On the 17th day of March, 2022, the following meeting was held virtually, from 10:00 a.m. to 12:00 p.m., before Jamie Young, Shorthand Reporter in the state of New Jersey.
MS. MILLER: Good morning, everyone. Welcome back to day four. We have a packed agenda today. So with that said, I'll get right into roll call. For accrediting agencies, we have Jamie Studley.

MS. STUDLEY: Good morning. Happy Saint Patrick's Day.

MS. MILLER: Good morning to you. And her alternate, Dr. Laura Rasar King.

DR. KING: Good morning.

MS. MILLER: Good morning. For civil rights organizations and consumer advocacy organizations, we have Ms. Carolyn Fast.

MS. FAST: Good morning.

MS. MILLER: Good morning. And her alternate, Mr. Jaylon Herbin.

MR. HERBIN: Good morning.

MS. MILLER: Good morning. For financial aid administrators at postsecondary institutions, we have Ms. Samantha Veeder.

MS. VEEDER: Good morning, everyone.

MS. MILLER: Good morning. And Mr. David Peterson.

MR. PETERSON: Morning.
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MS. MILLER: Good morning. For four-year public institutions of higher education, we have Mr. Marvin Smith.

MR. SMITH: Good morning.

MS. MILLER: Good morning. And his alternate, Ms. Deborah Stanley.

MS. STANLEY: Good morning.

MS. MILLER: Good morning. For legal assistance organizations that represent students and/or borrowers, we have Mr. Johnson Tyler.

MR. TYLER: Good morning.

MS. MILLER: Good morning. And his alternate, Ms. Jessica Ranucci.

MS. RANUCCI: Hi, everybody.

MS. MILLER: Hello. Okay. For minority serving institutions, we have Dr. Beverly Hogan. Dr. Hogan is not with us just yet. And we have her alternate, Ms. Ashley Schofield. Not with us just yet. For civil rights organizations, we have Ms. Amanda Martinez.

MS. AMANDA MARTINEZ: Good morning.

MS. MILLER: Good morning. For private nonprofit institutions of higher education, we have Ms. Kelli Perry.

MS. PERRY: Good morning.

MS. MILLER: Good morning. And her alternate, Mr. Emmanuel Gilroy.
MR. GUILLORY: Good morning and happy St Patrick's Day.

MS. MILLER: Happy St Patrick's Day. Okay. For proprietary institutions of higher education, we have Mr. Bradley Adams.

MR. ADAMS: Good morning.

MS. MILLER: Good morning. And his alternate, Mr. Michael Lanouette.

DR. LANOUETTE: Good morning.

MS. MILLER: Morning. For state attorneys general, we have Mr. Adam Welle.

MR. WELLE: Morning.

MS. MILLER: Good morning. And his alternate, Yale Shavit.

MS. SHAVIT: Good morning. How are you?

MS. MILLER: Good morning. Okay, for state higher education executive officers state authorizing agencies and/or state regulators or institutions of higher education and/or loan services, we have Ms. Debbie Cochrane.

MS. COCHRANE: Good morning.

MS. MILLER: Good morning. And her alternate, Mr. David Socolow.

MR. SOCOLOW: Top of the morning to all of you.
MS. MILLER: Good morning. For student loan. I'm sorry. For students and student loan borrowers, we have Mr. Ernest Ezeugo.

MR. EZEUGO: Good morning.

MS. MILLER: Good morning. And his alternate, Mr. Carney King.

MR. KING: Good morning.

MS. MILLER: Good morning. For two-year public institutions of higher education, we have Dr. Anne Kress.

DR. KRESS: Hello. Good morning.

MS. MILLER: Good morning. And her alternate, Mr. William Durden.

MR. DURDEN: Good morning.

MS. MILLER: Good morning. For U.S. military services, service members, veterans or groups representing them, we have Mr. Travis Horr.

MR. HORR: Good morning.

MS. MILLER: Good morning. And his alternate, Mr. Barmak Nassirian.

MR. NASSIRIAN: Morning.

MS. MILLER: Good morning. For the Department office of general counsel, we have Mr. Steve Finley.
MR. FINLEY: Actually, you've got Donna Mangold this morning.

MS. MILLER: Okay. I'm sorry. We have Donna Mangold. I'm sorry.

MS. MANGOLD: Good morning. I'll do my best Steve impersonation.

MS. MILLER: Okay. Thank you. And our chief negotiator, Mr. Gregory Martin.

MR. MARTIN: Morning.


MR. MCCLINTOCK: I'm here. Dave's here.

MS. MILLER: Oh, I missed the advisors. I'm so sorry.

MR. MCCLINTOCK: The esteemed advisors.

MS. MILLER: Yes, the esteemed advisors. How could I forget them?

MR. MCCLINTOCK: I trademarked that already.

MS. MILLER: So let me do that. So compliance auditors with experience auditing institutions that participate in Title IV HEA programs, Mr. David McClintock.

MR. MCCLINTOCK: Good morning. Thank you.

MS. MILLER: Good morning. And labor economists and/or individual with experience in policy research,
accountability and or analysis of higher education data, Dr. Adam Looney. Dr. Looney is not with us quite yet. Now, have I missed anyone? Okay, I think we're ready to go. Greg, I'm going to turn it over to you. I don't know if you want to pick up where we left off yesterday or have any comments or responses.

MR. MARTIN: Yeah. Thanks, Rozmyn. Before we start, we left off at six at yesterday, I believe we left off at 600.21. But before we go back there are a couple of things I want to revisit. So, let's go back to the definitions of starting with a nonprofit institution. So, if we go down to where the definition of a nonprofit will be, arrow down the definition of a nonprofit institution. Yeah, just keep going south of there, Vanessa. Here we go. Starting here under the definition, we have made some changes to this over what you saw yesterday. And we believe this language does provide the Department with a more justifiable and reasonable interpretation of a nonprofit institution, ensuring that any revenue-based lease or other agreements with a former owner must be market based and appropriate. We appreciate the concern of negotiators, but our interest as the Federal Government is to ensure institutions are acting appropriately and consistently with the tenets of a nonprofit organization. We believe this is the clearest, most effective way to ensure that. For instance, consider an example of an institution that fails, and the new owner purchases the institution but continues to lease the building from the former owner since it is already outfitted with classrooms and other needed facilities. In that case, we are concerned about the involvement of the former owner. We are less concerned about
the involvement of the former owner provided the market study shows that the lease on the building is appropriate. However, we agree with the negotiator who suggested language related to excess benefit transactions and we have added that language. So, let's walk through these changes here. I'll read through these going back. We'll start at the top and just so we can get a holistic view of this non nonprofit institution, I should point out that the changes over yesterday are highlighted in light blue. An institution that meets the requirements of either paragraph one or two of this definition for a domestic institution, no part of the net earnings of the institutions benefit of the institution benefits any private entity or natural person. And for a private nonprofit institution, the institution is owned and operated by more by one or more nonprofit corporations or associations, is legally authorized to operate as a nonprofit organization by each state in which it is physically located and is determined by the U.S. Internal Revenue Service to be an organization which to which contributions are tax deductible in accordance with section 501(c)(3) of the Internal Revenue Code. When making determination regarding that earnings, the Secretary considers the entity of the entirety rather of the relationship between the institution entities and ownership structure and other parties. By way of example, a nonprofit institution is generally not an institution that is an obligor, either directly or through, and any entity in its ownership chain on a debt owed to a former owner of the institution, or a natural person or entity related to or affiliated with the former owner of the institution, either directly through any entity in its ownership chain, enters into or maintains a revenue or
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maintains revenue a revenue sharing agreement with any party, including related or unrelated parties of a former owner of the institution, or a natural person or entity related or affiliated related to or affiliated with the former owner of the institution unless the institution demonstrates that payments under the revenue sharing agreement are reasonable based on the market share for such services or materials, including demonstrating a reasonable relationship to the cost of services or materials provided. Is a party either directly or indirectly, to any other agreements, including lease agreements with a former owner of the institution or natural person or entity related to or affiliated with the former ownership of the institution under which the institution is obligated to make any payments unless the institution demonstrates that the payments under the agreement are comparable to payments in an arm's length transaction at fair market value or engages in an excess benefit transaction with any natural person or entity. So those are the changes related to the definition of a nonprofit institution. And that's where the Department is on this. And however, I will open the floor for any comments related to it before we move on.

MS. MILLER: Johnson and Yael and Carolyn I see your hands. But I just want to mention that David Peterson is in for state agencies and Yael is in for attorney general. Okay. So first on my list, I have Johnson.

MR. TYLER: I think Yael was first.

MS. MILLER: Okay. Yael?
MS. SHAVIT: I just want to say I'm really disappointed that the Department has taken this position in light of both the discussion that we had yesterday. And more than that, frankly, the experiences that state AGs have been seeing consistently and that the Department is aware of that necessitated this rulemaking on this point to begin with. But I'm also really surprised that at the very least, the Department didn't include language here requiring the assessment. So, when you ask an institution to demonstrate fair market value, why would the Department not put the onus on the institution to ensure that the fair market value is being determined by an objective, independent third party? Right. What does demonstrate mean in this context where we know that these types of calculations are subject to manipulation by institutions?

MR. MARTIN: Well, the Department does have discretion in reviewing that to make our own determination about fair market value. So, I don't think that precludes us from doing that. I, I will I'll turn it over to Donna if she wants to add to that. I want to give her an opportunity to weigh in on this.

MS. MANGOLD: We do that. We ensure that the valuation comes from an unrelated third party. We look to see who has commissioned the valuation. We look at the terms of the valuation. We absolutely do that in our review. We don't just take the word of the institution or the party that submits it that it is a value. I mean, that's our process. That's what we do.
MS. SHAVIT: If I could just say one more thing here. I appreciate that the Department does a lot of work here. It seems like if you're going to be in the context where actually seeing comparators and finding real comparators is exceedingly difficult, if not impossible. I don't know why, at the very least, wouldn't be spelling out more clearly that it's the requirement of the institutions and the details related to the requirement of demonstrating fair market value. Make sure that the Department at least has all of the information that the Department needs to engage in these types of determinations. It just seems like more of the work needs to be shifted here to the institutions and that it should be made clear that these types of arrangements are disfavored. It seems like we've, in these discussions, identified one circumstance where having a continued relationship between proprietary owners of proprietary institutions makes sense, right? We've been talking about one scenario, which is the lease of classrooms, but the language here envisions a lot of different types of arrangements, and it feels to me like the exception is overvalued here as compared to the real risk of misconduct. And when I say risk, I want to be clear that this is not hypothetical. It's what we have seen time and time again in these types of changes of ownership. But I won't belabor the point.

MS. MILLER: Johnson?

MR. TYLER: I'm disappointed here as a litigator and often the litigator who's dealing with adversaries with much greater resources than our office. I'm really troubled by this creates sort of a burden shifting test where if the Department
of Education says we don't think this is legitimate, you're going to be in litigation with adversaries. We're going to be pointing, frankly, to other transactions that have happened and that the Department of Education hasn't been able to do any enforcement action that had run under the scheme, under their ability to police these things. And those will be the standards of what is a market rate transaction. So I just I feel like you're giving a lot here. And I have great respect for the litigators in the Federal Government. They they're very capable. But, you know, so are a lot of these white shoe law firms who attract the same people. So, I just feel like you're setting yourself up where you're losing a huge amount of discretion here. And part of your discretion is designed to protect students, particularly in these sort of transactions where they're looking for nonprofits because they think they're better. And often they don't know the difference because of a transition. And that goes back to that case in Colorado is that that institution was marketing itself as a nonprofit for four years until it closed its doors in 2016. Thank you.

MS. MILLER: Thank you. Carolyn.

MS. FAST: I share these concerns and I fear that the language as it is, is actually legitimizing the types of arrangements that we're trying to prevent. So, I feel that this language is actually worse than nothing and it doesn't help the problem that the regulation was attempting to address. And it would be better, in my opinion, to scratch this entire section rather than to legitimize the kinds of relationships that we're trying to avoid.
MS. MILLER: Thank you. Barmak?

MR. NASSIRIAN: I want to echo the profound disappointment of my colleagues that after what we have already seen in terms of fake transactions that the Department has approved, that we would add language like this. And for what it's worth. This is such a gigantic sized loophole that I don't care what else the Department does in this section. We might as well move on because I mentioned yesterday this really is as close to a deal breaker as it gets. I cannot wrap my head around the thinking that allows this. I mean, the inconsistency, you point blank, prevent debt financing by former owners, even if it's below cost, presumably, but then allow revenue sharing on the basis of the fuzzy market-based assessment that that they're going to put on the table. Are you not concerned that every debt financing that you are going to block is going to turn into a revenue sharing agreement that you can't contest? It's just such a profound error that I just don't see what the point of the rest of this effort is if we're going to allow loopholes like this to be formalized in regs, particularly when the Department does have the discretion to do exactly what it purports to want to do under this provision with the previous language, the previous language said it's generally prohibited, but that means that occasionally it's not, and that that delegates the discretion to the Department without the constraint of these kinds of excuses. You bought this sort of nonsense before. It's not a matter of the career civil servants. A future political administration could endorse all kinds of things that I don't think civil servants would endorse. It's a mistake, and it's just really regrettable.
MS. MILLER: Thank you, everyone. Greg, I'll turn it back over to you.

MR. MARTIN: Thank you very much for the comments and understand some of the misgivings that have been expressed, all of the misgivings that have been expressed. I'll take that back. Currently, this is the Department's position, however, I will convey those misgivings, as I said before. Donna, do anything else you want to add before you move on? Alright. Vanessa, could you pull up 600.20 please? It's 20, yeah let's go back to where we see the blue text so we'll. Yeah. So. Right. We have made some changes to three here. And you see those changes highlighted in blue. So let's just start looking at these, for purposes of this section, a private nonprofit institution, a private for-profit institution or a public institution submits a material incomplete application if it submits a fully completed application form designated by the Secretary, supported by a copy of the institution's state license or equivalent document that authorized or will authorize the institution to provide a program of postsecondary education in the state in which it is physically located, supplemented with documentation that as of the day before the change of ownership, the state license remains in effect. A copy of the document from the institution's accrediting agency that granted or will grant the institution accreditation status, including approval of any non-degree programs that offers supplemental supplemented with documentation that as of the day before the change of ownership, the accreditation remained in effect. So those are some changes that we made to 600.20. And I, I will see if
anybody has any comment about this section before we move on as well.

MS. MILLER: Kelli?

MS. PERRY: I don't have a comment about this section per se, but it looks like you're going through changes that we may have discussed yesterday. One of the things that had come up was in number six, the whole concept of distance ed. programs being associated with the main campus. And you were either going to define that or check on what the rest.

MR. MARTIN: Yes. Hold on one moment. We did, I was going to address that later about the about the in six, the distance education language. And so, to that, what we have reflects our current policy. By codifying in the regulations, we can ensure, we do ensure consistency. We are concerned that the negotiator’s proposal to base the location on enrollment may mean that fluctuations in student enrollment can lead to floating locations that change from year to year, which could be challenging to both institutions and the Department. We do agree that institutions may need some time to adjust to having to have all the distance programs flow to the main campus. So, to that end, we would allow a year for institutions to conform to that requirement.

MS. PERRY: What was the answer regarding the branch campus though?

MR. MARTIN: The branch campus would be treated no different than an additional location. It still has to, even in a branch campus, the regulatory definition of branch campus
the of all distance programs have to be related to the main campus.

MS. PERRY: That's really unfortunate. I mean, I think that Jamie brought it up yesterday that all the main campus has responsibility for all of the branches and etc. And so, you're asking institutions to go through a lot of additional work for something that they already have oversight of.

MR. MARTIN: Yeah, your point is taken. I however we have especially with distance education, we for consistency’s sake, are still of the hold to the position that all of those programs need to stem from the main location.

MS. MILLER: Brad, please.

MS. PERRY: I'm sorry. I just want to follow up with one question. So, when it says associated with the main campus, what does associated with actually mean?

MR. MARTIN: Those, all the distance programs at the institution would be basically offered from the main campus. So, all those all students enrolled in those and those programs, distance education programs are enrolled are at the main campus.

MS. MILLER: Brad.

MR. MARTIN: Donna, do you want to address that at all or?

MS. MILLER: I don't see that. Brad?
MR. ADAMS: Yes. I just want to also say I'm disappointed. And but that being said, I am appreciative of the one-year extension. This is going to be a very burdensome undertaking and I just want to confirm the new effective date for six will be July 1st of 2024. And if so, could we get that added to the text in six? Because I didn't see any changes in blue to six when we reviewed it.

MR. MARTIN: Thus far, the Department hasn't, we have not proposed any reg text. We would just be allowing the institutions a year to comply with that.

MR. ADAMS: Isn't this effective date of this paper going to be July one or 23? I just worry if it verbally. That's great, Greg. I appreciate it, but I'd like to see it in writing.

MR. MARTIN: I'll take back what we can what we can do in writing. We certainly could make reference to it in the preamble to the document. But let me let me take that back with me.

MR. ADAMS: Thank you.

MS. MILLER: Okay. Greg, I don't see any other hands. So, I'll turn it back over to you.

MR. MARTIN: We're going to be moving on to 600.21, which is where we left off yesterday. So, in 600.21 looking at (a)(6), there we have it. We just note throughout the entire section that we have removed references to direct or indirect ownership interests or control and voting interests, and instead have ensured those terms are reflected later in the
definitions of ownership, ownership, interest, and control. So, you see here where we've made those changes to changes in ownership. So, changes ownership is any change in ownership of the institution whereby the natural person or entity acquires at least 5 percent of the ownership interests, direct or indirect of the institution, but does not result in a change of control as described in 600.31. Moving on to (a)(14) and I just think we'll start with A just so everybody knows the root of this. These are reporting requirements except or as provided in paragraph B of this section, an eligible institution must report to the Secretary in a manner prescribed by the Secretary no later than ten days after the change occurs. Any change in the following. So, then we are moving on to 14. And here we have made some changes again to streamline the language in this item, but we have not made any substantive changes to 14. So, we'll take a look at that. This would be reporting any change in the ownership of the institution that is subject to the requirements of 600.20 G and H but does not result in change of control as described in 600.31 and is not addressed under paragraph (a)(6) of this section, including the addition or elimination of any entities in the ownership structure. A change in the entity from one type of business structure to another, or any excluded transactions under 600.31 E. And now we'll move down to B. 600.21 B and this subsection was not previously included in the in the issue paper, but we've added it so that we can cross reference to the new paragraph (a)(14) So we just added B in here for reference and you can see that it says additional reporting from the institutions owned by publicly traded corporations. An institution that is owned by a
publicly traded corporation must report to the Secretary any change in the information described in paragraph (a)(6) or (a)(14) of the section when it notifies the accreditation agency, but no later than ten days after the institution learns of the change. So that just in there so we can incorporate the reference to (a)(14) above. And that is all for 21. So, before we move on to 31, I'll allow any comment, I'll allow an opportunity for comments or a discussion.

MS. MILLER: Jamie, is your hand up?

MS. STUDLEY: Yes, I think I call it a point of order. I did not see the last text on the screen at all. It never appeared while Greg was reading it and he said it was completely new language. And this is these last set, I just wish we could do it at a pace where we can actually write. You were reading something that you could see. Greg it never appeared.

MR. MARTIN: Okay Vanessa, let's bring that back up again then, please. So, we're going to.

MS. STUDLEY: I just don't want to whip through brand new language.

MR. MARTIN: No, that's fine. Let's bring up. You have received it has been emailed to you. But for purposes of discussion here, will we'll bring it up.

MS. STUDLEY: Was that emailed this morning?

MR. MARTIN: I don't know exactly when.
MS. STUDLEY: Or are you reading things from the last? I'm not sure.

MR. MARTIN: No, this is in the current issue paper.

MS. STUDLEY: Okay. Because I couldn't see it. I couldn't tell whether it was a today blue revision.

MR. MARTIN: No, that's not a blue revision.

MS. JEFFRIES: Right. You were emailed the whole entire document again this morning with the addition of the blue pages. And the rest would be the same as what was in yesterday. So, you should actually have two copies of this at that point, one with the added blue changes and then the one that we were working off yesterday.

MS. STUDLEY: I'm simply saying it was going so fast that.

MR. MARTIN: Vanessa, arrow down from arrow down from this to 600.21 B. So just above 600 point, it's just above 600.31. It's on page seven.

MS. STUDLEY: Thank you. I don't mean to slow folks down.

MR. MARTIN: No, don't worry. No, it's, we want to definitely pull it up. I wasn't aware it wasn't up there. So let me let's review that again. No problem.

MS. PERRY: There, it's just not highlighted or there's no red text.
MR. MARTIN: There's no highlight. There's no highlight to it. No, it's just because it's not new. It's just showing something that was already in regulation that we just, the only reason we put it in there is because we wanted to reference what was what was in 14 above. We changed or for it just changed (a)(6) to or 14 so. Vanessa, just go down to 600.31 where it starts. There we go. Now, just go up just one little bit to B, right above it. Right. So there, there's, the new language, Jamie. So, it says there's only one part that's new, but we, just put B back in so we could make the reference to (a)(14). So it says additional reporting from institutions owned by publicly traded corporations, an institution that is owned by a publicly traded corporation, must report to the Secretary any change in the information described in paragraph (a)(6) and the addition there is or (a)(14) of this section when it notifies the accrediting agency, but no later than ten days after the institution learns of the change. So, the only the only addition is the reference to 14. Does that make sense?

MS. STUDLEY: Thank you.

MR. MARTIN: Sure. Sorry about the confusion there.

MS. MILLER: Any questions or comments about this section? Greg, I don't see any hands up so we can move on to the next section.

MR. MARTIN: Yes. So, we'll be moving on to 600.31, which is change in change in ownership, resulting in a change of control for private, nonprofit, private, for-profit and public institutions. And we are going to B. Under the
definitions. And let's go down to ownership or ownership interest. There we go. So here we are in B under ownership or ownership interest. And we have built a direct or indirect end to this definition so that we don't have to repeat it throughout the regulatory text. In 600 point and 600.21, so here you see the definition of ownership or ownership interest. Ownership or ownership interest means a direct or indirect legal or beneficial interests in an institution or legal entity or a right to share a right to share in the profits. So that's a change there. Our next change is in still under the definition of ownership or ownership. No, sorry. Going over to the definition of a parent. There we go. We have made some clarifications here in this section of the definition of a parent or parent entity. So, I'll read through that. A parent is the legal entity that controls the institution or a legal entity directly or indirectly through one or more intermediate and through one or more intermediate entities. So just a little bit for clean up and in the language there. Next, we are moving and then the number becomes a little complex here. So, let's start with where it C and we're the standards of identifying standards for identifying changes in ownership for control. I just want to walk through the numbering here. So, we have one, two and three starting with other entities. So, if we're in three and then we're moving to, so to note three is broken up into romanette one and then we come down to romanette two and under romanette two we have a, b, c, d, e, f, g and then H and so we'll start there. There are some changes here. We have added a new H and I to further capture transactions that may not have been reflected in the list, which involve an entity that
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has a member and ceases to have a member or has no members and
becomes an entity with members. So, we've added H and I so
I'll just read those and remember looking at the stem again.
The Secretary deems the following changes to constitute a
change of ownership, resulting in a change of control of such
an entity. So, adding H and I here, which is an entity that
has a member or members, ceases to have any members. And then
in I, an entity that has no members becomes an entity with a
member or members. And then we need to go down to romanette
four under that section. There we are. And we have moved this
out to a new romanette. This is romanette four because it was
unclear how it worked with the stem and in romanette three.
Below we have further streamlined the language to conform
without making substantive changes. So, this romanette four is
new, notwithstanding paragraph (c)(3), romanette two and
romanette three of this section. If a person who alone or in
combination with other persons, holds less than 50 percent
ownership interest in an entity, the Secretary may determine
that the person, either alone or in combination with other
persons, has actual control over that entity and is subject to
the requirements of this section. And any person who alone or
in combination with other persons, has the right to appoint a
majority of any class of board members of an entity or
institution is deemed to have control. And now we will move
down to five below there. And this is we have we have added a
cross reference to (c)(3) which addresses the variety of
entity structures that might involve changes to changes of
control. So, you can see in five. Nonprofit institution, a
nonprofit institution changes ownership and control when a
change takes place that is described in paragraph (c)(3) and D
of this section. So, I'll stop there before I move on to
paragraph D since there was quite a lot in the
numbering gets a little complicated there so. I'll go back and
take any comments.

MS. MILLER: Johnson and then Brad.

MR. TYLER: Yeah. I think I commented at the second
negotiated rulemaking week that we had that 50 percent was too
high and that the GAO who did the what I think is a seminal
study on conversions of for-profits this is 50 percent of the,
owns 50 percent of the interest in in the company. They use 35
percent I mentioned that and I just read while we were talking
why they use 35 percent. That's what the IRS uses. They want
that in the documents they're reviewing if there's more than a
35 percent interest in a transfer of ownership of a company.
So, I don't know why we're stuck at 50 percent. That seems
you're going to not even identify entities that the IRS is
already considering the transaction as worthy of greater
scrutiny.

MR. MARTIN: I know Donna addressed that in previous
sessions, so I'll turn it over to Donna to address that issue.

MS. MANGOLD: What we're seeing is most transactions
as we review these transactions and they're very time
consuming to review, that the corporate documents, all the
time, are showing control at 50 percent. We're just not seeing
it at the lower levels. And that was compelling us to look at,
this is a default position. Is that we will deem it to be
control at 50 percent. And we could still have we would still
retain the discretion to actually find actual control that
isn't triggered by if we found it at 25 or 35 or some lower amount. But this is what we're deeming to be. This is the default position. If you've got 50, you've got control.

MR. TYLER: Okay, thank you.

MS. MILLER: Thank you, Johnson. Brad.

MR. ADAMS: Yes. We discussed and I submitted language requesting a voluntary application fee after the week one session to the Department. And I was just curious if they considered that kind of where they stand? I can resubmit the language. I think you've probably got it, though. Just want to get your thoughts on whether the Department is on whether or not they would consider a voluntary application fee in exchange for an expedited pre acquisition review.

MS. MILLER: The idea of the fee is something that we need to do some research on. It’s definitely, we heard you. We saw it. I've got, we've got it.

MR. ADAMS: Great. I think there's a bill too in Congress related to this. Okay, perfect. Thank you.

MS. MILLER: Greg, I don't see any other hands or comments.

MR. MARTIN: Okay. In that case, we'll move on to 31 D. And there we go. Under covered transactions and we have in the only one we have there is in is in eight, which is we have added this item to clarify that the Department views mergers of institutions in which a non-closed institution or in which a non-closed location or institution is acquired by another as
a change of ownership. So, in eight, I'll read that change, the acquisition of an institution or additional. Well, I should start with seven because it flows into that. So, a change in status as a for-profit, nonprofit, or public institution or in eight the acquisition of an institution or additional location of an institution to become an additional location of another institution unless the acquired institution or location closed or ceased to provide additional instruction. And that concludes the issue paper. So, I welcome any discussion on the last section.

MS. MILLER: Okay, Kelli and then Jamie.

MS. PERRY: I'm going to get back in line because my question goes back to the very beginning.

MS. MILLER: Jamie?

MS. STUDLEY: Mine's right here at the very end. The acquisition unless it's a closed location. There's nothing there that would preclude the accreditsor from reviewing the addition of a program or the effect of that closure. You're just trying, I'm trying to understand the purpose of the unless. It's to allow a closing location to be, I don't want to say rescued, but to acquire an institution presumably in distress, or that was going to change. But the accredited could still review it as a new program or a change to the structure of the institution, is that right?

MR. MARTIN: Yes.

MS. MILLER: Does that answer your question, Jamie?
MS. STUDLEY: Yes.

MS. MILLER: Okay, Kelli.

MS. PERRY: Okay. So, I apologize for going back, but I want to go back to the definition of the private nonprofit, just because I needed time to process what was here. First, I'm disappointed that there wasn't more that changed in this based on the fact that it seemed like it was the one issue that negotiators actually were somewhat in agreement on yesterday. But in saying that, does this definition only apply to changes of ownership, or is this the Department's definition of a private nonprofit? Because if it's the definition of a private nonprofit without a change of ownership, this would affect almost every private nonprofit in the country. Because I guarantee that the majority of them have some agreement, whether it be food service, bookstore lease agreements, anything where part of the net earnings of the institution is going to benefit a private entity because they have agreements and relationships that exist in the normal course of business. So. I guess if you could answer my question first and then I'll go on. But is this just change of ownership? And I'm honestly, I don't know that it even matters. But or is this your definition of a private nonprofit?

MR. MARTIN: I'll let Donna address that.

MS. MANGOLD: This is contained in our definition section. It happens to be part of this issue paper, but it's in the definition section. So, it's not it's not limited.
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MS. PERRY: Okay. So, I have even more concern. Because nonprofits, private nonprofits have these relationships. So how are you going to address those in the normal course of business? In essence, basically what this is saying is, is that every private nonprofit out there is now not a private nonprofit if they have some type of an agreement with a private entity.

MS. MANGOLD: No, what we're saying is we presume that all of these contracts that you have, whether it's for food service, whether it's for anything else, maintenance of the dorms are at market rate.

MS. PERRY: I understand what you're saying down below. I'm talking about number one, where it says a domestic institution, no part of the net earnings of the institution benefits any private entity.

MS. MANGOLD: That is the statutory definition of a nonprofit. It's in 501(c)(3). It's been in our regs all along. That is the statutory definition of a nonprofit in, you know, for tax exempt status. And it's in our statute also.

MS. PERRY: Okay. So, you're saying that by adding in B below, unless the institution demonstrates that the payments under the revenue sharing room are reasonable, that that section, you're saying that that would exempt all of the private nonprofits in the country from this becoming an issue for having relationships and agreements with food service providers and.

MS. MANGOLD: It is not intended to catch that. Generally, under tax authority, that clause, that first clause
there, is really looking at either insider relationships or
former owner relationships, those kinds of things where you're
actually almost treating where you're treating that that other
party is really almost looking like a shareholder. But in
nonprofits you don't have shareholders, but it's looking like
a shareholder. But that is that is just the standard that is
the standard language.

MS. PERRY: Okay. But I still do have some concern
about this language and the fact that it is expanded, but as
long as that is not the intent of this and.

MS. MANGOLD: It is not.

MS. PERRY: Okay. Because that could be very
detrimental to the private nonprofit industry as a whole and
students as well, because these relationships that that
schools have with these companies, they're structured such
that they do benefit the students.

MS. MANGOLD: And even in the lower section, we talk
about the connection to costs that there has, even if you
would do a revenue share SF connection to cost. It is not our
intent to say you can't do food service outside, that you
can't get an outside vendor to provide food service or
cleaning services or maintenance services on machines.

MS. PERRY: Well, and it's not I mean, it's not so
much the service in the contract itself, but there's other
things within those contracts a lot of times that, you know,
for example, you may have a this is pretty typical, right,
with food service suppliers, where they'll make a contribution
to your facilities to improve the facilities where they're
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giving you, let's say, $10 million of capital investment that
you're then amortizing over a period of time and the payback
on that relationship. That that is not captured here, correct?

MS. MANGOLD: That is correct.

MS. PERRY: Okay.

MS. MANGOLD: The intent is not to capture those
kinds of relationships in this, in this in this definition.

MS. PERRY: Okay.

MS. MILLER: Thank you, Kelli. Brad?

MR. ADAMS: Apologize for that. I've been also I want
to apologize for going back and I've been thinking about
something, Greg, you said on distance ed. comment, and I did
provide some text on the effect date being one year out from
this regulation going into effect for you to consider. But you
said that this change in the distance ed. codifies current
policy. So today, if an institution has its distance ed.out of
a branch location, are we not in compliance with the policy is
written today?

MR. MARTIN: No, I no. I would not say that you're
out of compliance. We can we consider that the programs are
offered from the main location. But we would not because you
have associated it with the branch say that it's out of
compliance. In assessing an institution for certification or
recertification, we might bring that up, but I'm not going to
make a blanket statement that all schools have done that right
now are out of compliance. In fact, that's why we would be
allowing the year for institutions to properly align those programs.

MR. ADAMS: Thank you.

MS. MILLER: Jamie.

MS. STUDLEY: I'm picking up Kelli's thread. I completely understand the challenge for Kelli. That I think hinges on the word benefits. And I've spent years also trying to figure this out. It has a special meaning. And it's not just the benefit of having a market rate contract or arrangement with somebody. It has special tax meaning. I wonder whether it's duplicating or what the purpose of the new D that's being added is, is engages in an excess benefit transaction, the same as no part of which benefits any private. Is that actually a specific version of the same thing, or is it a narrower or more demanding test? Because I can certainly understand why no part of I have struggled with no part benefits any private entity. But the benefit is above and beyond market rate contracting. It's not, you can't have a deal to buy books at millions of dollars each in order to transfer money to a source that the Department doesn't want you dealing with. But you may buy books from a bookseller at the price of books as your purchasing people determine. This is a, you know, a good price in the market for those books that we need to buy. But can you speak specifically to D and whether that's just articulating what the benefit test is at the beginning or is it something in addition?

MS. MANGOLD: This was in response to Barmak's suggestion yesterday of his drafted language that he included
an excess benefit transaction. This is actually to try to 
catch other kinds of transactions that we may not have caught 
in A, B, C. For example, the president or a board member gets 
a very expensive car. Is that that might be included or being 
paid in some other ways that is beyond, you know, it's someone who 
the president is a bad example but say it's someone who 
devotes 50 hours over the course of the year and that person gets a car, you know, that 50 hours shouldn't result in a car. It's just it's trying to capture some of these other some of 
these other things.

MS. STUDLEY: And wouldn't it capture my books? And 
$1,000,000 for a book can't be a sham way of transferring 
money over the benefit of the book or books. But does it but 
isn't that the same thing as no part of the net earnings 
benefits any entity? I thought it was a more specific 
articulation of that legal standard.

MS. MANGOLD: We are informed by tax authorities. I 
mean, obviously it's different because sometimes what happens 
is either it's the tax status is disallowed or you might have 
an excess tax on the excess benefit excise tax, on the excess 
benefit. But that authority, which does guide us, talks about 
these different prongs. They talk about the prong up at the 
top is typically called the inurement prong. No part of the 
et earnings inures the benefit of any person. Then the second 
part is the excess benefit prong, which is which also provides 
us a benchmark for looking at things.

MS. MILLER: Kelli.
MS. PERRY: Thanks. I just want to go back to my other concern in number six. So, we're saying that branch campuses are excluded as it relates to the definition of being associated with the main campus. But then in the definition of branch campus, we're saying that the branch campus is approved by the Secretary as a branch campus. So, the Secretary's is proving that branch campus, that branch campus is most likely being included in the financial statements for financial responsibility and all of the other things that we've been talking about here. I Just, I would recommend that this whole concept of associated with the main campus includes the branch campus based on based on those two things.

MR. MARTIN: I'll take that for consideration. We did discuss it previously and that was the position we reached. But I will ask to revisit it.

MS. MILLER: Okay, Greg, I don't see any more hands. Should we move to consensus?

MR. MARTIN: Yes.

MS. MILLER: Oh. Barmak, did you have a comment?

MR. NASSIRIAN: Yes. Is it possible to take a ten-minute caucus with a subgroup of the negotiators before the vote?

MR. MARTIN: I'll turn it over to facilitators?

MS. MILLER: Yes. I believe so. Cindy, am I right about that? I'll get, your headset is on mute.
MS. JEFFRIES: Sorry about that. You are correct, Roz. Any member of the committee can request a caucus. So, Barmak, we're going to ask you to say for the record who you would like to have in the caucus. Then we will go off the live feed and Brady will double check to make sure he has everyone assigned to it that you that you wanted, and then we'll open that room. Okay?

MR. NASSIRIAN: So, I would like negotiators from the consumer civil rights groups, both negotiators from both organizations, including Amanda. I would like to invite the legal aid negotiators, the student and student borrowers negotiator, the state agencies negotiator and the AGs, plus myself.

MS. MILLER: Okay. So, with that, I think we can stop the live feed. Okay. Welcome back. The caucus has concluded. I see Kelli, you have your hand raised.

MS. PERRY: Yeah, before we before we vote. Two things. One, Greg, you had said that you would take back the whole concept of the branch campus. I don't know if you had a chance to discuss that while you were or while they were in their caucus. But I really would like you to consider including the branch in that. And then my second thing, quickly going back to this definition, when we were discussing it a minute ago, I was told that one was what was already in the statute and during the break, this what the statute says is that no part of the earnings benefits a private shareholder or individual. So, we're changing private shareholder or individual to private entity or national person. A private entity is very different from a private shareholder. So, I
just would like someone to explain to me, one, why was I told that this was what was already in statute, which it doesn't seem like it is, and two how we go from shareholder to entity, because those are two very different words.

MS. MANGOLD: Nonprofits don't have shareholders. So, the language doesn't quite really fit because they don't have shareholders typically. Usually it's a non-stock and it's not a shareholder, but that is the shareholder is the language. So, I sort of spoke a little bit too broadly, but nonprofits don't have shareholders. So, we felt that this language fit better.

MS. PERRY: Well. So again, it goes back to my concern about the language and that you're right, nonprofits don't have shareholders, which means the language as it exists currently is not necessarily accurate. But the concept of benefits, any private entity there could nonprofits could have a situation where a private entity is benefiting from a relationship. So, we're really changing. And I mean, I'm not going to we don't need to go back and forth, but I'm just I want to go on record saying we're really changing the definition of this. And, you know, I guess I don't, to be told that this was what was already in statute when it wasn't is somewhat concerning to me.

MS. MANGOLD: And I had overstated it. The private inurement part is in the statute. That's the language of the statute, the private inurement.

MS. MILLER: Okay. So, Greg, are we ready to take consensus? And before we do that, I just want to mention that
there is no representation for minority serving institutions, but that will not hold up consensus.

MR. MARTIN: Yes.

MS. MILLER: Okay. So, a show a thumb's sorry to change of ownership. Hold them up high and we'll go through. Okay. Kelli has a question before we take or consensus.

MS. PERRY: I just would like the Department to respond to the requests about the branch campus. If they did discuss if they did.

MR. MARTIN: I'm sorry. Yes, we did discuss. And we remain on the same position we have. We're concerned to have branch campus there is a there is a we do have a separate definition in the regulations in 600.2 for branch campus. And essentially it has its own program it has its own budgetary authority, having authority as geographically separate. There is somewhat of a haze between what separates a branch from an additional location there. Essentially, the only advantage to having a branch is we don't approve that many of them. It's kind of an antiquated thing. But those are approved as branch campuses do have the authority to spin off another location from the branch. That's about the only true difference. But as concerns to distance education, we have we have some, we do have, as I said, concerns about distance programs going through branches. First of all, the only relationship the student really has is with the main, if they're in a distance program is, you know, as far as where it flows from. And we do have there could be issues related to closed schools where a student is in a distance program and if they in the event of a
closure of an additional location or branch, there could be
issues related to any type of closed school benefits that
accrue to the student. So, we've elected to remain with our
initial position.

MS. MILLER: With that, we will move on to the vote.
Please a show of thumbs for issue paper five, changes of
ownership. We will read so first I have Brad, sideways thumb.
Amanda thumbs down. Jamie thumbs down. Sam thumbs sideways.
And Marvin thumbs sideways. Anne thumbs sideways. And Yael
thumbs down. Okay. So, we have a number of dissenters. Kelli,
would you like to explain your descent and what would it take
to get you to consensus?

MS. PERRY: Sure. So, my thumbs down relates to the
changing of the definition of a nonprofit. I appreciate the
Department's attempt to add language to B that it talks about,
you know, unless it demonstrates payments as it relates to
revenue sharing agreements and such as something that was not
intended to include the relationships that most private
nonprofits have. However, I'm concerned that what they may the
Department may think is reasonable versus what a school may
think is reasonable based on a whole slew of different
business decisions that have been made may be different. And I
don't think that schools should be caught up in this as a
result of that.

MS. MILLER: Thank you, Kelli.
MS. JEFFRIES: Roz? Kelli, and maybe I missed it, could you articulate what it would take to get you to consensus?

MS. PERRY: Going back to the language from the second session.

MS. JEFFRIES: Okay, thank you.

MS. MILLER: Thank you. Barmak, your dissent and what it would take to get you to consensus.

MR. NASSIRIAN: While I appreciate the Department's efforts. Neither the Department's track record nor the changes made in this document are adequate to the enormity of the fraud that is directed against students and the taxpayers. And I view the changes that the Department made between the draft we saw during the second round of this negotiation and the third round, the addition of market-based assessment as a basis for supporting revenue sharing agreements, as a giant loophole. I want to read to you from a sample valuation that the Department has apparently approved. I won't name the institution or the appraiser, but I love this sentence. The valuation is for purpose of assisting management in setting the sales price for the sale of the entity to a not-for-profit entity and to support the sale price before regulatory authorities. Our opinion of value should not be used for any other purpose. I mean, if that's the kind of appraisal we're going to hang our hats on, we got huge problems. So, the removal of that language would get me to support this, even though I would say that the amended language would still not
be adequate to protect people. At least we don't create new loopholes. Thank you.

MS. MILLER: Thank you, Barmak. Carolyn.

MS. FAST: I have the same opinion as Barmak, as I've said before. My concern is with the nonprofit definition language, which I believe is doing the opposite of what was intended here, which was to try to prevent the problem that we have seen of schools that are essentially involved in relationships with former owners, that that really negate them as a nonprofit so that they're actually for-profit entity. And I think that the change between section two and section three was the problem. And if the Department was willing to go back to the language that was provided to us in session two, that would address my concerns.

MS. MILLER: Thank you. David.

MR. SOCOLOW: Yes, I will associate myself with both the comments of Barmak and Carolyn, and only just to say I was cheered by the original January issue paper in its topic, which cited approvingly the GAO report about the fact that the Department needs to do more to guard against the risk of conversions from for-profits to nonprofits. And you expressed eloquence on that. I think that the provision in the second session issue paper at the top of page three was certainly better than current reg and I would be able to reach consensus on that. But you've opened up a new loophole here inexplicably, in week three, in session three. So that's my reason.

MS. MILLER: Thank you, David. Johnson.
MR. TYLER: Yeah, hi. So, the language that I really have a problem with is what other people have talked about. It says unless the institution demonstrates the reasonableness of the market price and so forth. So, you created a regulation that is easily appealable. You're going to be fighting over whether the market rate is correct or not, and it's going to go to administrative law judges who are going to be Department of Education related, people who understand all this sort of accounting stuff or whether they're just going to be other people, then it's going to go to a Federal court judge. There's a case now going on involving a gigantic organization out in the West Coast area, litigating this exact issue with the Department of Education. So, I think it's really dangerous for consumers. People believe higher education is out to help them. And I think everyone here is invested in that mission. But you're kind of going to end up with where consumers don't know the difference between a real nonprofit and another nonprofit. And I think it's very dangerous. And the last thing I'll say is the fact that Brad mentioned that there's already a bill in Congress to create a fee to facilitate the Department of Education's work, which is tremendous, that they have to do on all of this to for these transactions. So maybe Gainful Employment is moving all the for-profits into this area. I think you really have to have the flexibility to defend your positions in court. This is going to be very difficult. You certainly can do it, but it's a huge resource thing. And I think Donna and other people there do a tremendous job trying to do this. But it's a huge amount of work. And I think you're putting yourself in a weaker position by creating this standard where you have to defend yourself.
You should, this is a discretionary thing. You have a mission to help students throughout the country with their educational trajectories. And you don't have to give this to the other side so they can beat you in court over and over and over again.

MS. MILLER: Johnson, did you say what would get you to consensus on this?

MR. TYLER: Back to the second paper. Thank you.

MS. MILLER: Thank you. Ernest, your dissent and what would it take to get you to consensus.

MR. EZEUGO: Yeah. Honestly, in the interest of time, my answer to both of those are articulated probably better than I could articulate it by Barmak, Johnson, David so far. So.

MS. MILLER: Okay. So going back to the previous language. Okay.

MR. EZEUGO: Yes.

MS. MILLER: Amanda.

MS. AMANDA MARTINEZ: Yeah, associating myself with Barmak, Carolyn, David, Johnson's comments and issues with the section of the definition of nonprofit nonprofits and what would take for consensus is referring back to session two's paper definition.

MS. MILLER: Thank you. Jamie?
MS. STUDLEY: Johnson, Carolyn and others did a fine job of explaining the risks. I think the entirety of the relationships is a reasonable standard, and the Department has an opportunity to be crisp and clear here that it can take by returning to number two. I think there's also a danger that it's overbroad in the other direction. The obligatory item A captures potentially things that that the Department should not need to be spending its time on. And finally, I think the branch issue that Kelli has spoken to and others, I don't see the need for that and think it could be dropped. I think it causes effort and mischief and I haven't heard enough reason for the need. I respect that the Department believes it would address a problem it's experienced, but I haven't understood it well enough to know why it needs this provision.

MS. MILLER: And you would move to consensus if?
You're on mute.

MS. STUDLEY: We returned to the second, we returned to the second version and dropped the new branch language.

MS. MILLER: Thank you, Jamie. Yael?

MS. SHAVIT: Thank you. I think the Department has missed an opportunity to make a regulation here to propose language that would be really meaningful and address the problem that we see. State AGs also review these types of transactions and have a good understanding of what fair market valuation actually entails and what these transactions look like. And we know as well as the Department does that the type of financial relationships that are incentivized by the
language that was proposed during session three should be
generally and there may be a rare exceptions.

   MS. MILLER: Sorry we lost you just a little bit
there.

   MS. SHAVIT: I've already made the points. I think
this is a missed opportunity. And returning to the language of
session two with would change my vote.

   MS. MILLER: Thank you. Have I heard from all of
those in dissent? Okay. Did the Department want to respond to
what they just heard?

   MR. MARTIN: No, except to say that we thank
everybody for their input and for their time we put into this
and their forthrightness and in giving us their positions on
what it would take to get to consensus. So, I'll take that
back. And again, appreciate all the effort.

   MS. MILLER: Okay with that said Greg, should we move
to issue paper number six certification procedures?

   MR. MARTIN: Yes. So, we're moving on to issue paper
six and I'll wait for Vanessa to give her some time to get
that up. Okay. Great. So, issue paper six starting with us
with 668.13 certifications certification and there's not much
here that changed in 13. So, I'll go through the entirety of
13 and then we're going to we're going to go in 13 is 13 C
which is provisional certification. And there are some changes
to 13 (c)(1), romanette one, and F. There we go. So, after
hearing negotiators concerns and suggestions, we have proposed
to eliminate the proposed specification that the Department
may place an institution on provisional status for repeat
findings of noncompliance. We understand there are concerns
with how this provision would be used, and we agree with
negotiators who noted that we have the authority already in
place to put an institution on provisional status for repeat
findings of noncompliance. We've also added a new event,
noting that the Secretary may opt to place an institution on
provisional status if the Department has determined the
institution is at risk of closure. This paired with the
Department's proposed additional conditions for provisionally
certified schools at risk of closure and will make it easier
to apply conditions such as transcript withholding if the
Secretary is concerned about the institution's viability. So,
you see in F that we have stricken the language that said the
institution has received the same funding of noncompliance
more than one reviewer audit and added the Secretary has
determined that the institution is at risk for closure. That's
all the changes associated with 668.13 certification. So, in
the interest of clearing this discussion on that section,
before we move on, I'll open it up to discussion or comments.

MS. MILLER: Brad.

MR. ADAMS: You know, I'm struggling with the
inclusion of the language that the Secretary is determined
that the institution is at risk of closure. I think this is a
surprising, unfortunate addition to this issue paper. I mean,
who behind the magic curtain is actually making this decision?
What information are they using? I think it's important to
note how serious this is. And this isn't just proprietary
issue. This is for all schools. There are a lot of schools out
there, especially on the nonprofit side, that don't have strong financials. If we go around announcing that an institution is at risk of closure, it's like announcing a bank is at risk of closure. Everybody is going to leave and take their money and run. And so, to me, this is you announce any institutions at risk of closure. There'll be zero students at the door and it will close. And so, if you want this provision in there to just close an institution, then it sounds like that's why as how it's written. So maybe, Greg, help me understand why we think the Secretary and frankly, also we've been negotiating all the different points and all these different issue papers of how the Secretary can use these items up to their discretion across the board. And now we're saying in here that Secretary, based on some unknown report or information, can announce that the institution is at risk of closure.

MR. MARTIN: You know, I think that there has to be acknowledged that there is a lot of discretion available to the Department here with this. And there is always some degree of subjectivity involved. We're not talking about announcing that an institution's closing we're talking about the Department taking an action to provisionally certify an institution. And the Department rightly so under, under, , I mean, we've seen a lot of closures, precipitous closures of institutions over the past few years. Some of them major, they can affect thousands of students. And there is a desire, I think, in the part of the Department and a lot of other individuals that the Department be aware or take action where there is the possibility of a closure. And to be aware of that before these events occur that puts students at risk. And I
think this is part of giving the Secretary that discretion. But I know Steve has his hand, I don't want to I'm not the facilitator, so I will I'll end there with a facilitator.

MS. MILLER: Yes, Steve.

MR. FINLEY: Yeah. I just want to add on as Greg pointed out, it's not necessarily that there's any announcement that the Secretary's made this determination. The institution would be advised that the Secretary had made that determination. And in that exchange, the Department has an obligation to explain the basis for the determination that would have that the institution was at risk of closure. So, in the dialog between the institution and the Department, there would be a discussion about the basis for that decision. And the institution could push back and say, you know, we disagree with that for the following reasons, and there would be an exchange there and that would result in some kind of final decision that could be challenged elsewhere.

MR. ADAMS: That's helpful. My main concern is not knowing the determination of that, but and there's so much discretion. So that's probably my main concern. But the secondary concern was that that becomes public information, and it somehow gets out in the press that the Secretary is deeming an institution is at risk of closure. And then we're all they're closed if that happens. So, I'll just leave it as I've got serious concerns with the discretion in in E here. Thank you.
MS. MILLER: Kelli, I see your hand up, but I just wanted to mention that Debbie is back at the table for state agencies. Okay, Kelli.

MS. PERRY: So, in romanette two, it talks about the fact that if the institution triggers one of the mandatory or discretionary triggers. And the institute is required to post financial protection. So, two questions. One. If the institution post financial protection up to a level of say, they go up to 50 percent, they are deemed to be financially responsible. So, in that case, would that still require the certification to become provisional? And then the second question is, we're adding this here as it relates to the mandatory and discretionary triggers. Is there something somewhere, and I apologize, I just can't, if it's there, I can't find it, does the institution become provisionally certified if they fail the composite score, or is it just relate to the additional triggers that we're adding?

MR. MARTIN: I'll let Steve address that.

MR. FINLEY: Why, thank you, Greg.

MR. MARTIN: Well, I think the first one, yeah, the first one I can address is the institution automatically becomes a certification, becomes provisional upon the triggering event. So even if you post a letter of credit, it's.

MR. FINLEY: So, let me let me try to expand on that. Institutions that fail the financial responsibility, strength standards, the composite score the Secretary usually provides an option of posting a smaller letter of credit in conjunction
with provisional certification or a larger letter of credit as
an alternative demonstration of financial responsibility.
Right? The larger letter of credit is at least 50 percent but
could be higher if there were other risk factors identified
that the Department thought required a higher letter. And it's
the same thing for the smaller one. It's at least 10 percent
and it could be higher. There are performance-based failures
of the financial responsibility standards that cannot be
overridden by posting a larger letter of credit. And the past
performance violations are an example of that large program
review liabilities, late audit submissions, those trigger
mandatory failures that will require a letter of credit. But
the institution does not have the option of being financially
responsible by just by posting the larger of the two amounts.

MS. PERRY: Or just the triggers that don't allow the
letter of credit to be posted or for all of the triggers? So,
for example, there's triggers that would allow you to post a
letter of credit, and then there's triggers that don't. Is
that what you're saying?

MR. FINLEY: Yeah, I think in general, the only time
you've got the option of meeting the alternate financial
responsibility demonstration with the larger letter of credit
is for a composite score violation failure.

MS. PERRY: Okay.

MR. FINLEY: It's not really a violation. It's just a
failure.

MS. PERRY: Okay. Thank you.
MS. MILLER: And Jessica has joined the table for legal aid. Don't see any other hands. So, I'll turn it back over to you, Greg, to take us to the next section.

MR. MARTIN: Okay. Thank you very much. Thank you, Steve. We'll be moving into six 668.14, which is program participation agreement. And will be starting in (b)(18). And in (b)(18) we're looking at romanette two. So this is an 18 the stem there, it will not knowingly and then looking at looking at romanette two under that we have proposed some revisions to 668.14 (b)(18) romanette two that this will address the situation in which institutions contract with another institution or third party servicer who have been terminated, who have been terminated for participation in Title IV, or whose owners, officers, employees, or had substantial control over the institution that still owes a liability to the Department for a Title IV violation and is not repaying. It will also ensure that institutions may not contract with owners or officers whose participation in the Federal aid programs led to a loss of Federal funds of at least 5 percent of annual Title IV volume. So I read the change there in romanette two, will not knowingly contract with an institution or third party servicer that has been terminated from participation in the Title IV HEA programs for a reason involving acquisition use or expenditure or Federal, state or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, state or local government funds, or whose owners, officers or employees exercised substantial control over an institution or a direct or indirect parent entity of an
institution that has a liability for a violation of Title IV HEA program requirement and is not making payments in accordance with an agreement to repay that liability. And look, we also have a change in 26 and I'll review that one and then we can go back and have conversations since or discussions since I know there are a few changes here, so let's review the one in 26. Here we have removed the reasonable relationship language as it's not relevant and potentially confusing. We've also clarified that rather than making this an eligibility limitation, the provision will apply to Title IV eligibility for the program. In other words, this ensures taxpayer financed Title IV aid will not exceed these maximum lengths. Though institutions may offer their own aid or financing to support ours beyond the cap, we have also clarified in B that this national medium will be established in the year of the effective date of these regulations so that the cap on time for eligibility has not become a moving target to institutions. So I'll review that the language there. This is in 26 for educational, for an educational program offered by the institution that is required to prepare a student for Gainful Employment and a recognized occupation. The Secretary limits Title IV HEA eligibility for the program to the lesser of the minimum number of clock hours required for training in the recognized occupation, for which the program prepares the student as established by the state in which the institution is located. If the state has established such a requirement or as established by any Federal agency or in B, at least half the states license the recognized occupation for which the program prepares students. The national median number of hours required for training as established in in those states, as
determined by the Secretary for the year of the effective date of these regulations and published in the notice in the Federal Register. So, I will now open up the floor for discussion and comment. So, we are looking at 18 and 26 comments on either of those.

MS. MILLER: Anne.

DR. KRESS: Sure. So, I've raised this issue before in 26 romanette one, A and B, the reality is that institutions don't have any ability to control what the states set as a threshold for license professions. And I'm just really concerned that we're going to disadvantage students based on where they live from accessing Title IV funds, because the students also don't have an ability to control what the state set as the minimum threshold for these programs. So I appreciate that the Department added the national median, which wasn't there before, but I really wish we would have kept greater because I do feel we're going to disadvantage students who have no ability to control again what the states are setting and the states are consulting typically the boards of these licensed professions.

MR. MARTIN: Thank you. The Department's concern and I want to say that we understand those concerns. We do have concerns over the rather high number of hours in some states that are required for licensure that far exceed national meetings and far exceed whereas in most states. And I would also point out that we have concerns extended it to the fact that there is not an appreciable difference in the earnings of students for a specific field in a specific field or a
specific occupation that are related to the increased number of hours.

   DR. KRESS: And I'll just say I get that. I just think we're going at that issue through students, which seems really wrong. We're not talking in most cases about students who can pick up and move across to another state where there are fewer clock hours or fewer credit hours associated with any of these professions, and then come back to their home state to be licensed in that profession. So, I just wish we would focus those energies on the states rather than on the students by denying them aid.

   MS. MILLER: Brad.

   MR. ADAMS: Yes, I have to agree with Anne and a plug here. Again, I don't oversee any cosmetology schools, so we really should have had someone that's a cosmetology expert on this committee. And I'm just surprised the Department did not make any meaningful changes to this section. I think it's a really bad idea, and it'll have consequences for institutions that are in states that have minimum licensure requirements above the national median. I think it's a crisis waiting to happen. The states, not the Department, should set the licensure requirements, but it seems like the Department seems to have rejected that idea and think the Federal Government knows better than the states in this item. And I'm not really sure personally how many hours it takes to be a good cosmetologist, but I don't think the Federal Government does either. And so why would we not want states to control this requirement? And why does the Department think they know
better than the states on what it takes to get a good
cosmetologist to give a haircut.

MR. MARTIN: I don't have anything else to add there.
I would say that the Department is not certainly not stepping
in to say what the adequate number of hours is to become, in
your example, a cosmetologist. It could be any other any other
any other profession. There are, I think, it calls into
legitimately calls into question the number of hours in some
of these states where they can exceed by twice what the number
of hours is and several other states or even the median. So
that is I don't know that it could be easily defended why it
takes that many more hours in one state as in another state.
So that's and students are paying for that and obviously
taking out loans for that. So, we are concerned for that area.
But I know.

MR. ADAMS: And I understand that response, Greg, and
I agree this is a GE issue at the same time. And as we saw,
cosmetology schools are the ones that are going to potentially
perform the worse than GE. And I get it. But at the same time,
why don't you ask those states why they set the threshold so
much higher? I have no idea why they did, but that seems like
that would be the better question than asking this committee
to determine that a national median makes more sense than the
states and what they determine as is necessary to be a good
cosmetologist or in another program. And I've got serious
reservations on this. And I just think we should have gone
back to the original language, as we discussed in several of
the sessions prior to making all these changes. Thank you.

MS. MILLER: Thank you. Jessica and then Barmak.
MS. RANUCCI: I have a more, yes, I understand that the sort of high level policy conversation you guys are having, I have a more specific question and concern. Which is that I understand your reasoning that rewriting this about Title IV eligibility for the program because schools can offer whatever, you're saying schools are allowed to offer programs that are non-Title IV. My question is that I think this language is susceptible to two readings. One is that if a program doesn't meet this requirements, no student within that program can ever receive Title IV. I think the other reading is that any student in that program can receive Title IV up to the maximum, but then can't compete with Title IV. I think that one is extremely problematic. That would just funnel students into private loans or institutional loans or non-completers it would leave them with Federal debt they can't repay. I think that's not really a position that the Department should be taking here, regardless of its position on the high-level policy issues that you guys have been discussing. So, I guess Steve or somebody maybe if you could clarify which one of those this language was intended to mean.

MR. MARTIN: I can clarify for sure that it is the second interpretation that the school may offer a program and we don't we're not capping the length of the program. The states can do that. I shouldn't say they can offer a program any length. They this would be capping the amount. This would be capping the portion of the program that would be eligible for Title IV. It would not be saying students could not enroll in these programs.
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MS. RANUCCI: No, I understand. I'm still not sure that answered my question. Are you saying any individual student who received Title IV can enroll in this program but not complete it with Title IV, or are you saying they can't get Title IV for this program in the first place?

MR. MARTIN: No, no. They could get Title IV for the program up to the number of allowable hours for this regulation. And then there would be no Title IV they would not, the school not be able to finance the additional hours with Title IV.

MS. RANUCCI: Right. And to be clear, there would be no loan discharge options, any options for completing the program other than trying to access their own savings or private credit?

MR. MARTIN: As written, there's no other there's no other Federal option for funding, no.

MS. RANUCCI: I think that's really problematic.

MS. MILLER: Okay. I see. Barmak and then Debbie. But we are 2 minutes to lunch, so Barmak.

MR. NASSIRIAN: Yeah, I want to echo Jessica's concern of leaving the wisdom of whether the Department should or shouldn't cap the maximum length of a program if it chooses to do so. It should really think about the idea of plugging students into programs they can conceivably finish with adequate financing and contemplate what is the likely backfill for that will be more predatory, problematic debt. I would also say, and I appreciate the Department's effort to attempt
to tamp down this sort of expansion of the length of these lengthier programs, which is often a kind of a protection racket for incumbents in some cases. If you decide to keep this, I would really encourage you to put a later effective date on this, to give the states time to adjust their respective laws to accommodate this. Because, again, particularly the way you have configured this, it could become a real problem of with all kinds of private label lending, back throwing, what the Department may cut off in some states.

Thank you.

MS. MILLER: Okay. Debbie, we have one minute until lunch, you're up.

MS. COCHRANE: I will mostly echo what others have said about the concerns about this provision, but also just build a little bit more on to Barmak issues of timing. It does look to me like I think from B, you're basically saying as of June, basically July 2023, you would be looking at the national median in that period of time and then that whatever the national median is then would be quantified going forward. So, I just want to clarify that that is the intent here. But also, just most of the states, they do have these provisions in their own regulations, which they wouldn't change until the Federal regulations are final. When state regulations are final, institutions need to develop new programs and then they need to start enrolling students into those new programs and allow the students to finish out their old programs that they had been enrolled in. So, I think there's a lot of timing implications if you want to go forward on this, that in a way
that doesn't really adversely impact students, that that just need some more thought.

MR. MARTIN: So, would you be saying to give institutions an additional year to come to the states a year to adjust?

MS. COCHRANE: I would say I think giving the states another a year to adjust would be helpful. That would give them time to have the regulations in effect. I would also add, and I've submitted language to this effect before, but in romanette one A have something also about the limit related to the time of the students initial enrollment. So, you're not getting or not hitting those students who are they're just kind of enrolled in a period trying to finish out a program and then the rules change and their aid is suddenly cut off.

MR. MARTIN: Thank you.

MS. MILLER: Okay. With that, we are one minute past lunch. Bradley, you'll be up first after our break.

MS. JEFFRIES: Roz, he just put something in the chat that he has a very quick question.

MS. MILLER: Okay.

MR. ADAMS: Yeah, I didn't want to come back after lunch on this. So, if it's okay, we'll take a real quick minute. But my concern is the way I read this now is the national median if the states start changing their hours that national median is going to change, then you're going to continue to have this chase, the tail chasing the dog scenario
where the states are going to update theirs and then the median changes. So shouldn't we codify a number of if you're going to go down this path, which I disagree with, the national media shouldn't change every year is what I'm trying to say, because the states won't even know what they're trying to hit. Is anyone else reading it like I am?

MR. MARTIN: We have the language so that as determined by the Secretary for the year of the effective date of the regulations.

MR. ADAMS: So, if that changes every year, then the states are going to have to change every year. That's not going to be good.

MR. MARTIN: I have to go. I don't think that we propose that to change it. We don't want it to become a moving target for institutions. That's not our intent. That's why we have this regulation changed and we'll set it in the year that the regulations are become effective.

MS. MILLER: Okay. Dave, is it okay if we or did you want to respond?

MR. MCCLINTOCK: I don't want to respond. I just want to ask you a question. If I ask it before lunch, it might be something people can think about that are better experts than me. I do not test individual student files and programs as much as I used to. The impact of this if a program is longer, if the state requirements have more hours than the median and the student is attending, does that mean they would get 100 percent of their financial aid up until they reach that point when the hours end up? Or would it get prorated over the
entire length of the program? So, if it's 110 percent in their state, they get aid up to 100 percent point and then they pay 10 percent at that point forward? Or does it get pro-rated throughout? I'm just asking for clarification.

MR. MARTIN: Yeah, that's a good point. You know, we haven't codified that yet, but it would be the way I would view it and my colleagues can correct me if I'm wrong later, but it would be up to the number of hours that that the that we're allowing the program to be funded with Title IV. So, you wouldn't take the entirety of the program and then prorate the number of hours eligible over that period the entire time, if it were if it were, if the school was able to offer it through 900 hours, but the program itself was 1500 hours. The student would get 900, would get aid 900 hours. You wouldn't take the 900 hours worth of aid and prorated over the 1500. And just to clarify, again, I know I already said this, but just I want to make clear that I make it clear that it would that the the meeting is not a moving target that is published in the Federal Register. Based on based on as said here the year the effective date of these of these regulations and would not change.

MS. MILLER: Okay. Jessica and Debbie. Your hands are up. But I'm afraid if we keep going, we won't have enough time for lunch because we do have to be back at 1:00. So, if that's okay, you two will be the first up Jessica then Debbie after the break. And with that, can we end the live feed, please?
Institutional and Programmatic Eligibility Committee

Session 3, Day 4, Morning, March 17, 2022

From Debbie Cochrane (P), State Agencies to Everyone:

After roll call, David Socolow will finish out changes in ownership/control for state agencies.

From Bradley Adams (P - Proprietary Institutions) to Everyone:

Well done on your Irish accent David. I am impressed.

From Adam Welle, State AGs (P) to Everyone:

Yael will be starting this morning at the table for state AGs.

From Kelli Perry - (P) Private Non-Profits to Everyone:

Can you please send us that language via email.

From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

would it be possible to send us the language/post it in the chat/keep it on the screen?
From Cindy-FMCS Facilitator to Everyone:

I am in the process of sending the updated document you just saw to all of you. Give a couple minutes.

From Cindy-FMCS Facilitator to Everyone:

You should all have it. Let me know if anyone didn't receive it.

From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

Thanks, received

From David Socolow (A) State Agencies to Everyone:

+1 to the profound disappointment expressed by several negotiators. I oppose this revised language defining "nonprofit institution." The Department should instead use the definition on page 3 of the Session 2 issue paper.

From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

+ Kelli's concern about the branch issue.

From Bradley Adams (P - Proprietary Institutions) to Everyone:

+1 to Kelli's concern

From Anne Kress (P) Comm Colleges to Everyone:

+1 to the branch issue
From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

this is difficult to go so fast when we cannot see the change on the screen

From Bradley Adams (P - Proprietary Institutions) to Everyone:

Only things in blue changed

From Anne Kress (P) Comm Colleges to Everyone:

Just to clarify, the yellow and bold are new in this paper for week three and the blue is new since yesterday, correct?

From Kelli Perry - (P) Private Non-Profits to Everyone:

that is my understanding

From Anne Kress (P) Comm Colleges to Everyone:

Thx!

From Bradley Adams (P - Proprietary Institutions) to Everyone:

Here is my proposed language to add to the distance education issue we discussed in 6 at the top of the document "Effective [one year from the effective date of these regulations]"

From Emmanuel Guillory (A) PNPs to Everyone:
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+1 Kelli

From Debbie Cochrane (P), State Agencies to Everyone:

I will be returning to the table for certification.

From Adam Welle, State AGs (P) to Everyone:

I am coming back in for state AGs

From Laura Rasar King (A) Accrediting Agencies to Everyone:

For 668.14 Program participation agreement, request to take it issue by issue rather than by the entire section.

From Johnson Tyler (p) legal aid to Everyone:

Jessica is back at the table

From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

This is a positive addition.

From Bradley Adams (P - Proprietary Institutions) to Everyone:

+1 Laura

From Bradley Adams (P - Proprietary Institutions) to Everyone:

i would recommend we keep 668.14 (26) comments separate from 668.14 (32) comments.
From Debbie Cochrane (P), State Agencies to Everyone:

Agree - going issue by issue would be helpful.

From Ernest Ezeugo (P) Students and Student Loan Borrowers to Everyone:

Agreed with Laura and Brad.

From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

Yes--please separate discussion issue by issue

From Laura Rasar King (A) Accrediting Agencies to Everyone:

+1 Anne

From Bradley Adams (P - Proprietary Institutions) to Everyone:

+1 Anne

From Marvin Smith (P) 4 Year Publics to Everyone:

+1 Anne

From Jamienne Studley--Accrediting Agencies (P)

she/her to Everyone:

+ Anne. While getting states to change the levels where they might be excessive is an important solution but the timing could pinch students.
From Anne Kress (P) Comm Colleges to Everyone:

Then, again, address this to the *states,* not to the students by cutting off their aid.

From Kelli Perry - (P) Private Non-Profits to Everyone:

+1 Anne

From Laura Rasar King (A) Accrediting Agencies to Everyone:

+1 Jessica

From Anne Kress (P) Comm Colleges to Everyone:

+1 Jessica

From Anne Kress (P) Comm Colleges to Everyone:

Jessica

From Laura Rasar King (A) Accrediting Agencies to Everyone:

This is going to be very harmful for students. Students can start the program, then lose their aid and not complete.

From Anne Kress (P) Comm Colleges to Everyone:

+1 Laura

From Carolyn Fast (P) Consumer/Civil Rights to Everyone:
+1 Jessica. It is not a good idea to permit students to enroll in a program, then cut off Title IV in the middle of a program.

From Bradley Adams (P - Proprietary Institutions) to Everyone:

+1 Laura. This is putting students in a bad position where there are differences between state and federal hours requirements.

From Amanda Martinez (P) Civil Rights to Everyone:

+1 Jessica

From Marvin Smith (P) 4 Year Publics to Everyone:

+1 Jessica

From Jessica Ranucci (A) - Legal Aid to Everyone:

Are there any other situations in which ED allows Title IV funds for a student to begin a program, knowing that they are ineligible for Title IV funds for the published program length?

From Anne Kress (P) Comm Colleges to Everyone:

+1 to later effective date

From Jamienne Studley--Accrediting Agencies (P) she/her to Everyone:

+ Anne again, plus Jessica's and Barmak's points: the burden falls on students but this is not the right vehicle for getting to better state min hours reqts
From Adam Welle, State AGs (P) to Everyone:

+1 to Barmak's suggestion to allow states time to adjust their hours requirements before this takes effect.

From Jamienne Studley--Accrediting Agencies (P)

she/her to Everyone:

+ Debbie also

From Bradley Adams (P - Proprietary Institutions) to Everyone:

i have a quick question related to this issue.

From Anne Kress (P) Comm Colleges to Everyone:

+1 You need to grandfather students enrolled prior to implementation.

From Jamienne Studley--Accrediting Agencies (P)

she/her to Everyone:

Lake Wobegone issue

From Debbie Cochrane (P), State Agencies to Everyone:

It looks to me like a single FR notice, not an annual one.

From Anne Kress (P) Comm Colleges to Everyone:

@Debbie, that’s my read, too.
From Jamienne Studley--Accrediting Agencies (P)
she/her to Everyone:

They could publish a new FR notice each year.

From Adam Welle, State AGs (P) to Everyone:

Agree with Debbie. Seems the language doesn't allow for adjustment to the median over time and as hours change in the states.

From Laura Rasar King (A) Accrediting Agencies to Everyone:

How will students know when their hours cut off? This is very bad policy. So harmful to students.

From Jessica Ranucci (A)- Legal Aid to Everyone:

Could the Department please be prepared to answer my question from the chat after lunch?