

November 3, 2021

Michelle Asha Cooper, Ph.D.
Acting Assistant Secretary for Postsecondary Education
and Deputy Assistant Secretary for Higher Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: 90/10 Rulemaking, Docket No. ED-2021-OPE-0077

Dear Dr. Cooper:

We represent a broad coalition of organizations working on behalf of students, veterans, faculty and staff, civil rights advocates, researchers, and other stakeholders concerned about institutions that rely on deceptive and fraudulent tactics to lure students into programs that provide little or no value. Strong and clear regulations that disincentivize these predatory practices offer critical protections to the students who are disproportionately harmed by these practices, including veterans, low-income students, students of color, and women.

We write in response to the Department of Education's (ED) request for public comments on a rule to fully implement closure of the 90/10 loophole. The 90/10 rule is an important and long-standing HEA provision that ensures for-profit colleges demonstrate market viability by forbidding for-profit corporations from being wholly dependent on federal funds for their revenue.¹ The rule originated in the post-World War II GI Bill, and it is intended to ensure that taxpayer funds are not used to prop up subpar, failing enterprises. The theory underlying the rule is that a college or school offering a quality education at a competitive price should be able to attract other sources of revenue from employers, scholarship providers, state funds, and students themselves.

Until earlier this year, however, education funds provided by the U.S. Department of Veterans Affairs (including GI Bill funds) and U.S. Department of Defense (including Tuition Assistance funds), as well as several other federal education benefits, were not required to be counted

¹ *Cleland v. Nat'l College of Business*, 435 U.S. 213 (1978). The Supreme Court upheld the provision's predecessor as "a device intended by Congress to allow the free market mechanism to operate and weed out those institutions [which] could survive only by the heavy influx of Federal payments" and "a way of protecting [students] by allowing the free market mechanism to operate... [I]f an institution of higher learning cannot attract sufficient... nonsubsidized students to its programs, it presents a great potential for abuse of our educational programs."

towards the “90” side of the 90/10 calculation.² This loophole has had the unfortunate effect of incentivizing for-profit schools to target veterans, service members, and their families with aggressive and deceptive recruiting to gain access to their GI Bill benefits and military tuition aid. Practically speaking, for every GI Bill-eligible student veteran a for-profit college enrolled, the institution could enroll nine additional students fully subsidized by federal grants and loans without risking violation of the 90/10 rule. Inclusion of the bipartisan Moran amendment as part of the American Rescue Plan Act in March 2021 closed this loophole and required that all federal education assistance funds be correctly counted in the formula.

We strongly supported legislative efforts to close the loophole, and we welcome quick action by the Department to issue implementing regulations. By moving to accurately define federal education assistance funds, the numbers of veterans and servicemembers who have been victims of predatory recruiting tactics will be dramatically reduced. Further, because the regulations will not be in effect prior to 2024, schools potentially affected by the requirement to generate 10 percent of revenues from non-federal sources have ample time to come into compliance. We therefore urge the Department to avoid an unnecessarily complex regulatory framework—including carve-outs, exemptions, or a protracted appeals process that would allow schools already on notice to prolong meeting this long-standing requirement.

Closing the loophole is a matter of simple arithmetic that first and foremost benefits student veterans by removing the enrollment payoff they currently offer some colleges. It also benefits all students by eliminating the lowest quality, least viable for-profit schools as educational options. Closing the loophole also benefits taxpayers by ensuring that tax dollars do not continue to subsidize schools that cannot demonstrate sufficient quality to generate investment by students and employers. Taxpayers have already invested billions in low-quality colleges like ITT Tech and Corinthian Colleges, both of which [engaged in 90/10 rule manipulation](#) prior to collapse. They deserve better federal stewardship of tax dollars.

Finally, we urge the Department to proceed in an efficient manner by including negotiation on 90/10 implementation with other outstanding issues identified in the Department's May 24, 2021 Federal Register notice. Congressional intent is clear on the timeline for implementation, and the process should begin as soon as possible. Critical accountability measures, 90/10 among them, demand timely consideration to ensure student and taxpayer protections are restored as soon as possible; nothing about the 90/10 issue merits a distinct negotiated rulemaking consideration.

Thank you for the opportunity to provide comments on behalf of our coalition, and for your work to serve the interests of student veterans and all student loan borrowers. A clear, simple 90/10

² Daniel Golden, “For-Profit Colleges Target the Military,” *Bloomberg BusinessWeek* (Dec. 30, 2009) (“When the law was enacted, for-profits hadn’t yet moved into the military market, so the legislation’s sponsors weren’t focused on [it],” says Sarah A. Flanagan, who helped draft the law as the Senate’s specialist in federal student aid.)

regulation will hold for-profit colleges accountable and strengthen this critical protection against waste, fraud, and abuse.

Sincerely,

American Federation of Teachers
Americans for Financial Reform Education Fund
Center for American Progress
Center for Responsible Lending
National Consumer Law Center (on behalf of its low-income clients)
New America Higher Education Program
Project on Predatory Student Lending
The Education Trust
The Institute for College Access & Success
Student Borrower Protection Center
Young Invincibles
Stephanie Hall, The Century Foundation
David Halperin, Attorney