 at a hearing and they make a sworn statement, then
18 we would include that information as well.

19 MR. BANTLE: Abby.

20 MS. SHAFROTH: All right. Number
21 seven on the bottom of page six, cooperation by
22 the borrower, I have I think, hopefully, sort of
23 a small technical sort of suggestion to make here.

1 If you're saying that the Secretary may
2 revoke relief granted to the borrower if the
3 borrower fails to cooperate with the Secretary in
4 the subsequent recoupment proceeding, just because
5 we're talking about the Department may do this
6 subsequent proceeding within three years after,
7 after the decision, I just want to make sure that
8 this language wouldn't, wouldn't allow, wouldn't
9 set off revocation of the borrower's relief if,
10 you know, the borrower moves during that time frame
11 and the Department isn't able to get in touch with
12 them.

13 And I don't think that's the intent
14 here. But just to clarify it in the language, if
15 we changed it to something like a borrower who
16 refuses to cooperate with the Secretary, I think
17 that would satisfy the concern.

18 MS. WEISMAN: Thank you. I appreciate
19 that edit.

20 And just to clarify, no, we were
21 certainly not intending to go back to borrowers
22 that we couldn't reach, that type of thing. There
23 may be reasons that for some reason they cannot

1 cooperate with the borrower. There could be
2 extenuating circumstances.

3 So I think a refusal to cooperate we
4 could probably work with that language. You know,
5 there could be a reason to refuse. But I think
6 it still covers what we're looking for.

7 MR. BANTLE: Chris.

8 MR. DELUCA: So I recall we've had the
9 conversation about this in connection with other
10 sections here. But when we get to page 9 -- or
11 page seven, I'm sorry, page seven, section nine,
12 recovery from the school, about instituting a
13 proceeding in accordance with Subpart G, the issue
14 came up regarding how does this affect schools under
15 a provisional certification? Do they get the full
16 protections of a Subpart G proceeding?

17 I mean, has that been answered? Have
18 we already answered that or is that still --

19 PARTICIPANT: We believe that
20 certainly they do. We did not feel that the
21 language was necessary but we did have it in the
22 issue paper in another location. You will see it
23 presented when you see a new issue paper tomorrow.

1 But our, our belief is that even without the
2 language, even without specifying, that
3 provisionally certified schools do have an
4 opportunity here under Subpart G for the hearing.

5 MR. BANTLE: Aaron.

6 MR. LACEY: So, we have a clearly
7 erroneous standard. What is the standard for other
8 Subpart G proceedings: fine, limitation,
9 suspension, termination proceedings? Is it
10 clearly erroneous?

11 PARTICIPANT: So, counsel has advised
12 me that in other Subpart G hearings we don't have
13 a prior proceeding. So this wouldn't apply.

14 MR. LACEY: Well, what is the
15 evidentiary standard? I mean, what's the standard
16 in those other Subpart G proceedings where an
17 institution is appealing a prior determination?
18 Or, I don't know, where an institution has the
19 burden of proving its case.

20 PARTICIPANT: So, under Subpart -- So,
21 in Subpart G we have the burden of proof, the
22 Department, in proving the limitation, suspension,
23 or fine.

1 MR. LACEY: Can I just ask why the
2 Department put this in Subpart G and not, not H,
3 what the thinking was there?

4 PARTICIPANT: Let me address this.
5 Subpart G, in Subpart G the school is almost --
6 well, Subpart G provides the opportunity for oral
7 argument -- I mean oral presentation of evidence.
8 Generally, this would, because this involves
9 money, most of our -- this would normally under
10 Subpart H, which is a paper hearing in most
11 circumstances.

12 In this case there is the possibility
13 that in the case of misrepresentation where you
14 have the need for oral testimony from the students
15 and from representatives of the school, so we put
16 it in Subpart G which has that opportunity.

17 However, like in Subpart H, in a Subpart
18 H proceeding the burden is on the school to counter
19 what the Department has done because we've set out
20 everything in a final program review determination
21 letter that says this is how much the school owes,
22 and we basically already presented our case.

23 This, as a procedural matter, the

1 borrower defense process is similar to that because
2 we will have already had a proceeding beforehand
3 involving where the student and the school are
4 already involved. We've presented a decision.
5 So we're putting it in Subpart G so that there's
6 the opportunity for oral testimony, if appropriate,
7 but we're using a burden of proof that's similar
8 to what would apply in Subpart H because we have
9 this prior proceeding. So it's kind of a mix.

10 MR. LACEY: And that was exactly my next
11 question is, well, what is the standard in Subpart
12 H? Is it clearly earnings?

13 PARTICIPANT: It's --

14 PARTICIPANT: Can you pull the mike
15 closer, please.

16 MR. LACEY: So my next question was,
17 so my next question was what, then what is the
18 standard used in Subpart H?

19 PARTICIPANT: In Subpart H it's really
20 we don't specify a standard of evidence, a standard
21 of evidence. The burden of proof --

22 MR. LACEY: Or review. I'm sorry.
23 Standard of review I should say.

1 PARTICIPANT: Right. The burden of
2 proof is on the school to disprove what, what's
3 in the final program review determination to the
4 satisfaction of the hearing official. So it's not
5 clearly erroneous or anything like that, it's, it's
6 what satisfies the hearing official.

7 PARTICIPANT: Follow-up. Would that
8 not be appropriate in this context as well if it
9 works in Subpart H?

10 PARTICIPANT: In this circumstance we
11 believe because of the more complete opportunity
12 in a Subpart, in a Subpart H proceeding, it's you,
13 you haven't had the back and forth with a third
14 party that you do here. So we, we believed that
15 the clearly erroneous standard was appropriate.

16 MS. WEISMAN: And just a reminder, this
17 is not new from the last session to this one. So,
18 if possible, I'd like to move on.

19 MR. BANTLE: Can we just get a show of
20 thumbs? I believe this is Section 685.206,
21 starting with Arabic seven on page six, and going
22 through Romanette (iv) on page seven, at the end
23 of the page, with Abby's refusal substitution.

1 Do you have another proposal, Abby?

2 MS. SHAFROTH: In Roman numerette (iv)
3 at the end of this section that we're looking at,
4 it says, the school may present relevant evidence
5 in the recovery proceeding.

6 Is this additional evidence that the
7 school didn't present in the underlying proceeding?

8 And, if so, should we put limits on that? Should
9 it be newly discovered evidence or otherwise the
10 school getting, like, sort of another, another shot
11 to put new evidence into the -- or to put additional
12 evidence in the record that wasn't there before
13 to sort of a second appeal that the borrower doesn't
14 get?

15 MS. WEISMAN: At this point the
16 borrower has already received this discharge. So
17 this is just looking at whether the school should
18 pay the Secretary. And so our feeling is that we
19 are requesting recovery from the institution. If
20 they have evidence that counters the claim that
21 we're making, that they be afforded the opportunity
22 to present that.

23 MS. WEISMAN: Final comment from Linda.

1 MS. RAWLES: Without commenting on it
2 substantively, I think the change from fails to
3 cooperate to refuses is not -- that's adjusting
4 language that's not new from the last time; correct?

5 It's not in gray, so I don't know why Aaron can't
6 finish his point about the clearly erroneous.

7 MR. BANTLE: Aaron, did you have any
8 more?

9 MS. RAWLES: I just want to make sure
10 he has full opportunity to talk about it.

11 MR. LACEY: I appreciate that, Linda.
12 I don't have anything else to add, other than my
13 mind is not made up on this yet. Subpart G is very
14 complicated.

15 You know, I'm processing what Bryan was
16 kind enough to share, which I appreciate, which
17 is why this is put in G and that there's no standard
18 in H. But, you know, I don't want to hold things
19 up, but we haven't voted on anything and I'm still
20 processing it.

21 PARTICIPANT: And just a reminder, our
22 votes today, you know, we do not have consensus
23 until we have final consensus on everything.

1 So, Valerie?

2 MS. SHARP: I just wanted to ask, you
3 mentioned that you were considering changing the
4 wording in the other place that I requested on
5 Subpart G for provisionally certified. And I had
6 requested it also be considered on Number 9. So,
7 just a point, if they're bringing back a revised
8 copy tomorrow that they would be consistent.

9 Thank you.

10 PARTICIPANT: And I think we are.

11 MS. WEISMAN: So, can you clarify? We
12 have somebody making edits who wants to make sure
13 he reflects exactly what you're requesting.

14 MS. SHARP: Yes. Oh, sorry. I,
15 yesterday you were going to go back and discuss
16 what wording you wanted to add there. And we had
17 discussed some text in the prior section. And you
18 mentioned that you didn't think it was necessary,
19 but you were considering adding it.

20 I requested that also that same text
21 that was added, where we talk about Subpart G at
22 the beginning of this section, that it also be added
23 at nine, at the end of nine, just matching text.

1 MS. WEISMAN: So, Aaron, maybe you
2 could just highlight that for right now. You don't
3 necessarily have to add the text in.

4 MS. SHARP: Yeah.

5 MS. WEISMAN: But just a note that we
6 want to be parallel in that section as well.

7 MS. SHARP: And my feeling is probably
8 you've adjusted the text.

9 MS. FREDMAN: I'm just wondering, like,
10 in this proceeding do you envision a cooperating
11 student to be, like, compelled to testify and be
12 cross-examined by the school's attorney in that
13 situation about the prior testimony? So I'm trying
14 to understand, you know, what you'd be looking for
15 in terms of additional sworn statements or
16 testimony.

17 PARTICIPANT: Juliana, thank you so
18 much for your question. And I think that really
19 is like a case-by-case analysis. But it was our
20 thought that given due process requirements, and
21 here we're talking about recovery from a school
22 of funds that they have, so their property, that
23 under due process we may need to -- if the

1 circumstances warrant, and certainly we'll have
2 to think about this very carefully given the
3 concerns that you are raising, whether or not there
4 is a need for cross-examination of an adverse
5 witness if issues of credibility or veracity are
6 at issue.

7 MS. FREDMAN: Because it does then sort
8 of seem like we're talking about two sort of
9 separate proceedings to establish almost the same
10 borrower defense. You know, presumably the
11 Department got all the evidence from both sides
12 and made a determination about the student's
13 credibility prior. And then that's all going to
14 happen again at any point in the new three years.

15 I understand that might not eradicate
16 the initial final determination, but it is a little
17 troubling to think it could be that open-ended and
18 that the finality isn't really final.

19 PARTICIPANT: So, I just want to
20 understand your concern a little bit more. So it's
21 the claim process is final as to the borrower.
22 Your concern is about whether the process, like
23 when the finality for the school occurs?

1 MS. FREDMAN: Well, the school if --
2 I guess, I mean, I haven't totally thought this
3 completely through, but I think that you get to
4 some point two or three years out and you have a
5 full hearing where there's a cross-examination and
6 maybe somebody doesn't -- you know, is
7 unrepresented, doesn't maybe remember what, what
8 they wrote in their application form because it
9 was a couple years ago. You know, I can just
10 envision stuff that would be a little problematic
11 from the borrower perspective in that situation.

12 I don't know exactly how it would play
13 out, but.

14 PARTICIPANT: So, just to clarify, we
15 use this language in our other discharges as well.

16 So this is something that we, again, have the right
17 to do. I don't think it's something that we
18 commonly do. But, but we want to preserve our
19 rights to have the borrower give us information
20 that we may need at that hearing.

21 MS. FREDMAN: Yeah, absolutely. And
22 I'm very familiar with the discharge applications,
23 and I know that the borrower -- I always explain

1 that to people that they, you know, might have to
2 provide additional information. It's more that
3 adversarial process that concerns me than the
4 Department asking the student for additional
5 information. Just to clarify.

6 PARTICIPANT: I don't think we see it
7 as adversarial. I mean, the borrower isn't being
8 put up against the school in the way that maybe
9 it seems because the decision for the borrower has
10 already been made and is final.

11 MR. BANTLE: Okay. Can we see a show
12 of thumbs on this, this item, starting with Arabic
13 7 on page 6, and going through Romanette (iv) on
14 page 7, with the refusal substitution that Abby
15 suggested and -- Okay.

16 Show of thumbs.

17 (Show of thumbs.)

18 MR. BANTLE: Okay. Seeing no thumbs
19 down, 685.212.

20 MS. WEISMAN: So then looking at
21 685.212, we pick up on page eight. The new text
22 is in Romanette (ii) in about the middle of the
23 page.

1 The text now reads, if the borrower
2 defense claim is approved, the Secretary discharges
3 the appropriate portion of the Direct Consolidation
4 Loan and affords the borrower further relief, as
5 applicable, in accordance with 685.206(c)(2) or
6 685.206(d)(6)(ii).

7 So that is basically, just to kind of
8 clarify, that is when a borrower has used a
9 consolidation loan as a vehicle for getting relief.

10 So, for example, if they have a FFEL loan that
11 they would like to file a claim on, the way we can
12 get them into the direct loan program is through
13 consolidation. So then we're clarifying what that
14 process would look like.

15 Moving on to 685.300, we moved this item
16 from the standard paper Number 1 into process, and
17 we have adjusted the language slightly so that
18 Number 11 now reads, Accept responsibility for
19 financial liability stemming from losses incurred
20 by the Secretary for repayment of amounts
21 discharged by the Secretary pursuant to sections
22 685.206, 685.214, 685.215, 216, and 222, and for
23 which the institution has been determined to be

1 liable as described in Subpart G.

2 So this is basically putting this into
3 the agreement between the institution and the
4 Secretary in terms of what it takes to participate
5 in the Direct Loan Program.

6 And those are the only changes left that
7 are new to this section.

8 MR. BANTLE: So, comments from 212 to
9 the end of the document? Abby.

10 MS. SHAFROTH: This is, this is sort
11 of a question, I raised this in Session 2, and I
12 don't, I don't think it was fully resolved.

13 For borrowers who have a Direct
14 Consolidation Loan, if, if they took out a direct
15 loan prior to the effective date of the regulation
16 and they consolidate that into a Direct
17 Consolidation Loan after July 2019, is that
18 borrower's claim subject to the old standard, the
19 state law standard, or is it subject to the new
20 standard?

21 And as a wrinkle on that, just to make
22 sure I fully understand, if the borrower had a
23 combination of direct and FFEL loans prior, that

1 they took out prior to July 2019 to attend a program,
2 and then they consolidate into, all of those into
3 a Direct Consolidation Loan after July 2019, is
4 part of their claim subject to the old standard
5 and part subject to the new standard, which strikes
6 me as pretty confusing to the borrower?

7 PARTICIPANT: So I think the text that
8 you're looking for is on page eight in (2) (i) (A)
9 and (B) to talk about what standard applies. So
10 we said basically it would be the standard in the
11 underlying loan.

12 If you want to propose a change, then
13 this would be the place to make an adjustment.

14 PARTICIPANT: I just have a clarifying
15 question. Isn't the Direct Consolidation Loan a
16 new loan? Because we talked about that last time
17 that I, we were under the impression that when that
18 consolidation loan is made, regardless of what's
19 folded in there, that was a new loan and that
20 creation of that new loan was based on, like, it
21 would follow whatever time period. If it was
22 before, it was under this. If it was after, it
23 was under the new.

1 That's what we were told last time.
2 So, is that not accurate?

3 PARTICIPANT: So I think, first of all,
4 we have some missing text that we need to address
5 first. So, we talk about -- and I think what I'm
6 saying is I believe we need a (C) to clarify, first
7 of all.

8 So, we have an (A), whether the omission
9 of the school with regard to the loan described
10 in paragraph (k)(2) of this section, other than
11 a Direct Subsidized, Unsubsidized, or PLUS Loan,
12 establishes a borrower defense under 685.206(c)
13 for a Direct Consolidation Loan made before July
14 2, 2019, or under the standard set forth in 685.222,
15 for a Consolidation Loan made on or after July 2,
16 2019.

17 So, there we've addressed the before
18 as well as the on or after. But then when we get
19 down to (B) we only address the on or after. And
20 so I, I just want to clarify that I think that we're
21 missing a piece in there.

22 PARTICIPANT: And just to sort of build
23 on that. So, (A) talks about basically anything

1 that's not a direct loan that can be consolidated.

2 (B) talks about direct loans made after
3 the new standard goes into effect, which is exactly
4 what Abby's question is. So I think we're missing
5 a (C) here, as Annmarie was saying, about what
6 happened, which is Abby's question.

7 MS. WEISMAN: So this is something that
8 I -- you definitely raised it, Abby. You know,
9 I wasn't here. I read the transcript. I saw that
10 you had raised it. But something that we really
11 need more discussion of.

12 So if people here have thoughts about
13 that, we'd like to hear it.

14 MR. BANTLE: Abby.

15 MS. SHAFROTH: So, I mean I'm a bit of
16 two minds. And to the extent that, to the extent
17 that I don't like the new standard that is created
18 I like to preserve the opportunity to borrowers
19 who have taken out direct loans prior to July 2019
20 to continue to rely on the existing state law
21 standard.

22 You know, at the same I am in favor of
23 clarity for borrowers. And I am concerned about,

1 particularly in an instance where a borrower has
2 some Direct Loans and some FFEL loans taken out
3 prior to July 2019, they consolidate them
4 afterwards as part of their claim, has to be subject
5 to a state law standard and part of their claim
6 has to be subject to a new fraudulent
7 misrepresentation standard, then that's probably
8 pretty confusing for an unrepresented borrower.
9 And I think there is some value to their being
10 clarity for the borrower going into their
11 application to know which standard they're going
12 to be held to.

13 So that doesn't -- that's not a
14 proposal, that's just a few things that I'm thinking
15 about, you know, things that I just suggest that
16 the Department give attention to. And if you come
17 back with language, then I'm happy to consider it
18 more.

19 PARTICIPANT: And just for the table,
20 just to provide some context here, you know, as
21 we're all aware, borrower defense is something
22 that's authorized for the Department to do under
23 the Direct Loan Regulations. However, that does

1 not exist in quite the same way -- and notice I
2 said "the same way" -- with other loans that may
3 be consolidated.

4 So when the borrower consolidates the
5 loan, then it's a direct loan that's authorized
6 under the program. And so then the question arises
7 of which standard applies and how it applies. And
8 that's, that's really where this comes to.

9 Whereas, if they have a direct loan
10 that's been consolidated they have a standard
11 applied to it under originally.

12 So we'll take it back.

13 MR. BANTLE: Jaye?

14 MS. WEISMAN: Okay. So I want to go
15 back to Issue Paper 1 and the change that you made
16 under (A)(1). I thought, and maybe I didn't
17 understand it, but you struck or the Department
18 struck (A)(2) which I thought was trying to get
19 at the consolidation of non-DL loans. And you
20 added language about where the making of a loan,
21 the making of a loan debt was repaid by a Direct
22 Consolidation Loan.

23 So I guess I was, my interpretation of

1 that was, and the process that we've talked about
2 for FFEL is that there would be this preview or
3 preevaluation of the FFEL loan. And if it was
4 approved, then the Department would instruct the
5 borrower to consolidate.

6 And so if those were loans, and they
7 would have to be pre-July 1, 2019 -- we're not making
8 any more FFEL loans, so. So anyway, I think what
9 you're saying is you want something, you're going
10 to consider whether there's more explicit language
11 about that in this section to kind of clarify the
12 change you made in (A) (1)?

13 PARTICIPANT: Right. I mean, so FFEL
14 is slightly different because the direct loan
15 authority, I mean the statutory authority is in
16 the Direct Loan Program statute. So the FFEL, so
17 the FFEL statute doesn't reference borrower
18 defense.

19 So, if a FFEL, if a FFEL loan gets
20 borrower defense relief through this process, the
21 Direct Loan borrower defense process, then they
22 basically need to become a Direct Loan through
23 consolidation. So that's why the standard would

1 matter for that.

2 But for a Direct Loan that gets
3 consolidated or was consolidated prior to someone
4 knowing about our end process, then that remains
5 sort of the question we need to take back.

6 MR. BANTLE: So, are there any
7 proposals on this new 8 from the table? Abby?

8 MS. SHAFROTH: So, this isn't specific
9 language. But I would just ask the Department to
10 consider whether, whether you think you would have
11 the authority to establish a rule that the standard
12 that applied is based on the date of the original
13 underlying loans, whether they be direct or not
14 direct prior to consolidation so that, you know,
15 all the loans that were Direct or FFEL that have
16 already been originated prior to the effective date
17 of this regulation are subject to the old standard,
18 even if they are later consolidated into a Direct
19 Consolidation Loan.

20 And all the loans that originated after
21 the effective date are subject to the new standard.

22 And, so making it based on the date of the original,
23 of the loan origination rather than the date of

1 the consolidation I think would be clearer to
2 borrowers and would be more equitable in treating
3 borrowers who originally took out Direct versus
4 FFEL loans and who didn't, you know, choose whether
5 they took Direct versus FFEL loans. So we'd be
6 treating those borrowers, borrowers who borrowed
7 at the same time, the same way.

8 MR. BANTLE: Jaye, is that a new tag
9 or a left up?

10 Okay, Ashley and then Wanda.

11 MS. HARRINGTON: Just a question on the
12 process though. A loan can be originated but never
13 disbursed; correct?

14 MS. WEISMAN: Yes. A loan can be
15 originated and never disbursed.

16 MS. HARRINGTON: So why would we, why
17 would we not just use when the loan was disbursed
18 then? Okay, I just wanted to make sure I understood
19 that it -- I was under the impression it could be
20 originated and never disbursed, and those dates
21 could be vastly different, so.

22 MR. BANTLE: So the modification would
23 be the date of disbursement rather than

1 origination. Okay.

2 Wanda?

3 MS. HALL: I thought I understood how
4 many categories of borrowers and loans that we had.

5 So, we have FFEL loans today are based on state
6 rules. Then in order for them to be able to have
7 the borrower defense discharge they need to be
8 consolidated into the Direct Loan Program.

9 There could be -- I don't think there
10 are any today -- but there could be some FFEL that
11 get consolidated into DL before 7/1/19. So those
12 would fall under one set of rules because of the
13 date it was made, originated, or whatever. Right?

14 And then you could have some FFEL that
15 get consolidated after 7/1/19. So that's another
16 group.

17 You have DL plus Stafford and in
18 consolidation that were originated. I always
19 thought in DL it was always just originated and
20 we didn't use the word "disbursed," that it was
21 originated. So DL plus Stafford in consol made,
22 originated prior to 7/1/19.

23 Then you have DL plus Stafford consol

1 made, originated after 7/1/19.

2 So, we really kind of have four groups.

3 For FFEL, the only way they can get
4 borrower discharge is if they -- borrower defenses,
5 if they go into the DL consolidation. And then
6 it's only for the amount that's outstanding at the
7 time that they consolidate. That's the discharge
8 amount; right? Or is that changed? That's what
9 we had talked about last year. And I don't know
10 that we've talked about that this year. Maybe I
11 just missed it.

12 You can back that wrinkle out and just
13 go with the categories if you want to.

14 MS. WEISMAN: I think we need to add
15 to what we have here and bring you back new language.

16 MR. BANTLE: Any final thoughts on
17 this, this section that we've discussed closing
18 out Issue Paper 2?

19 (No response.)

20 MR. BANTLE: Okay. So I think we're
21 going to get other additional modifications to
22 Issue Paper 2. So let's close out this discussion.

23 And tomorrow, when we bring back that, we can look

1 at the issue paper in its entirety.

2 So, Issue Paper 4.

3 MS. WEISMAN: So, for Issue Paper 4,
4 in the summary of changes -- this was, again, on
5 pre-dispute arbitration agreements, class action
6 waivers, and internal dispute processes -- we
7 talked about in the last session changing
8 "counseling borrowers" to include a requirement
9 that schools would provide information about
10 pre-dispute arbitration.

11 And so now we've clarified that to say
12 that it would be schools that use pre-dispute
13 arbitration agreements and/or class action waivers
14 would review with borrowers the information about
15 the availability of an internal dispute resolution
16 process.

17 So that way it relieves the burden of
18 providing that information. Schools who do not
19 use that would not have to discuss that within their
20 counseling.

21 So, moving over to page 2 under (h),
22 part of the "enrolled students, prospective
23 students, and the public" disclosure section. We

1 state that an institution has to make available
2 to enrolled students, prospective students, and
3 the public easily accessible information regarding
4 any class action waiver or pre-dispute arbitration
5 agreement that is included in any agreements
6 between the institution and students receiving
7 Title IV federal student aid.

8 So, it's just rewording what was in the
9 next sentence and I think trying to rewrite it for
10 some clarity.

11 We also on page 3, under Romanette (ii),
12 we took out the word "lawsuit" from the end, so
13 that we're now just talking about an individual
14 participating in a class action. So that's part
15 of the definition of what a class action waiver
16 means.

17 In 684.304, under "counseling
18 borrowers" in two locations we've removed the
19 language that said "from that school." What we
20 were proposing the last time was that institutions
21 would be repeating the entrance counseling any time
22 a new borrower came to their institution. So what
23 we're doing here is reverting back to what currently

1 exists, basically saying that a borrower would
2 complete entrance counseling one time, that they
3 would not be repeating it at each institution that
4 they attend.

5 Going down to the bottom of page 3, in
6 (B), we are specifying here who they are providing
7 information to by inserting the words "to the
8 borrower." So if an electronic tool was available
9 to provide entrance counseling, the school must
10 provide to the borrower any elements of the required
11 information that are not addressed through the
12 electronic tool.

13 Moving over to page 4, we had been asked
14 about the idea of what it means to provide something
15 in writing. The Department's practice has been
16 that that could include information that is given
17 electronically. But we were asked for clarity.
18 And so here we've added the words "or electronic."

19 So, it now reads, "On a separate written
20 or electronic form provided to the borrower signs
21 and returns to the school." So, again, it's an
22 electronic version as one option for you.

23 I think let's break it up there to get

1 some feedback.

2 MR. BANTLE: Wanda, is your tag new or?

3 Okay, we'll go John, William, Chris.

4 PARTICIPANT: So let me start by saying
5 what I'm not saying in this comment. We are in
6 Washington after all.

7 So, my comment, before anyone reacts,
8 it doesn't go to the wisdom or advisability of
9 regulating the use of pre-dispute arbitration
10 agreements. Various attorneys general have
11 different views on that. Various of them have
12 discussed that with policy makers on Capitol Hill
13 many times.

14 But in the past I've flagged my concern
15 that what the Department is doing here is regulating
16 in an area where it doesn't have authority to
17 regulate. The behavior that's being regulated
18 here is not really the provision of educational
19 services or the provision of loans. What's being
20 regulated here is the use of pre-dispute
21 arbitration agreements.

22 Congress has expressed a policy in that
23 area. It's gone so far as to preempt most of state

1 law in regulating the use of binding pre-dispute
2 arbitration agreements. And I don't recall -- the
3 Department is more than welcome to correct me if
4 I'm wrong -- I don't recall the Department being
5 given any rulemaking authority under the Federal
6 Arbitration Act.

7 That act went into effect in 1925. It's
8 been amended by Congress since that time. Congress
9 has shown that it knows how to create exemptions
10 or additional requirements in different public
11 contracting situations when it wants to. And I
12 just have real concerns that what the Department's
13 doing here, whether it's a good idea or not, is
14 not something that the Department has the authority
15 to do.

16 PARTICIPANT: I'd like to respond to
17 that. Our position is that we are not regulating
18 the use of them. We are just saying that if you
19 use them you need to let students know there's some
20 information.

21 PARTICIPANT: And I understand that,
22 that what you're saying is you're actually
23 regulating the education services and

1 participation here. I don't agree with that
2 characterization.

3 You're adding a requirement on the use
4 of those clauses that Congress didn't include in
5 its statute. Congress spoke strongly enough that,
6 for instance, the state of Texas couldn't create
7 this requirement more than likely.

8 So, again not to be flippant, and I know
9 how hard our friends at the Department are working,
10 they have a much stronger argument that they can
11 preempt the states than they have argument that
12 they can preempt Congress.

13 MR. BANTLE: William, Chris, then
14 Justin.

15 MR. HUBBARD: Thanks, Ted.

16 On (6)(i) on page 4, it's a very minor
17 thing that hopefully will not spark a lot of concern
18 but I think is important, I would like to amend
19 the language or propose amending the language to
20 read -- and I'll highlight the pertinent part --
21 "Explain the use of a Master Promissory Note (MPN)"
22 as a student loan contract.

23 Understanding that that may appear

1 redundant, I think to emphasize the point of the
2 use of the Master Promissory Note as a student loan
3 contract is important.

4 MR. BANTLE: I think that we might have
5 stopped at (2). Correct me if I'm wrong. Okay,
6 so we'll put that on hold, please. Keep that in
7 your mind.

8 So, Chris, Joseline, then Linda. Or
9 Chris, okay, Chris, Joseline, and then Aaron, and
10 then Linda.

11 MR. DELUCA: So my, my question -- or
12 not question but issue, on page 2, (h)(1), the
13 change that was made, "An institution of higher
14 education musts make available to enrolled
15 students, prospective students, and the public
16 easily accessible information regarding any class
17 action waiver or pre-dispute arbitration
18 agreement."

19 "Easily accessible," what, what does
20 that mean? I mean, is the Department going to have
21 a template that schools are going to be using?
22 You know, it seems to me that what one person might
23 think is, well, this is easily accessible, another

1 may say no. And I think using the words "easily
2 accessible" creates a level of confusion.

3 MS. WEISMAN: Do you have a suggestion
4 for what we could say instead? Because we did not
5 intend to create a template.

6 MR. DELUCA: I'll think about it.
7 Because that was one of the questions I had is
8 whether you were going to have a template or not.

9 MS. GARCIA: My question is actually
10 on the same thing as to what "easily accessible"
11 means and when institutions are distributing this
12 information what does that look like?

13 I know that for students, sending an
14 email is not always the most efficient thing because
15 they don't always look at emails. I mean, I don't
16 know if institutions have this capacity, but doing
17 presentations at classes, making them go through
18 a training program before they enroll that goes
19 through all these steps, or, I don't know, using
20 social media. So Instagram, Facebook, Snapchat,
21 I don't know if you all have those, but those are
22 ways where information can be easily accessible
23 to students.

1 And my question was how, how would the
2 Department be able to enforce that or navigate that
3 because I do assume it would be different for every
4 institution.

5 MR. BANTLE: So I see that suggestion's
6 been noted in the text up there. So, if anyone
7 has any ideas, feel free to put up your card.

8 Actually, is your card directly
9 responding or? Okay.

10 PARTICIPANT: So, could you say, let's
11 see what it is, prospective students and the public.
12 So, I know that in -- I can't remember the exact
13 wording but I know there are some pieces where it
14 talks about requiring an institution to have a
15 direct URL to that information. Could we possibly
16 use something like that?

17 Yeah, I think at Consumer Information
18 we have one for state, so something maybe along
19 those lines where it would directly link the student
20 to the page. Meaning, for those that aren't
21 familiar, you don't have to keep, like, linking
22 from page to page to page to page to find that
23 information. It would be a direct link to that.

1 MR. BANTLE: Next I have Aaron, then
2 Linda, then Jaye, and Suzanne.

3 MR. LACEY: I'll offer a couple of
4 general comments and then I have a specific one.

5 I mean, I agree with John. I'll start
6 by saying I think this is, there is a real question
7 as to whether or not this really is an attempt to
8 once again add conditions on to the use of
9 arbitration causes and class action waivers. I
10 mean, I appreciate that it's, as John said, I mean,
11 it has to do with disclosure, but it's still a
12 condition prerequisite to being able to use them,
13 practically speaking.

14 You know, my other general comment,
15 though, and bigger concern is just that even outside
16 of this room in the context of higher education,
17 I mean it is well established that consumer groups
18 frequently do not like arbitration causes, class
19 action waivers. That's been well established.
20 It's been stated here.

21 Many organizations, institutions, I
22 don't necessarily mean of higher education,
23 companies often advocate for them, plaintiff's

1 attorneys don't like them; arbitration unions and
2 associations do like them. I mean, they're just
3 split out there, and people for different reasons
4 go different ways.

5 The Department has made a conclusion
6 which it has articulated that it is not going to
7 attempt to -- and I agree with completely that it
8 does not have the legal authority to try to regulate
9 arbitration agreements, class action waivers.
10 This feels like a very unpopular attempt to split
11 the difference.

12 I mean, there's been a lot of testimony,
13 or whatever the right -- commentary here by folks,
14 I believe from all sides, but I don't claim to
15 characterize that but, you know, that dumping more
16 disclosures on people, adding more stuff to the
17 entrance exam and exit exam processes is not going
18 to be helpful. Students already get way too much
19 paper.

20 And I, it is my personal believe, with
21 all due respect, that the triad is failing
22 institutions and students alike on that score; that
23 institutions can't keep up with all the stuff

1 they're supposed to hand out; and there's so much
2 stuff dumped on students that it is not meaningful.

3 And I just really encourage the
4 Department when they go back to consider whether
5 or not attempting to put an unpopular idea out that
6 may not be within their statutory authority is
7 really a good idea. I just don't think it is.

8 I think I get that the Department was
9 trying to maybe put something out there here that
10 would satisfy folks. And I just want to go on the
11 record as saying I don't think it does, and I don't
12 think it's going to help necessarily students.
13 I mean, I don't want to speak for the students
14 obviously, but I've seen how much paper gets dumped
15 on them, and I just think it's just more paper.

16 All that having been said, my specific
17 concern which I brought up in the last round again,
18 is that the definition of class action waiver
19 agreement and pre-dispute arbitration agreement
20 have no box around them. So, you know, if the
21 University of Alabama, which I like to pick on,
22 if it's got Title IV students driving into its
23 parking garages and there's an arbitration

1 agreement on the back of those tickets that they
2 get that print-out every time they drive in, I do
3 not believe that this is putting a box around that.

4 We've had that conversation. It's
5 clearly not in the definitions on these agreements.

6 And if I look at (h)(1), that's putting an
7 affirmative obligation for disclosure.

8 So, I just encourage the Department,
9 we've got to figure out a way, unless it's your
10 intention that every single arbitration agreement
11 that Ohio State or any other massive university
12 may have for health clubs -- not health clubs, wrong
13 word, but you know, maybe not in every case -- you
14 know, gym, athletic facilities, parking garages,
15 on-campus concerts, all those places where they
16 may have agreements or tickets that have a
17 pre-dispute arbitration clause and you've got a
18 Title IV student that's signing one of those things,
19 I don't see the box.

20 And I don't think it's your intent to
21 require that entrance exam to talk about the parking
22 lot in, you know, Building G, but I think this needs
23 more work to make sure that it gets there. And

1 I did make that comment before, and I just, I don't
2 see how it's there yet.

3 MR. BANTLE: Do you have a proposed box?

4 MR. LACEY: I think it could be done
5 easily in the definitions of, well, relatively easy
6 in the definitions of class action waiver, "means
7 any agreement or part of an agreement, regardless
8 of its former structure, between a school, or a
9 party acting on behalf of a school, and a student
10 that" -- and then the question becomes relates to
11 X, fill in the box, and prevents.

12 And I don't know what the Department's
13 intention here is. You know, is it enrollment?
14 Is it enrollment in the provision of educational
15 services? I mean, we do have a definition of
16 provision of educational services. But, again,
17 I think if you don't put a box here it's going to
18 create an unintended consequence. I mean, I think
19 it's unintended. And certainly one that's going
20 to cause a lot of institutions surprise when they
21 discover that they're out of compliance.

22 So, I think you've got to have something
23 there. Again, it could be enrollment in the

1 provisions of educational services, you know.

2 MR. BANTLE: Linda then Jaye.

3 MS. RAWLES: There we go. Yeah, I
4 won't just repeat what Aaron said. He did make
5 most of the same statements that I was going to
6 make, only much more eloquently. But I want to
7 add to it just a bit and then make a proposal.

8 If it was just the issue that we're
9 adding a burden to schools, which always ends up
10 being a burden to students as well, then maybe we
11 would just let this go, even though I haven't heard
12 anyone in here really say that this is particularly
13 helpful to students.

14 So, I'm a little concerned about doing
15 something that isn't helpful to students but is
16 an additional burden to all parties concerned when
17 I think John is right in his reading of the law.

18 And I worry about if we do reach consensus here,
19 and this is part of it and there is any kind of
20 legal challenge, what that will do to the rest of
21 our efforts here.

22 So, in that vein and just to get it on
23 the table, in addition to Aaron asking the

1 Department to reconsider, I'd like to make a
2 proposal that we strike Issue Paper 4.

3 MR. BANTLE: Jaye.

4 MS. O'CONNELL: So this is somewhat of
5 a knit, but I think Dan last time asked for the
6 addition of "or electronic" in Item (2) on the top
7 of page 4, which I support. I just had heard on
8 Issue Paper 1 when we were talking about the written
9 decision earlier in the week, so, under
10 685.206(d)(4), Annmarie, I heard you talk about
11 the Department's kind of longstanding position on
12 written can be electronic.

13 I'm just pointing out that sometimes
14 we say "written or electronic," sometimes "written"
15 is understood that it can be either. But just
16 within this rulemaking it was inconsistent. So,
17 I just don't know if you want to look at that.

18 Thank you.

19 MR. BANTLE: Suzanne.

20 MS. MARTINDALE: Oh, I just want to
21 support in particular some of the examples that
22 Joseline threw out as a demonstration of how
23 financial literacy often doesn't really work and

1 is no substitute for substantive protections. You
2 really do need to get into counseling and skill
3 building at meaningful decision making points to
4 help a consumer make an informed decision. Which
5 is why I think, you know, we share many of the
6 concerns that have already been expressed about
7 whether this will in fact be helpful to students
8 so that they can make informed decisions.

9 The solution to this problem is for
10 schools to stop using pre-dispute arbitration
11 agreements. And not going to relitigate the
12 discussion around authority, but we believe that
13 the 2016 rule got it right and stated a very
14 reasonable basis for what it did then.

15 MR. BANTLE: Suzanne, do you have any
16 additional proposals to Joseline's list at this
17 time?

18 MS. MARTINDALE: No.

19 MR. BANTLE: Okay. William.

20 MR. HUBBARD: Thank you. I think this
21 paper is getting to the point where we would be
22 comfortable with it. I think it's a great start,
23 and I applaud the Department for the attempt.

1 Initially my proposal would be to not
2 strike the whole paper. I think that's absurd.
3 And also points to the fact that there's, I think,
4 fundamentally a misunderstanding over what this
5 paper is trying to achieve, which I think ultimately
6 is, as federal money, the Department is in a
7 position to determine if a school wants to take
8 the money, federal funds, how pre-dispute
9 agreements are used, and I think this is getting
10 to that point.

11 So it's not telling any school whether
12 or not they can or can't use pre-dispute. I think
13 that that would get towards the statutory concerns
14 as outlined by some of my colleagues. But in terms
15 of how it's done if they do accept federal funds,
16 I think it does outline that.

17 Noting that there is concerns over
18 whether or not dumping a bunch of paper on students
19 is successful or not, I am empathetic to those
20 points. You know, on occasions that can be the
21 case. But that's not a reason for, for throwing
22 this out entirely. I don't think that provides
23 any level of justification for not making the best

1 attempt possible to inform students.

2 We, you know, we certainly we can talk
3 later about perhaps more effective ways to do that.

4 But barring other options, just throwing it out
5 entirely I think would be a tremendously disastrous
6 idea.

7 MR. BANTLE: Any additional proposals
8 on this section that we're discussing, will?

9 MR. HUBBARD: So, my proposal is to not
10 strike the paper.

11 MR. BANTLE: Not strike it. Okay.

12 I see Joseline, Bryan, Michael. And
13 then I want to wrap up discussion on this section,
14 unless we have new proposals. And Walter will be
15 the final card.

16 Okay, so Michael will be the final card.
17 Joseline.

18 MS. GARCIA: Thank you. Yeah, so I
19 mean I echo a lot of the things that Will was just
20 stating right now. I don't think we should strike
21 this.

22 I mean, my original position is that
23 I'm not comfortable with class action waivers and

1 pre-dispute arbitration agreements. But, you
2 know, in an offer to negotiate in good faith I think
3 it's important that we have this.

4 And I see where Aaron is coming from.
5 I don't like to waste paper. And I totally
6 remember being in that situation. But, you know,
7 going back to the ideas I mentioned earlier, I think
8 we can be very creative with this in terms of how
9 we deliver information to students and actually
10 break it down.

11 And I would be willing to, like, sit
12 down with institutions and the Department. I was
13 a student organizer and knows how to rally up
14 students and get information that is complicated
15 and break it down to them to figure out ways that
16 this can be accessible.

17 Again, this is really important. This
18 is a really big lifetime and life-changing
19 decision. And I think that more information gives
20 the students to better set them up for success.

21 MR. BANTLE: Bryan, Michael. I see
22 Abby's card again. Hopefully we're looking at
23 proposals here.

1 MR. BLACK: I'm actually going to come
2 out in favor of the Department of Education
3 proposal. And the reason I say that, and I want
4 to be transparent here, but I've been, at least
5 on the periphery, involved in litigation that has
6 involved a class action lawsuit against cosmetology
7 schools where a plaintiff firm brought an action
8 under the Fair Labor Standards Act.

9 And what they were trying to argue, and
10 filed a multi-, multi-count complaint that it dealt
11 with trying to turn our students into employees,
12 even though they're licensed, they're going through
13 a vocational program, they wanted all the benefits
14 that an employee would get.

15 Most all the District Federal courts
16 have thrown out this lawsuit. But I know the
17 entities that I am familiar with and involved with
18 to some extent have spent well over a million
19 dollars in challenging what really has become a
20 very, very frivolous case. And if we didn't have
21 some pre-dispute arbitration, class action
22 waivers, you know, going forward at least, I feel
23 that we'd be really hamstrung.

1 The thing that I mentioned even at the
2 very outset of these hearings is that these
3 arbitration agreements seem to be held up only about
4 half the time. It seems that the courts, if they
5 want to ignore them, they simply ignore them and
6 allow the plaintiffs to proceed. So, while we're
7 talking about perhaps that they don't have absolute
8 concrete effect, that they're granted the effect
9 that they are intended, many times they don't have
10 that effect at all, they're just simply ignored
11 by the courts, and plaintiffs get their day in
12 court.

13 But, again, and I want to be transparent
14 on this, is that myself personally I've seen how
15 a frivolous action can get out of hand. And having
16 that added protection I think is necessary to
17 institutions.

18 So I support --

19 MR. BANTLE: Is your proposal as is?

20 MR. BLACK: It is, yes.

21 MR. BANTLE: Okay.

22 MR. BLACK: Thank you.

23 MR. BANTLE: Michael.

1 MR. BOTTRILL: So, just a couple
2 points. I'm assuming that it stays. So, my
3 comments are along those lines.

4 With regard to "easily accessible," I
5 think that there are many places throughout either
6 these regulations, accreditation standards, where
7 you use words that the onus and the burden will
8 always fall upon the institution to demonstrate
9 it. So, somebody questions it. Then the burden
10 falls on the institution to convincingly show, yes,
11 it was easily accessible because of X, Y, and Z.

12 So, because of that I don't know that
13 we need to add a whole lot of additional language
14 to define that. I'm not particularly persuaded
15 that we need to include, you know, social media
16 or other forms. I mean, the burden will fall on
17 the institution to make that demonstration.

18 However, in that last sentence I'm not
19 sure that you specifically mean to say -- and maybe
20 you do, and maybe I'm mis-remembering the last
21 conversation -- do you mean to say that the
22 institution may not solely use an internet website?

23 They could use it for those purposes.

1 PARTICIPANT: So, to clarify, an
2 intranet site is different from an internet site.

3 MR. BOTTRILL: Yes. I understand
4 that.

5 PARTICIPANT: So the idea of an
6 intranet site could not be used to meet the needs
7 of notice by any prospective students and the public
8 that they wouldn't have access.

9 MR. BOTTRILL: My question --

10 PARTICIPANT: So they could use it for
11 students but not prospective students or the
12 public.

13 MR. BOTTRILL: Okay. But I'm just
14 suggesting that you may want to include the word
15 "solely" in between "may" and "not." I get that
16 what -- that doesn't get to the public, but they
17 could use that as one tool of several for the purpose
18 of providing that notice as part of "easily
19 accessible" information.

20 PARTICIPANT: Yes. But it could never
21 be used to provide information to prospective
22 students or the public. So I don't think "solely"
23 would apply there.

1 MR. BOTTRILL: Okay, fair enough.

2 PARTICIPANT: Do you know what I mean?

3 MR. BOTTRILL: I do. I do, okay.

4 PARTICIPANT: You can use it for your
5 own students but never for prospective students
6 or the public because they wouldn't have access
7 yet.

8 MR. BOTTRILL: Okay. To Aaron's point
9 -- and I'm not sure that this helps -- but maybe
10 the language under Romanette (ii) on page 3, to
11 put a box around it on behalf -- starting, you know,
12 "or a party acting on behalf of a school, and a
13 student that" and then insert something along the
14 line of "relates to the educational services for
15 which the student received Title IV funding and
16 prevents an individual from filing or participating
17 in a class action" and add "with regard to those
18 services."

19 And then something conforming or
20 corresponding to that same theme in Romanette
21 (iii). So, at the end of that sentence Romanette
22 (iii) it would be, oh, "any future dispute between
23 the parties relating to the educational services

1 for which the student received Title IV funding."

2 Aaron, does that -- Where did Aaron go?

3 Oh, there he is.

4 Oh, does that somewhat get to what you
5 were talking about?

6 MR. LACEY: That addresses that
7 concern, I think, in putting a box around it,
8 excluding the parking lots and the athletic
9 facilities and whatnot.

10 MR. BANTLE: Okay. Final comment from
11 Abby.

12 MS. SHAFROTH: I also won't relitigate
13 the issue of whether the Department has authority
14 to act in this area. I strongly believe that it
15 does, and I believe that the appropriate way to
16 address this problem is to, is to not allow
17 institutions that participate in Title IV to use
18 these agreements to silence their students and to
19 prevent -- to take away their right to go to court.

20 But to the extent the Department isn't
21 willing to do that, my proposals:

22 One would be to address the problem of
23 secrecy and help protect taxpayers and alert the

1 Department to misconduct at schools by requiring
2 the schools to notify the Department of arbitration
3 claims received and results of arbitration
4 proceedings as they relate to the type of misconduct
5 that could be a basis of a borrower defense claim.

6 This is language that was -- I won't
7 read all of the language, but there is language
8 like this in the 2016 rulemaking. And this is not,
9 is not limiting institutions from using arbitration
10 agreements, but saying if you are going to use them,
11 then we at least need you to -- we need some sunlight
12 on that, and we need you to inform the Department
13 of those issues.

14 So that's my first proposal.

15 My second proposal would be, you know,
16 I'm not convinced that a lot of these disclosures
17 would have any meaningful effect on students. If
18 we want it to be meaningful, then I would say we
19 should make the -- we should be clear about what
20 the disclosure language has to say. Like it has
21 to say "warning, if you enroll in this school it
22 will require you to give up your right to go to
23 court."

1 I would even put a skull and crossbones
2 there, but we'll just leave that language. And
3 I would put it on the college scorecard.

4 MS. WEISMAN: So if I can respond to
5 that first piece, that was something that we did
6 discuss at the last session. And I believe we had
7 further discussion to explain that if we are
8 gathering that type of information, then we of
9 course need to be prepared to do something with
10 it.

11 And our feeling was that we could not
12 commit resources to take on that activity. And
13 we declined to include that in these papers.

14 MR. BANTLE: I had cut it off, Joseline.
15 Is it a proposal on modification to the language?

16 MS. GARCIA: If it's possible --

17 MR. BANTLE: Okay. Very quickly. And
18 then I want to move on, just noting it is 3:00,
19 and we have four more issues to get through today.

20 MS. GARCIA: I had a question. In
21 terms of the entrance counseling, does that -- is
22 that different for every institution or is there,
23 like, one template of entrance counseling that they

1 all follow?

2 MS. WEISMAN: So, we have outlined in
3 regulations specifically what topics must be
4 covered within entrance and exit counseling. We
5 provide information online on our website that
6 institutions may choose to use, and many of them
7 do. But they are not required to use our electronic
8 or other materials. They can use their own if they
9 prefer.

10 We only regulate the content of what
11 must be within both exit and entrance counseling.

12 MS. GARCIA: Gotcha. Makes sense.

13 I'm a little concerned, just because
14 I don't know how this counseling looks like, and
15 I don't know if it's actually, like, accessible
16 to a student to understanding all the financial
17 language and the decisions that they're actually
18 taking place.

19 Yesterday my intern, I found her crying
20 outside because she was talking to her financial
21 aid office and she had to take out more loans.
22 And it's a really scary process. And she didn't
23 have the resources to fully understand that. I

1 didn't even have the resources to, like, break it
2 down to her.

3 And I don't know if there's any way
4 within the material that you recommend on your site
5 if you can perhaps work with some national youth
6 organizations that work with students to help
7 reconfigure that language in a way that is more
8 accessible, and a way that students can actually
9 understand what their options are and what they're
10 getting themselves into. Because, I mean, I
11 remember being in this position. It is very scary.
12 It's intimidating.

13 And that's why I stepped out of the room
14 yesterday because I had to calm her down.

15 MS. WEISMAN: Sure, I'd like to respond
16 to that. That would be outside of the purview of
17 these negotiations. But it's more of an
18 operational issue. We do have staff within federal
19 student aid who work with preparing that counseling
20 website that we offer.

21 And my understanding is that it has been
22 kind of pilot tested -- there's a word I'm looking
23 for and it's not coming to me -- but that students

1 -- focus group, thank you -- I believe that it has
2 been through that process. We have not made
3 changes to that in at least a few years. But it's
4 something that we could recommend to them as well,
5 is that when they make their next update, or even
6 just looking at it now, to, you know, consider
7 having some student input in that process.

8 MS. GARCIA: And I can send you
9 organizations that you can reference to.

10 MR. BANTLE: Okay. Will, is it a
11 proposal?

12 MR. HUBBARD: It is.

13 MR. BANTLE: Okay. Final proposal.
14 And then I want to give -- it is 3:00, so I want
15 to give us a 10-minute break. And just looking
16 at body language around the room, I think that would
17 be appropriate.

18 MR. HUBBARD: I'll keep it brief.

19 So, as a subcomponent of (h), to
20 Joseline's point a proposal might look something
21 -- and certainly noting what the Department's
22 response, a proposal might look something like "the
23 Secretary may delegate consultation of language

1 to ensure that it's easily accessible," or
2 something to that effect.

3 MS. WEISMAN: So, I think I need to hear
4 a little bit more about what the goal is with that
5 text. The Secretary would always delegate the
6 responsibility of, say, program review or audit
7 to federal student aid employees. And they would
8 be the ones who would be looking at whether somebody
9 met this requirement, for example.

10 So, if I can hear a little bit more about
11 where you're going with this proposal to know maybe
12 how we could finesse it.

13 MR. HUBBARD: Sure. No, that makes
14 sense. Thank you for that.

15 I would say, and just remaining
16 consistent with the other text, leaving it at the
17 Secretary's discretion on whether or not this
18 occurs, but also encouraging that as something that
19 might be pursued. I mean, if we want to take the
20 Secretary out of it, that's fine as well.

21 But just identifying that within
22 consulta -- with consultation with
23 student-centric, or however you want to word it,

1 organizations is an option. I mean not necessarily
2 a requirement, but strongly encouraged option.
3 That might be kind of some way to put some language
4 around that concept that Joseline proposed.

5 MS. WEISMAN: So I don't think that we
6 would be looking at putting that operational
7 information within this regulation. I think that
8 would be something that we would consider on the
9 outside. Because, again, that counseling, the use
10 of that resource is not a required resource. And
11 because schools wouldn't be required to use it,
12 I think we're looking at is there a way to adjust
13 this text in a way that makes people understand
14 the idea of notifying the students, whichever
15 method they are receiving the counseling from.

16 MR. BANTLE: Okay, let's take a
17 10-minute break. Please be back at 3:10.

18 (Whereupon, a recess was taken.)

19 MS. CARUSO: Okay. Annmarie, would
20 you kindly take us through 685.304.

21 MS. WEISMAN: So, for 685.304,
22 "counseling borrowers," we are picking up on the
23 beginning of 4, at the top of page 4. We do not

1 have any changes to any of the text on page 4 from
2 the last session. So I'd like to skip over to page
3 5.

4 "If the school requires borrowers to
5 enter into a pre-dispute arbitration agreement or
6 to sign a class-action waiver, as defined in
7 668.418," then they will provide a description of
8 that process, the internal dispute resolution
9 process that is.

10 So this is basically changing the text
11 in a way that conforms to what we discussed at the
12 last session where we would not hold everyone
13 accountable to do this, it would only be the schools
14 that are using the pre-dispute arbitration
15 agreement.

16 Over on the next page, on page 6, we
17 do a similar thing in Romanette (v) by saying, "If
18 the school requires borrowers to enter into a
19 pre-dispute arbitration agreement or to sign a
20 class-action waiver, as defined" we go on to talk
21 about the idea of those receiving a loan that they
22 need to provide that information as specified
23 within this section.

1 We have also removed the words "from
2 that school" to again parallel the change that we
3 made earlier because we are not requiring
4 counseling for those who are attending a school
5 each time they attend a new school. And it would
6 be one time only, as we're doing it currently.

7 On page 7, the change we made was to
8 clarify that we were talking about enrollment in
9 the same school as opposed to "attendance at." The
10 idea here is that enrollment more closely aligns
11 with the language that we have already used, and
12 covers a broader period of time, which could include
13 once someone is admitted going forward. You can
14 obtain a loan before you're actually attending
15 classes.

16 And then going on to page 8 in Romanette
17 (xi), doing similar to what we've done earlier.
18 "If the school is required" -- "If the school
19 required the borrower to enter into a pre-dispute
20 arbitration agreement or to sign a class-action
21 waiver, as defined" then they need to go ahead and
22 review the student's -- with the borrower the
23 school's internal dispute resolution process. So

1 we're just carrying over that text again.

2 On page 9, our key changes are to include
3 the words "to the borrower." So we're again, we
4 did that on an earlier page, we're conforming here
5 as well that the school must provide to the borrower
6 elements of the required information that are not
7 addressed. And, again, this only would pertain
8 to those are required to do so.

9 And then we make the change where we
10 clarify in (2) the idea that it's a written or
11 electronic form.

12 So that closes out Issue Paper 4.
13 Again, that covers pages 4 through 10.

14 MS. CARUSO: Any proposed changes for
15 685.304? Juliana.

16 MS. FREDMAN: I have a question for the
17 Department. I'm not really, not familiar with the
18 enforcement side. So I'm wondering what the weight
19 of this proposal is?

20 In other words, like, how does the
21 Department know what schools are using for dispute
22 arbitration waivers? How does the school enforce
23 it if they are not? What's the process if that's

1 not -- if these disclosures are going to be
2 provided? What are the consequences?

3 MS. WEISMAN: So, just as with any other
4 Title IV regulation, if we determine through the
5 audit resolution process, through a program review,
6 through a student complaint, we would take the
7 appropriate steps as we would already have outlined
8 in those processes.

9 MS. CARUSO: If there are no other
10 comments, let's move on to Issue Paper Number 5.

11 In the interests of time we're moving
12 on to Issue Paper Number 5 to make sure we capture
13 all of the proposed changes.

14 There will be an updated Issue Paper
15 Number 4 presented by the Department tomorrow
16 morning; is that right? No? Just 1 and 2.

17 MS. WEISMAN: One, 2, and 3.

18 MS. CARUSO: One, 2, and 3.

19 MR. BANTLE: We did have a number of
20 items for discussion. I think we'll come back to
21 votes when we're looking at this in totality. But
22 as Moira said, just in the interests of time I think
23 we should move on to 5 and have conversation on

1 that as well.

2 MS. WEISMAN: So I stand corrected
3 though, just quickly. We will have an updated
4 Issue Paper Number 4. There were some additional
5 edits and some language that somehow I forgot we
6 had some proposals out there. So we are going to
7 put together some additional language for you and
8 bring that back as well.

9 And also to note one other correction
10 that was nicely pointed out to us, the statutory
11 citation in Issue Paper 4 is incorrect at the top.

12 Instead of saying Section 455(a)(6), that should
13 be 454(a)(6). So we will note that in the new paper
14 as well.

15 So, moving on to Issue Paper 5, "Closed
16 School Discharge," under the summary of changes
17 we want to remind you that we are providing for
18 Department review of a closed school discharge
19 claim denied by a guaranty agency.

20 Other new text appears on page 2. We
21 updated some language that begins on page 1 where
22 we talk about a "nondefault, contested Federal or
23 State court judgment issued by a court of competent

1 jurisdiction, or an adjudication by a Federal or
2 State administrative agency concluding that the
3 school violated State or Federal law."

4 So, I think the idea here is adding the
5 word "concluding," is that there is an actual
6 decision there.

7 On the last time when we met we had a
8 couple of places that appear on page 2 where,
9 although we had stated our intention to move from
10 120 days to 150, we had forgotten to make those
11 edits. So we have made them here in paragraph (d)
12 under 682.402 for closed school. Again, moving
13 that time frame from 120 days prior to the date
14 that the school closed, and the idea that we could
15 extend that period as well, where necessary, at
16 the Secretary's discretion.

17 So, again, we've updated that text.

18 We continue on to say "but are not
19 limited to:" -- and, again, these are the
20 exceptional circumstances -- "revocation or
21 withdrawal by an accrediting agency of the school's
22 institution accreditation; the school's
23 discontinuation of the majority of its programs;

1 the State's revocation or withdrawal of" -- and
2 I think, oh no, it is there -- we have the "of the
3 school's license to operate or to award academic
4 credentials in the State; or a nondefault,
5 contested Federal or State court judgment issued
6 by a court of competent jurisdiction or an
7 adjudication by a Federal or State administrative
8 agency concluding that the school violated State
9 or Federal law."

10 On the bottom of page 2, while we were
11 at it we made the edit from "shall" to "must."

12 We have done that in some other places
13 as well within this paper, including at the top
14 of page 3; again in the middle of page 3 in (F).

15 We also state in (F) that "the agency
16 must notify the borrower in writing of that
17 determination," -- This is referring to the
18 guaranty agency -- and "the reasons for the
19 decision, and how the borrower may ask the Secretary
20 to review the decision."

21 On the rest of page 3 we are changing
22 our "shalls" to "must" again.

23 Doing the same over on the top of page

1 4.

2 And then we come to our new text in
3 (J) (1). "Within 30 days after receiving the
4 borrower's request for review of its decision that
5 the borrower did not qualify for a discharge under
6 paragraph (d) (6) (ii) (F) of this section, the agency
7 must forward the borrower's discharge request and
8 all relevant documentation to the Secretary."

9 So this is just kind of outlining what
10 that process looks like for the Secretary review.

11 In (2) we say, "After reviewing the
12 documents provided by the agency, the Secretary
13 notifies the agency and the borrower of the decision
14 on the borrower's application for a discharge.
15 If the Secretary determines that the borrower is
16 not eligible for a discharge under paragraph (d)
17 of this section, within 30 days after being informed
18 of the Secretary's decision, the agency must take
19 the actions described in paragraph (d) (6) (ii) (H)
20 of this section, as applicable."

21 We then continue on to say, "If the
22 Secretary determines that the borrower meets the
23 requirements for a discharge" the agency has 30

1 days after the decision of the Secretary's decision
2 to take the actions required, as indicated above.

3 And that "the lender must take the actions
4 described in paragraph (d) (7) (iv) of this section,
5 as applicable."

6 And then the last change we have in this
7 paper is over on page 5 at the top where, again,
8 we make the conforming change here that we mentioned
9 earlier stating, "concluding that the school
10 violated State or Federal law."

11 MS. CARUSO: Ashley Reich, would you
12 like to open us up with comments and proposals?

13 MS. REICH: Just I have some real minor,
14 minor like spacing, commas, et cetera. Should I
15 just work with Aaron to --

16 MS. WEISMAN: If they're seriously just
17 spacing and things like that, I'm fine to have you
18 work directly with him.

19 MS. REICH: Okay. Yeah, that's all it
20 is.

21 MS. CARUSO: Juliana.

22 MS. FREDMAN: So, I have a question
23 about how the Department views some of these

1 exceptional circumstances in terms of the time
2 frame. So, in other words, if there's a state or
3 federal administrative agency decision, or one of
4 these other events, will the Department look back
5 to when the -- when the conduct underlying those
6 events began when looking to set a new date for
7 the school closure in terms of the deterioration
8 of the services, or whatever it might be?

9 Or is it the date of the actual judgment
10 or decision, which could come a year later?

11 MS. WEISMAN: The Secretary already has
12 the ability to extend the deadline. So I think
13 that it's within the Secretary's discretion then
14 to consider information even earlier.

15 MS. FREDMAN: Yeah, I don't -- you'd
16 consider it information that happened earlier after
17 the, after the final decision was made, in other
18 words, like, the conduct underlying, that they
19 could set the date back further from that decision
20 date? Is that what you're saying?

21 MS. CARUSO: Anything remaining for
22 Issue Paper 5?

23 (No response.)

1 MS. CARUSO: Moving on to Issue Paper
2 6.

3 As we have no edits in Issue Paper Number
4 5, can we see a show of thumbs as to whether we
5 are at consensus, barring any spacing, periods,
6 commas?

7 PARTICIPANT: Why didn't we do that
8 with Number 4?

9 MR. BANTLE: Because we had edits.

10 MS. CARUSO: We're going to have an
11 updated Issue Paper 4.

12 MS. WEISMAN: So, maybe to clarify,
13 we're looking for tentative agreement. This is
14 not final. This is not binding, just what you're
15 thinking of what you saw.

16 MR. BANTLE: And we are temperature
17 checking because there were no edits, so we will
18 not have a new version of it.

19 MS. CARUSO: Given all of that, how do
20 we feel?

21 (Show of thumbs.)

22 MS. CARUSO: I see no thumbs down.
23 Thank you.

1 MS. WEISMAN: Issue Paper 6 is "False
2 Certification." Very minimal changes to Issue
3 Paper 6.

4 On page 1, under 685.215(a)(1)(i) we
5 now streamlined the language and say, "Certified
6 eligibility for a Direct Loan for a student who
7 did not have a high school diploma or its recognized
8 equivalent and did not meet the alternative
9 eligibility requirements described in 34 CFR part
10 668 and section 484(d) of the Act, applicable at
11 the time the loan was originated."

12 So, as we mentioned at the last session,
13 the goal here was to conform this language to the
14 updated requirements that pertain to having a high
15 school diploma or its equivalent, and what that
16 equivalent is.

17 And so we make a similar change on page
18 2. Under Romanette (ii) we say, "Received a Direct
19 Loan at that school and did not have a high school
20 diploma or its recognized equivalent, and did not
21 meet the alternative to graduation from high school
22 eligibility requirements described" in regulation
23 or in statute, as "applicable at the time the loan

1 was originated."

2 MS. CARUSO: Questions, proposals for
3 Issue Paper 6?

4 (No response.)

5 MS. CARUSO: If there are none, can we
6 see a show of thumbs, temperature checking and
7 moving on from Issue 6?

8 PARTICIPANT: I was just conferring
9 with Juliana. We just wanted to make sure we --
10 I appreciate the change to the language in Issue
11 Paper 6 that the Department made. We are trying
12 to figure out whether the language would clearly
13 cover the instance where a school has worked with
14 another company to issue false high school
15 diplomas, invalid high school diplomas to students.

16 Could the Department clarify whether
17 this language would provide borrower's relief in
18 that instance? And if it wouldn't provide
19 borrower's relief, maybe we could change the
20 language by inserting "valid," "who did not have
21 a valid high school diploma."

22 MS. WEISMAN: So our understanding,
23 especially given a case that happened fairly

1 recently, is that we have used this for that
2 purpose, and that the case went forward. And so
3 we would not expect any issue.

4 But I understand your concern. And so
5 the idea of saying a "valid high school diploma"
6 is certainly something we could consider.

7 MS. CARUSO: Mike Busada.

8 MR. BUSADA: You know, any changes I
9 would want to make sure fully protect schools.
10 And this is an issue that hits very close to home.

11 Some of you may be familiar with the United States
12 vs. Bobby Ray Lowe in the United States District
13 Court for the Eastern District of Louisiana.

14 Mr. Lowe was convicted through his
15 printing shop. He was falsifying and creating fake
16 diplomas for students that were used to get into
17 primarily one school in New Orleans. This went
18 on for a good period of time. He has been
19 sentenced.

20 And I bring that up because this was
21 a professional printing company that does it for
22 a living that was creating very, very hi-tech, very
23 nice diplomas that were being used, and the schools

1 were being defrauded on that with this individual
2 and with some fraudulent people that were working
3 with him to scam the system.

4 So I just want to make sure that anything
5 that we do is going to recognize the fact that there
6 are these Bob Lowes out there in the world, and
7 schools need to be able to protect themselves as
8 well.

9 MS. CARUSO: Alyssa.

10 MS. DOBSON: Just a small concern with
11 some verbiage. On page 1, Romanette (i), it says,
12 "as applicable at the time the loan was originated."

13 And some schools originate very early for cleanup
14 processes, to provide notice to students a little
15 bit earlier. Sometimes maybe change that either
16 to "applicable for the period of enrollment," or
17 "for the loan period," because that at least means
18 that they would have had the high school diploma
19 for the time frame that the loan was intended, maybe
20 not yet at time of origination, especially for
21 incoming freshman.

22 And that same issue then on page 2, top
23 of the page, Romanette (ii), it has the same

1 verbiage that could be problematic just timewise,
2 not in concept.

3 MS. WEISMAN: So I hear your concern.

4 But I, in hearing the concept I missed the specific
5 language that you suggested. So were you saying
6 applicable for the time that the loan was originated
7 or something else? I'm sorry.

8 MS. DOBSON: Right. So I guess I'm
9 suggesting, if you're referencing the first page,
10 "applicable for the period of enrollment." Or
11 maybe it's even more clear to say "for the loan
12 period."

13 Rather than requiring having the high
14 school diploma at the time of origination, having
15 the high school diploma prior to the start of that
16 loan period makes more sense and helps schools be
17 in compliance.

18 MS. WEISMAN: So just in case anybody
19 is unclear on why we would make that change, the
20 issue becomes that an institution who is awarding
21 students in March for incoming students who begin
22 in, for example, September, could be awarding a
23 high school student who does not currently have

1 the high school diploma but will have it.

2 So, again, I understand. So I think
3 we're there in concept.

4 MS. CARUSO: Aaron and then Michael.

5 MR. LACEY: Unless I'm missing it, I'm
6 very concerned that knowledge has dropped off.
7 In the prior version a false certification required
8 that a school knowingly certified the eligibility
9 for a Direct Loan for a student who did not have
10 a high school program or its recognized equivalent.

11 And we had also talked about adding to
12 the back end something about affording the
13 institution an opportunity to demonstrate that the
14 student had represented to the institution.

15 I mean, I think those were redundant,
16 but one of them's got to be in here. I mean, there
17 has to be an opportunity for the institution --
18 well, let me state it in the converse.

19 If a student had represented to the
20 institution at the time of graduation that they
21 have a high school diploma and provided them with
22 a false document, and then the institution
23 certifies the loan, and then it's subsequently

1 determined that that loan was certified but the
2 student didn't in fact have a high school diploma,
3 that should not be a false certification.

4 So, I mean, we -- that was in the prior
5 version. I'm also, respectfully, a little
6 concerned that this doesn't show knowledge, having
7 been struck from this version. Makes me a little
8 nervous.

9 But that's absolutely essential. I
10 mean, it has to be knowingly certified. And it
11 was previously.

12 MS. WEISMAN: Okay. So, mystery
13 solved. The idea of knowingly or knowledge of the
14 institution was language that we discussed in one
15 of the sessions but it was not in current text.
16 So it's not something that we had to redline because
17 it was only proposed language. And when we decided
18 we weren't including it, we just eliminated it.

19 So that is why it disappeared.

20 The feeling of why it disappeared, also,
21 is that there is no requirement that the school
22 knowingly certified it in that manner. So we're
23 not holding the school accountable for knowing.

1 We would just say if it's determined that the
2 document is not valid, or the credential has not
3 been received, we will review for false
4 certification.

5 MS. CARUSO: Go ahead, Aaron.

6 MR. LACEY: Yeah. I mean, I'm just --
7 it's, it's very important for me that "knowingly"
8 be there. I mean, it says, "the Secretary
9 considers a student's eligibility to borrow to have
10 been falsely certified if." And then it says if
11 you certified the loan for a student who didn't
12 have a high school diploma.

13 Well, if you didn't knowingly do it,
14 it's not a false certification. "False" implies
15 knowledge; right? If someone represents to you
16 that they have a high school diploma and you certify
17 the loan based on that representation, which
18 schools are able to do; right?

19 MS. WEISMAN: So it's not talking, it's
20 not referring to the conduct of the institution.

21 It's just referring to the fact that it was not
22 certified under the conditions that are part of
23 the Title IV eligibility requirements.

1 MR. LACEY: Okay. I'll have to think
2 about it. But you understand my concern? If the
3 definition of a false certification is certifying
4 the, you know, the loan who did not have -- for
5 a student who didn't have a high school diploma,
6 I don't think that's sufficient. I think there
7 has to be a knowledge element there.

8 So I'll look at it, but I would not be
9 able to agree to a concept that if a school certified
10 a loan, that in and of itself would be false
11 certification to certify a loan for a student that
12 didn't have a high school diploma and it's a false
13 certification if they did it and did not have
14 knowledge that it was -- that the student didn't
15 have the high school diploma.

16 MS. WEISMAN: So this is currently
17 regulation and outlined as a basis of statute.
18 And this is what we call it.

19 MR. LACEY: Yeah. Well, it's --

20 MS. WEISMAN: So this is not new.

21 MR. LACEY: -- ability to benefit right
22 now; right? I mean, there's nothing there about
23 high school diploma in the reg.

1 But I'll, I'll -- let me go back and
2 look at it. I'll look at it.

3 MS. CARUSO: Michael.

4 MR. BOTTRILL: I just, to Ashley's
5 point and, Annmarie, where you had said, I just
6 want to make sure because I think Ashley had said
7 "for the period." When we were talking about loan
8 origination she said maybe "for the period that
9 the loan covers."

10 I think you had said "prior to." And
11 I just, I would support the "prior to" the period
12 that the loan covers as opposed to "during the
13 period," meaning that they get that documentation
14 or they, they do the certification prior to. Maybe
15 not at the time of origination but prior.

16 MS. WEISMAN: So that was Alyssa's
17 comment.

18 MR. BOTTRILL: I'm sorry. Alyssa, I'm
19 sorry.

20 MS. WEISMAN: So, maybe we can look at
21 the language up on the screen and kind of look at
22 what we might best say. Noting that we're starting
23 in 685.215(a)(1)(i), at the bottom of that where

1 it talks about at the time the loan was originated,
2 and trying to find a place that would then be
3 parallel on the next page as well.

4 MR. BOTTRILL: So, I'm suggesting it
5 would say "prior to" the period of enrollment for
6 the loan period. So that's in between the time
7 that the loan was originated and the period; is
8 that correct? Am I --

9 MS. CARUSO: Alyssa, do you want to
10 weigh in on that?

11 MR. BOTTRILL: Yeah, I'm a little out
12 of my depth. But I just, from an accreditation
13 perspective, we typically have an expectation that
14 that admissions documentation is secured prior to
15 when the students start class. So that would be
16 the appropriate time to have it in.

17 MS. DOBSON: Right. But to me, that
18 makes it just the same as it was before, which is
19 when it was originated. Because you can originate
20 a loan prior to the period of enrollment. However,
21 the requirement is simply to have the high school
22 diploma or equivalent right as of that day of the
23 period of enrollment.

1 I think -- and maybe the Department can
2 correct me if I'm wrong -- but I think it still
3 retains the essence of the meaning if we simply
4 say the period of enrollment or the loan period,
5 without have the "prior to." Because putting the
6 "prior to" puts us right back into the spot that
7 I'm trying to avoid from the school perspective.

8 MS. HARRINGTON: Could it just be prior
9 to the period for which the loan was intended or
10 made, prior to the start of that period, or
11 something like that?

12 MS. CARUSO: That was Ashley
13 Harrington. Ashley, do you want to repeat that?

14 MS. HARRINGTON: I'm just trying to be
15 helpful and help find some language. Prior to the
16 period -- to the academic period for which the loan
17 was intended or made?

18 MR. BOTTRILL: I mean, that's what I
19 have in my notes is prior to the period that the
20 loan covers or for which it was made. That's what
21 I'm -- But, look, this is your wheelhouse and I'm
22 not trying to monkey around in there. But I think
23 that the "prior to," if you're certifying the

1 eligibility for that individual.

2 MS. CARUSO: Microphone issues.

3 PARTICIPANT: So, I think even
4 especially now, with the recent advent of early
5 pass for this, it becomes even more important.
6 As time frames are being shifted forward, all in
7 an effort to be more forthcoming and allow more
8 time for students and borrowers, that it's going
9 to become even more problematic if we leave the
10 "prior to" in there.

11 I'm just trying to avoid a loophole
12 because there can be -- we can be, you know,
13 determining awards months, and months, and months,
14 and months prior to the period of enrollment where
15 they're actually still in high school.

16 MR. BOTTRILL: So, can I ask a practical
17 question then? So would an institution certify
18 eligibility for a Direct Loan without knowledge
19 that it has, that that applicant in fact has these
20 credentials?

21 PARTICIPANT: I'm going to give you the
22 financial aid response of "it depends." And so
23 --

1 MR. BOTTRILL: Does that mean that
2 there's a real response?

3 PARTICIPANT: Technically what, what
4 we would do is we would originate early and prior
5 to the start of the semester. But prior to
6 disbursement we would go through all of those
7 certifications and make sure that they had them.

8 I don't know if we want to get that muddy
9 or cloudy in this.

10 MS. WEISMAN: I don't think we do.

11 PARTICIPANT: Yeah.

12 MS. WEISMAN: I mean, I understand the
13 practice and how it's done. And you're correct,
14 for the current high school senior you're going
15 to originate the loan as soon as you can so they
16 know what they would be eligible for. And then
17 go back and reconfirm later.

18 It's a matter of trying to find
19 streamlined language that doesn't go on and on and
20 on, and catches all of what we're trying to intend.

21 PARTICIPANT: Right. We have our own
22 accreditation standards in this area that require
23 documentation prior to the student starting class.

1 That's good enough, you know, for me along those
2 particular lines.

3 MS. CARUSO: Okay, we've got a
4 suggestion from Kelli.

5 MS. HUDSON PERRY: Unless I'm totally
6 missing it, too, is there a reason that we can't
7 just say "prior to disbursement"?

8 MS. WEISMAN: No, because that's really
9 the test. You don't, you do not want to disburse
10 the funds if you'd certified that this has happened.

11 PARTICIPANT: You know, I don't think
12 you want to say "prior to the loan period" because
13 do you not have students that come in after the
14 loan period has begun --

15 PARTICIPANT: Yes.

16 PARTICIPANT: -- and you're certifying
17 them?

18 PARTICIPANT: Yes.

19 PARTICIPANT: So you could have ones
20 that come in late, for late certification.

21 MS. WEISMAN: Okay.

22 MR. BOTTRILL: So I just had one more.

23 Are we moving on?

1 MS. WEISMAN: So I think "disbursed."
2 Gold star for Kelli for today. I think
3 "disbursed" gets us to where we need to be and we
4 feel like we're not missing anything there.

5 I'm seeing some head nods. And then
6 I'm seeing some looks that just say "I don't know."

7 Does anybody have any objection to using
8 the idea of "disbursed"? Is there something we're
9 not thinking of? I think that covers us for people
10 who get disbursements just prior to enrollment or
11 just prior to the disbursement being ten days prior
12 to the semester start or the date of period of
13 enrollment. I think it covers those who disburse
14 after a term begins. I think it gets us to what
15 we're looking for.

16 MS. CARUSO: Okay. So we'll do a
17 temperature check at the end after we have any other
18 suggested changes. But we're ready to move on to
19 Abby and Dan.

20 MS. SHAFROTH: Thanks. So, I was just
21 looking back over the transcript from Session 2.
22 We had a, we had a really long and I think robust
23 discussion of whether, whether "knowingly" should

1 be in the requirement or not. And it seems that
2 we as a group had largely reached consensus that
3 it should not be in there.

4 And one of the reasons I discussed last
5 time that it shouldn't be in there is, you know,
6 that it's the school's responsibility to determine
7 if the borrower has a high school diploma and if
8 they're going to certify that the student does have
9 a high school diploma and is eligible on that
10 basis,.

11 And if we include "knowingly" in there,
12 then that's a problem in that, for one reason, that
13 some schools just don't ask whether the borrower
14 has a high school diploma or not is an issue we
15 have seen. And if the school doesn't ask but they
16 go ahead and certify, then the student should be
17 able to get a discharge if they didn't have a high
18 school diploma.

19 So that, so, you know, essentially that
20 gives the school's still falsely certifying if they
21 didn't bother to certify but they say they did.
22 And you don't need the knowledge language in there
23 to do that.

1 So, you know, I think that the
2 Department's change since last time was based on
3 that discussion. And I don't see a reason to
4 reinsert a knowledge standard in there, which would
5 make it, again, like really hard for a borrower
6 to demonstrate that the school did or did not know.

7 And we'd get into some proof issues.

8 And, regardless, if the school
9 certifies without knowing, that's a problem, and
10 the student failed to get relief.

11 The other thing I just wanted to point
12 out is that this is the standard for the borrower
13 to get relief. There's a different standard for
14 the borrower to seek a recoupment from the school.

15 You know, that exact language is referenced
16 actually in Issue Paper 2 that the school's only
17 going to be liable if the school was negligent or
18 willful in its false certification. So I think
19 that might address some of the concerns here as
20 well from the school side.

21 MS. CARUSO: Okay. So, Dan, was that
22 your point? Okay.

23 Aaron and then Mike Busada.

1 PARTICIPANT: Just make a quick comment
2 just to clarify that what is in Issue Paper 2 is
3 a process related strictly to borrower defense.
4 And that would not cover false certification.
5 Subpart G does but --

6 PARTICIPANT: Whoa, whoa. That's not
7 what it says. It says remedial actions of the
8 school's negligent or willful false certification
9 under 685.215.

10 PARTICIPANT: I did get that advice
11 from counsel.

12 (Laughter.)

13 PARTICIPANT: I said I'm not an
14 attorney. Thank you.

15 No, it's fine. I stand corrected. You
16 are correct, it is covered by Issue Paper 2.
17 Rewind, splice that out, start again.

18 MS. CARUSO: Aaron.

19 MR. LACEY: We did have a robust
20 conversation about knowledge last time. And I had
21 proposed at a different place here in this
22 regulation that the institutions have the
23 opportunity to provide an affirmative defense that

1 the borrower had represented to them at the time
2 that they did have a high school diploma.

3 And the agreement was -- and I think
4 if you do look at the notes and the transcript you'll
5 see that the agreement was that it should be in
6 one place or the other. And we were willing to
7 drop knowledge from the front end, provided that
8 there was the opportunity for the institution to
9 assert an affirmative defense and demonstrate on
10 the back end, before there was a decision made,
11 that the borrower had represented to the
12 institution that he or she did have a high school
13 diploma.

14 So there wasn't an agreement to drop
15 knowledge, it was a tradeoff.

16 Second, I will note that I am okay with
17 the idea of the institution having to provide that
18 defense. My experience is -- and we were talking
19 about this -- in the vast majority of the cases
20 where there is a dispute, institutions will have
21 some sort of documentation besides the FAFSA. And
22 I want to point out to everybody, this happens all
23 the time. You have home schooled students, you

1 have students who can't find their high school
2 transcript, their high school is closed, et cetera.

3 I mean, it is not an uncommon occurrence to have
4 a student who cannot produce a transcript and who
5 will certify to you, even apart from the FAFSA,
6 on some other document that they have a high school
7 diploma.

8 So, schools should have to prove that.

9 But my point is before you grant a false
10 certification discharge there should be a mechanism
11 by which the institution has an opportunity to
12 demonstrate to the Department at the time of
13 enrollment the student certified to the
14 institution, apart from the FAFSA, certified to
15 the institution that he or she had a high school
16 diploma. And that's not here.

17 Now, the reason I think that you don't
18 see knowledge here presently is because this is
19 a revision of the ability to benefit standard.
20 And the ability to benefit determined required a
21 decision on the part of the institution; right?

22 So a school -- a student was not going
23 to certify to a school that they had the ability

1 to benefit. A student was going to -- a school
2 was going to put them through a test or process
3 and reach that conclusion. So you would need a
4 knowledge qualifier.

5 But the problem here is it is a common
6 occurrence that students will have to represent
7 to institutions that they have that high school
8 diploma. And many times they do legitimately.
9 They were home schooled, so they don't have one.

10 Again, they may not have access to a transcript.

11 And I think we all agree those students ought to
12 be able to get access to Title IV and higher
13 education. But if an institution is relying on
14 that certification, it ought in the least to have
15 an opportunity to demonstrate that it has that
16 documentation.

17 And the way I would suggest doing that
18 is by saying, if you don't like "knowingly," let's
19 see, certified eligibility for a Direct Loan, et
20 cetera, et cetera, et cetera, prior to
21 disbursement, and the institution cannot
22 substantiate that the student certified at the time
23 of enrollment that the student had a high school

1 diploma, or something like that. Valid high school
2 diploma or its equivalent.

3 MS. CARUSO: Sure. I just want to make
4 sure that the language gets right.

5 Aaron, can you review that sentence,
6 please?

7 MR. LACEY: I can try.

8 MS. CARUSO: Thank you.

9 MR. LACEY: I'm getting old.

10 Let's see. Let's see, prior to
11 disbursement and the institution cannot
12 substantiate that at the time of enrollment -- or,
13 yeah, could not substantiate that at the time of
14 enrollment --

15 PARTICIPANT: I thought we'd
16 determined "disbursement."

17 MR. LACEY: "Disbursement," is that
18 what we want? I mean --

19 PARTICIPANT: That's what we want.

20 MR. LACEY: Okay. If that's the
21 standard.

22 And the institution cannot substantiate
23 -- wait, shouldn't it be "prior to disbursement"?

1 Okay. And the institution could not
2 substantiate that by the time of disbursement the
3 student -- Wait. The institution could not
4 substantiate that by the time of disbursement the
5 student had represented, or had certified to the
6 institution, let's say that, certified to the
7 institution that he or she had a -- There you go.

8 Sure. Recognized, or its recognized equivalent.

9 MS. CARUSO: Dan and Michael, are your
10 comments in relation to that sentence? Okay. So
11 Dan, Michael, and then Kelli.

12 MR. MADZELAN: If you're going to say
13 "valid high school diploma" here, are you going
14 to make, need to make a conforming change back in
15 Subpart 8, student eligibility? Because I think
16 that just says to be eligible you have to have a
17 high school diploma and recognized equivalent.
18 I don't think the word "valid" is in there.

19 MS. CARUSO: Michael.

20 MS. WEISMAN: Okay. So I think we're
21 ready to regroup. The feeling is at this point
22 that we feel we need to go back to the original
23 language, as proposed, regarding the idea of not

1 including knowledge and not including the
2 information up here that Aaron had proposed.

3 The feeling here is that we would be
4 going beyond our statutory authority; that we have
5 been doing this discharge and this process has been
6 in existence, and that we are following what the
7 statute asks of us. Schools are required to have
8 a process in place to verify the validity of high
9 school diplomas received. That's part of the
10 verification requirements and student eligibility
11 requirements.

12 So while we agree that changing the text
13 to "at the time the loan was disbursed" makes sense,
14 we do not feel we're able to make the other changes
15 requested here.

16 MS. CARUSO: Do you agree to adding
17 "valid" in front of "high school diploma"?

18 MS. WEISMAN: No. Our feeling is that
19 that's not necessary, given the processes already
20 in place through verification, through student
21 eligibility, and that the student would then make
22 their case about what they are presenting. And
23 we would talk about the idea of going after a school

1 separately if we were to do that.

2 MS. CARUSO: Mike Busada and then
3 Ashley and then Aaron.

4 MR. BUSADA: And this is just to get
5 on the record. I understand the point.

6 I just want to make sure under the
7 scenario, the real life scenario that I laid out
8 that went through the court process, and this was
9 actually determined by an undercover agent with
10 the Department was the one that uncovered this when
11 he went and bought one of these diplomas.

12 This school that accepted these
13 diplomas would not face any penalty, they would
14 not have to undertake legal costs to defend
15 themselves. I mean, basically these schools that
16 accepted this, these diplomas that were fake, they
17 had no idea.

18 MS. WEISMAN: So, what I'm saying is
19 that through other regulations that we have on the
20 books through part of student eligibility as well
21 as verification, we require the institution to have
22 a process in place to determine the validity of
23 diplomas. That said, we understand that, you know,

1 not left on the hook if there's a bifurcated process
2 there.

3 MS. CARUSO: I appreciate your concern
4 for the taxpayer. As a member of the Department
5 that, we appreciate that. But this is statutory.

6 And Congress didn't have so much concern in that
7 regard in directing us to do it a certain way.

8 However, in recovery against the
9 school, as others have corrected me since I'm of
10 dubious us as counsel, you know, in recovering
11 against institution we don't -- a recovery action
12 is only brought if it's willful or negligent. So
13 the institution, if recovery action is brought
14 against the school, would then have opportunity
15 to demonstrate that it was neither willful nor
16 negligent, if that, if that's helpful.

17 MR. BUSADA: Well, and I appreciate
18 that. I mean, obviously if you don't have the
19 statutory authority to do it, there's nothing you
20 can do. So, I mean, I think that it's something
21 though that Congress, just to put on the record,
22 it's something that Congress ought to look at
23 because it does leave a situation where taxpayers

1 can be left on the hook. And, you know, we've seen
2 a situation where that occurred.

3 So, thank you, I appreciate it.

4 MS. CARUSO: Ashley.

5 MS. HARRINGTON: I just have a
6 clarifying question. We were talking about this
7 kind of in the back here. But is -- does the
8 Department consider career pathway programs to be
9 a recognized equivalent? Because some of these
10 they won't have one but they can go through a
11 different process.

12 And under the -- within the FSA handbook
13 it doesn't lump career pathway programs under the
14 recognized equivalent language. It's kind of its
15 own subset on the side.

16 So do you consider that to be part of
17 this or should that be clearly spelled out here?

18 MS. WEISMAN: So, we've used the term
19 "alternate eligibility requirements" and then we
20 referenced our student eligibility regulations in
21 Part 668. And we also referenced the statute in
22 484(b), with the idea here that it covers what
23 Congress is doing now, but also what they might

1 do in the future without us having to go back and
2 amend our regulations.

3 MS. HARRINGTON: So this would fall
4 under alternative eligibility basically, because
5 there are high school grad -- or, they haven't
6 necessarily graduated, but they're still eligible,
7 and they won't have a diploma. So I just wanted
8 to know where they fell.

9 So is it alternative?

10 MS. WEISMAN: Yeah.

11 MS. HARRINGTON: Okay.

12 MS. WEISMAN: Anything that's not
13 specifically the high school diploma or recognized
14 equivalent, which would be the GED, if it meets
15 the requirements under the statute, that's when
16 it's included as alternative eligibility
17 requirements.

18 Again, we've changed this to reflect
19 that we're taking out the ability to benefit test
20 due to the change back in 2012 for that. So, when
21 things are added in, then that would be the box
22 that we would consider them under.

23 MS. CARUSO: Mike.

1 MR. BUSADA: In this, for informational
2 purposes too, and I just want to point out I don't
3 want anybody to get the wrong idea, for schools
4 -- and I can't speak for every school but I can
5 tell you just our accrediting body we have to, in
6 order to stay accredited have to have 60 percent
7 completion rate, 70 percent placement rate, 70
8 percent license or exam rate.

9 There is no incentive, for at least
10 schools that I know about, to want somebody without
11 a high school diploma because all it means is that
12 you are going to lose your accreditation on the
13 back end.

14 So, my fear is that a lot of times a
15 lot of our students are second, you know, are coming
16 to school they're your non-traditional students.

17 I mean, some of them are 40, 50 years old. Their
18 high schools it's almost impossible to get a
19 transcript sometimes. They have a copy of their
20 diploma. And, you know, it's very taxing on small
21 schools to say now you have to put this piece of
22 paper through, you know, a TSA screening in blue
23 lights and everything else, I mean.

1 And I think that some of the others here
2 can testify to that, especially when you're dealing
3 with older students from out of state. So, I know
4 we can't do anything about that specifically now,
5 but I just wanted to make clear why that's
6 important. Because it's to the detriment of
7 schools if somebody slips in with a fake diploma.

8 But it's also very taxing, with limited resources,
9 to determine whether documents are real or not,
10 especially in this day and age with computers and
11 technology.

12 MS. CARUSO: Are there any other
13 suggested changes to Issue Paper 6?

14 (No response.)

15 MS. CARUSO: Okay. So if we are going
16 back to the, just the initial change offered by
17 Alyssa to "prior to disbursement" can we get a
18 temperature check, with all other things in place,
19 whether this version of Issue Paper 6 would be
20 acceptable?

21 PARTICIPANT: Changes at the time of
22 disbursement.

23 MS. CARUSO: Prior to the time of

1 disbursement?

2 PARTICIPANT: No, at the time.

3 MS. CARUSO: At the time of
4 disbursement. Okay. Thank you.

5 (Show of thumbs.)

6 MS. CARUSO: We have a thumbs down.
7 Aaron, can you please offer an alternative?

8 MR. LACEY: I've offered an
9 alternative. And I respectfully disagree with the
10 Department. I've look at the statute. You know,
11 it is well within the discretion of the Department
12 to define what constitutes a false certification.
13 And I believe that defining it in the way that
14 I suggested, again, is well within the statutory
15 authority.

16 I would just point out we created the
17 entire bar defense framework out of one paragraph
18 in the statute. I just cannot imagine that the
19 Department lacks the regulatory authority to
20 indicate that a false certification on the basis
21 of a high school diploma would only be the case
22 if X is not true.

23 And I think it is just extraordinarily

1 unfair to institutions to suggest that if an
2 individual certified to, and you can provide
3 documentation that the individual certified to you
4 that they had a high school diploma prior to
5 disbursement that that still constitutes a false
6 certification. It's a problem for me.

7 MS. CARUSO: Shall we have any more
8 discussion?

9 MS. WEISMAN: Can we take a 5-minute
10 break?

11 MS. CARUSO: Sure. The time is 4:17.
12 Please come back -- okay, come back at 4:25,
13 please.

14 (Whereupon, the above-entitled session
15 recessed at 4:17 p.m., to reconvene at 4:25 p.m.)

16 MS. CARUSO: So, the Department has
17 heard enough information on Issue Paper 6; is that
18 what I'm hearing? So, Annmarie, can you open up
19 Issue Paper 7 for us, please. Thank you.

20 MS. WEISMAN: Yes. Thank you.

21 Moving on to Issue Paper 7, "Guaranty
22 Agency Collection Fees." The only changes that
23 we made on this issue paper are found on page 2.

1 We've added "(b) Administrative requirements."

2 We have changed in one, two, three, four
3 locations from "shall" to "must." I'm sorry, from
4 "shall" to "may" or from "will" to "must."

5 And we've done some other cleanup in
6 clarifying some regulatory citations in Romanette
7 -- in numeral (2), Romanette (ii), as well as in
8 (iii).

9 I believe all are items we discussed
10 and agreed on at the last session, but we are open
11 to hearing comments.

12 MS. CARUSO: Mike.

13 MR. BUSADA: I hope you'll pardon this
14 personal privilege. But some of you may have seen
15 recent -- just now that there was a school shooting
16 in Florida, 14 people wounded and some fatalities.

17 And so, just as we are here to talk about education
18 just wanted to ask for a moment of silence for those
19 that are involved right now in Florida. It's a
20 high school.

21 (Moment of silence.)

22 MS. CARUSO: Any comments, proposals,
23 suggestions, edits for Issue Paper 7?

1 Jaye.

2 MS. O'CONNELL: Just thank you for the
3 technical corrections. And no further comments.

4 MS. CARUSO: Okay. Can I see a --
5 Seeing a show of thumbs, is Issue Paper 7 as is,
6 and are we ready to move on to Issue Paper 8? Show
7 of thumbs, please.

8 (Show of thumbs.)

9 MS. CARUSO: No thumbs down.
10 Issue Paper 8, Annmarie, please.

11 MS. WEISMAN: Issue Paper 8 has no
12 adjustments from the last session. So we are going
13 with language as proposed and reviewed in Session
14 2.

15 MS. CARUSO: Questions, comments,
16 proposals for Issue Paper 8?

17 (No response.)

18 MS. CARUSO: Seeing no tents pop up,
19 can I see a show of thumbs for Issue Paper 8 as
20 is?

21 (Show of thumbs.)

22 MS. CARUSO: So, no thumbs down. So
23 I think we have made it at least through Issue Paper

1 8. I know we have to go back to Issue Papers 1
2 through 4 tomorrow morning. So, we go through that
3 piece.

4 So, the time is now 4:37. I'm wondering
5 now if we can open the floor up to public comment.

6 Are there any public comments this
7 afternoon? One. Okay, if you could come -- Two.

8 Okay. Do you know how long they'll be,
9 like?

10 PARTICIPANT: Two minutes.

11 MS. CARUSO: Two minutes. Okay.

12 Okay, so I know we're a little early,
13 but we still want to leave it to five minutes apiece
14 for public comment. And we will work in that time
15 for that one person who's on their way, so.

16 MR. HALPERIN: Well, I'm David
17 Halperin. I have heard it said by representatives
18 of the for-profit schools in this rulemaking and
19 in the past that the industry has changed. That
20 with Corinthian and ITT gone, all that is left are
21 good schools who are trying to do the right thing.

22 There are many good schools, but that
23 is not a true statement. Many schools that have

1 engaged in predatory behavior still operate, still
2 enroll students. Examples: Career Education,
3 Kaplan, Bridgepoint, College America, and many
4 more. And there have been many law enforcement
5 investigations and actions against these schools.
6 And those are still ongoing.

7 You've heard student stories. There
8 are also employee stories. And I've spoken with
9 hundreds of employees who were pressed by their
10 superiors to do the wrong thing. And I just want
11 to read you one of those many accounts. This is
12 one that we provided a few years ago to law
13 enforcement. It's from a school still in operation
14 called the Art Institutes. They're all across the
15 country.

16 "Overcoming objections was what this
17 job was all about. There are only so many
18 objections that a person can have to attend
19 college." This is from a recruiter. "Money,
20 time, fear, family support, to name a few."

21 "Once you knew what the objections were
22 you could have an answer for each one memorized
23 and tailor your response to each individual

1 student. Essentially, we would use hope and fear
2 to drive our results. We would guilt parents into
3 supporting their students, while painting a vision
4 of the student succeeding with their course and
5 career."

6 "What we didn't tell them was that our
7 associate degrees cost \$60,000, and our bachelor's
8 degrees cost \$90,000. What we would tell them was
9 that the cost of tuition was \$473 per credit hour."

10 "What we would tell them, if they asked,
11 was if they wanted to know more they could go to
12 financial aid for a consultation. Our job was to
13 sell the American dream and a degree at the Art
14 Institute at the only way that the student could
15 fulfill that dream."

16 "Our work environment were tightly
17 packed cubicles that resembled any sales bullpen.

18 We could hear everyone speaking, and that would
19 benefit the new people who were constantly
20 overcoming objections and selling the school in
21 their own way."

22 "We had beautiful interview rooms, one
23 for each degree program. If a student wanted to

1 study animation, we interviewed him in our
2 animation room. Same for our interior design and
3 other programs."

4 "It pains me to think of the lives that
5 I helped derail with massive amounts of student
6 debt. The first student I signed up for the school
7 was a 46-year-old father of three named Donald.
8 I think about him often. I manipulated this man's
9 religious beliefs, hopes, and fears to get him to
10 sign up for a graphic design program."

11 "Donald already had a master's degree
12 and only enough financial aid to complete two
13 quarters of school. When he came to the school
14 late one Monday night he told me he wanted to learn
15 graphic design to spread the word of the Lord.
16 I gave him the standard tour. And during my final
17 closing pitch I said to him, 'Donald, I feel like
18 something larger than you and I brought us here
19 today.'"

20 "His eyes lit up and he said, 'I feel
21 exactly the same way.'"

22 "I signed up Donald right then and there
23 and afterwards had a long walk home. I remember

1 not sleeping that night. The next day when I told
2 my director that Donald will run out of financial
3 aid and could not possibly finish the program, he
4 told me -- he said that each student is responsible
5 for their own decisions. That's what everyone said
6 when a student would drop out. They were
7 responsible. They didn't work hard enough, et
8 cetera."

9 "But what I knew was the truth: many
10 of these students did not belong in this program,
11 were not prepared for the task in front of them.

12 None of these things mattered to EDMC, the owner
13 of the Art Institutes. The only thing that
14 mattered were the numbers."

15 Now, I would just say to conclude, the
16 difference between a strong borrower defense rule
17 as issued by the Department in 2016, and a weak
18 rule as proposed so far by the Department this year,
19 is that a strong rule would separate the good
20 schools from the bad schools, penalize and deter
21 predatory behavior, allow honest operators to
22 thrive, improve student outcomes and, in the end,
23 save taxpayers a lot of money.

1 A weak rule, by contrast, will allow
2 bad behavior to increase, causing immense harm to
3 students and taxpayers, and ultimately, I believe,
4 trashing the reputation and imperiling the survival
5 of for-profit colleges, good and bad.

6 That is the choice that you face and
7 the Department faces.

8 MS. CARUSO: Thank you.

9 Other public comments? Any idea on
10 time, Joseline? Do we want to -- Okay.

11 Just step up right here. And I know
12 you're just hustled through, but we are trying to
13 keep it to five minutes, please. Thank you.

14 MS. LIVIA: Hello. My name is Livia.

15 I'm a student in higher ed, and I'm here to read
16 a number of students' stories because, once again,
17 I feel like it's very important for this
18 conversation that you all are having at the table.

19 "My name is Anders Tavares and I am a
20 student victim who attended the Art Institute of
21 San Diego. I did so only after being shown what
22 I, what I now know to be false job placement
23 statistics. These complete fabrications were used

1 to ease my fears that I had regarding the debt.
2 They were used to cover up the fact that the schools
3 were actually viewed unfavorably in the industry
4 they worked.

5 "I never considered that a college would
6 outright lie to its students. My future wife also
7 went there after believing that those statistics
8 represented the school's legitimacy."

9 "Together we graduated at about the same
10 time, owing \$96,000 in debt. Although we both --
11 we were both outstanding students and very active
12 in our job searching, we can definitely say that
13 --" Sorry, I'm a little out of breath. "-- we
14 can say that we have never benefitted from our
15 degrees or education at the Art Institute of San
16 Diego."

17 "Now, ten years later, we have paid over
18 \$100,000 towards the degrees, but due to interest
19 that we acquired, we will have to pay an additional
20 \$160,000 before it is paid off. We will both be
21 in our fifties."

22 "I submitted my detail in August of
23 2015. It goes without saying that it is still in

1 pending status. I'm not an economist, a lawyer,
2 or historian. I went to school to learn film.
3 But I can still see the way that our current higher
4 education system functions and is morally wrong."

5 "Schools being allowed to defraud their
6 students for profit and then face no consequences
7 or accountability is wrong. The U.S. Government
8 profiting off the debt of all these student victims,
9 who are all sold on American taxpayers funding their
10 jobs, is wrong. Higher education should not pay
11 the risk of financial ruin."

12 "My wife and I are examples of how even
13 trying to pay this debt has dramatically altered
14 the course of our lives. Whether or not a person
15 is able to pay, their lives are put on hold, their
16 life choices become more limited, dreams seem less
17 attainable. I have become tired of telling my
18 story, of adding it to the sea of woe that is a
19 part of an inept system."

20 "You all know in your hearts that our
21 system is broken, that it's dragging our economy
22 down. You all know that students are dramatically
23 under served because the predators are protected

1 while the victims are ignored. By now you have
2 encountered so many of what you probably refer to
3 as student fraud stories, that you have developed
4 a callous type of selective hearing when you hear
5 them."

6 They are disturbing stories on their
7 own. But equally disturbing is how nobody seems
8 willing or able to truly help these students. Our
9 parents, grandparents, no other generation in our
10 nation's history has collectively held debt of this
11 magnitude from higher education. Shame on anyone
12 that does not refer to this as a crisis. Shame
13 on anyone who is actively trying to be a part of
14 the solution but -- trying to be a part of the
15 solution but instead stalling it in favor of
16 defending the predators.

17 During this network I have witnessed
18 so much opposition of regulations under the premise
19 that these regulations could potentially hurt the
20 good schools. So much work for this hypothetical
21 when we have actual tens of thousands of people
22 who have laid out their reasons for their suffering
23 in their DTRs. These students, like myself, are

1 suffering every single day due to lack of action.

2 Each day that passes, more desperate people are
3 trapped in debt and are falling victim to debt
4 relief scams.

5 Arbitration has stripped them of their
6 rights. Not hearing or sensing a lot of concern
7 for these actual current victims in this committee,
8 we students are the only variable in the U.S. higher
9 education equation that bears any risk. The
10 schools should bear the risk and be forced to prove
11 their worth, to compete based on their reputations
12 rather than how they can get away with charging.

13 I'm sorry if this is difficult, but I
14 refuse to believe that it is not possible. You
15 postponed the results from the last reg and now
16 you are on track to do it once again. Every single
17 dollar that is added to the \$1.4 trillion -- every
18 -- sorry. Every single dollar that is added to
19 the \$1.4 trillion, every person that gambles with
20 their dreams by enrolling, every desperate person
21 that falls victim to debt relief scams you should
22 feel that weight on you.

23 There are people -- these people are

1 wronged. You have the chance to do truly great
2 things, but all I see in here are arguments over
3 the semantics of a failing system. The efforts
4 of this negotiated rulemaking committee will
5 ultimately be remembered more for the strange
6 predictable and telling battle over the
7 transparency of the life stream. It will not be
8 remembered as a victory for students.

9 When you allowed the bad actors to the
10 bargaining table, you ensured that there would be
11 no way that student interests were served. The
12 \$1.4 trillion is not going away. The multitudes
13 of people who are now student victims, as well as
14 taxpayers, are not going away. They are growing.

15 We see each day more sensible minds
16 advocating for the tangible idea of tuition-free
17 college and total debt cancellation. This is the
18 kind of bold progress that we need in order to make
19 any sort of meaningful difference in people's lives
20 and return the dignity of the education system of
21 the United States.

22 Each day more victims are waking up to
23 the fact that education that they were sold was

1 a lie. They are waking up to the fact that there
2 are so many people in Washington who are willing
3 to stand up for them. They are uniting and
4 informing others about our education system and
5 how it has been broken.

6 Despite our best attempts, I have faith
7 that progress will be made. I am sorry that you
8 cannot be part of it. We gave you a shot when we
9 entrusted you with all the evidence submitted in
10 our DTRs, but at this point we are tired of sitting
11 and waiting. At this point we are out of trust.

12 Thank you.

13 MS. CARUSO: Thank you.

14 Annmarie, does the Department have any
15 last logistical information before we adjourn for
16 the day?

17 MS. WEISMAN: Yes. We are circulating
18 a letter. At this time we only have copies for
19 the primary negotiators. I apologize. We will
20 try to obtain additional copies.

21 This is a letter from Congresswoman
22 Maxine Waters from the 43rd District in California.

23 Congresswoman Waters wanted to be here, and was

1 not able to do so, during the public comment period.

2 So she asked that we distribute her letter to the
3 Borrower Defense Committee, to you, and so we are
4 doing that on her behalf.

5 So those are coming around, down each
6 side.

7 In addition to that, I do want to thank
8 everybody for their hard work today. And just as
9 a note on looking at the time, there are a lot of
10 people who said we would not do what we just did.

11 So, again, I know we did rush through some of it
12 a little bit more than we would have liked. But
13 I would like to thank you for the discussions that
14 we had today that I think were very helpful.

15 We have some issue papers to bring you
16 back tomorrow, so we will be revisiting with some
17 edits that have been discussed around the table,
18 and with some proposed language where the
19 Department had some homework to go and craft some
20 new language. So, we will have a pretty busy day
21 tomorrow as well.

22 If you are bringing luggage through,
23 please be aware that that would need to go through

1 security, so leave a little extra time in the
2 morning because we will be starting promptly at
3 9:00. But you may certainly bring that with you
4 if that's easier for you. Just, again, note that
5 it would need to go through security.

6 MS. CARUSO: Joseline, did you have one
7 comment?

8 MS. GARCIA: Yeah, just one quick
9 comment.

10 I wanted to thank those who have
11 appeared in public comments. And I also wanted
12 to thank the people here at the table, and the people
13 in the audience, and the Department for sticking
14 through this very difficult process and putting
15 in the work.

16 But I especially want to give a shout
17 out to those who are coming out of their way to
18 give information to those at the table. And I think
19 it is very disrespectful when negotiators, also
20 alternative negotiators, Linda, when they're on
21 their phone and not paying attention to people who
22 are coming here out of their way to give us
23 information, to tell us stories.

1 The story that Livia just shared and
2 the comments that David made were very disturbing
3 to hear. And the thing is that these are people's
4 lives. And I think the least that we can do as
5 negotiators is give them their undivided attention
6 because people are asking us to work for them and
7 to put in the work. And I just think that being
8 on our phones and being on our laptops is not okay.

9 PARTICIPANT: I have a client with a
10 student threatening to blow up the school, so
11 sometimes we have to work. I apologize for that.
12 But it's important.

13 MS. CARUSO: Okay. So, tomorrow is a
14 new day.

15 PARTICIPANT: I'm sorry, I'll keep this
16 extra brief. But I also feel distressed with the
17 fact that when student voices are brought into the
18 room they are not being heard. It's not a one-time
19 thing. I just would, would ask that when student
20 voices are in the room, whether that's a story being
21 read or being read in public comment, that the room
22 pay full attention.

23 And if there's a scenario where someone

1 has to step out, it's understood, but while in the
2 room choose to provide that level of respect. I
3 think that's absolutely critical.

4 MS. CARUSO: Okay. So, tomorrow is a
5 new day. And we will take that information back
6 with us. We will see you tomorrow at 9:00 a.m.,
7 because we have a lot of work to do.

8 Thank you.

9 (Whereupon, Session 3 recessed, to
10 reconvene at 9:00 a.m., Thursday, February 15,
11 2018.)

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