DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

INSTITUTIONAL AND PROGRAMMATIC

ELIGIBILITY COMMITTEE

SESSION 1, DAY 3, MORNING

January 20, 2022

On the 20th day of January, 2022, the following meeting was held virtually, from 10:00 a.m. to 12:30 p.m., before Jamie Young, Shorthand Reporter in the state of New Jersey.

P R O C E E D I N G S

MR. ROBERTS: Good morning, and welcome back to day three of session one of this round of the Department of Education's negotiated rulemaking. My name is Brady Roberts, part of the FMCS facilitation team. We are going to jump right back into discussion after roll call. So, let's dive right into that. If folks just want to turn on their camera to let folks who are viewing on the live stream see your face, and we can jump right back into discussion. So first off, representing accrediting agencies, we have our primary Ms. Jamienne Studley.

MS. STUDLEY: Good morning, and thank you for the opportunity to see the sunrise, something I rarely do.

MR. ROBERTS: Good morning, Jamie, and she's joined by her alternate, Dr. Laura Rasar King.

DR. KING: Good morning.

MR. ROBERTS: Morning. Representing consumer advocacy organizations, we have our primary Ms. Carolyn Fast.

MS. FAST: Good morning.

MR. ROBERTS: And her alternate Mr. Jaylon Herbin. We're still waiting for Jaylon to join. Representing civil rights organizations, we have Ms.

Amanda Martinez.

MS. MARTINEZ: Present here, thank you. Good morning.

MR. ROBERTS: Morning, Amanda. Representing financial aid administrators at postsecondary institutions, we have Samantha Veeder.

MS. VEEDER: Good morning, everyone.

MR. ROBERTS: Morning, Sam. And she's joined by her alternate, excuse me, I lost my place, Mr. David Peterson. Morning, David.

MR. PETERSON: Morning.

MR. ROBERTS: Representing four-year public institution. I was muted, sorry, we have Mr. Marvin Smith, our primary for four-year public institutions.

MR. SMITH: Good morning.

MR. ROBERTS: Morning. And Deborah Stanley his alternate.

MS. STANLEY: Morning.

MR. ROBERTS: Representing legal aid legal assistance organization organizations that represent students and/or borrowers, we have Johnson Tyler.

MR. TYLER: Good morning.

MR. ROBERTS: And his alternate,

Jessica Ranucci.

MS. RANUCCI: Hi.

MR. ROBERTS: Morning. Representing minority serving institutions, we have our primary Dr. Beverly Hogan, who is not able to join us this morning, but we are joined by her alternate Ms. Ashley Schofield.

MS. SCHOFIELD: Good morning, everyone.

MR. ROBERTS: Representing private nonprofit institutions of higher education, we have Kelli Perry.

MS. PERRY: Morning.

MR. ROBERTS: And her primary, Mr. Emmanual Guillory. Still waiting for Emmanual to join us. Representing proprietary institutions of higher education, we have Bradley Adams.

MR. ADAMS: Good morning.

MR. ROBERTS: Morning, Brad. And his alternate Michael Lanouette.

DR. LANOUETTE: Good morning.

MR. ROBERTS: Morning. Representing state attorneys general, we have Adam Welle.

MR. WELLE: Present, good morning.

MR. ROBERTS: Morning, Adam. And his alternate Yael Shavit.

MS. SHAVIT: Hi, good morning.

MR. ROBERTS: Morning. Representing state higher education executive officers authorizing agencies and/or state regulators of higher education and/or loan servicers, we have Debbie Cochrane.

MS. COCHRANE: Morning.

MR. ROBERTS: Morning, Debbie. And her alternate, Mr. David Socolow.

MR. SOCOLOW: Good morning.

MR. ROBERTS: Good morning. Representing students and student loan borrowers, we have Ernest Ezeugo.

MR. EZEUGO: Morning.

MR. ROBERTS: And his alternate, Carney King.

MR. KING: Good morning.

MR. ROBERTS: Good morning. Representing two-year public institutions of higher education, we have Dr. Anne Kress.

DR. KRESS: Hello. Good morning.

MR. ROBERTS: Good morning. And her alternate, William Durden.

MR. DURDEN: Good morning, nice to be here.

MR. ROBERTS: Rounding out our main

negotiators, we have represented U.S. military service members veterans or groups representing them, Travis Horr.

MR. HORR: Good morning.

MR. ROBERTS: And his alternate Barmak Nassirian.

MR. NASSIRIAN: Morning.

MR. ROBERTS: Good morning. Negotiating on behalf of the Department of Education, we have Mr. Greg Martin.

MR. MARTIN: Good morning.

MR. ROBERTS: Good morning. And he is joined by a number of folks with the Office of General Counsel, I believe we are joined today by Mr. Steve Finley.

MR. FINLEY: Yep, good morning.

MR. ROBERTS: Morning, Steve. We are also joined by two expert advisors. We have for compliance auditor, Mr. Dave McClintock.

MR. MCCLINTOCK: Good morning. Happy to be here again.

MR. ROBERTS: Morning, Dave. And our labor economist, Dr. Adam Looney. We're still waiting for Professor Looney to join us, but we will announce him when he does. Alright. Now, Greg, I believe we are still on 668.171 subparagraph B. Just as a quick reminder, we do ask the folks, try to hold their comments to three minutes per comment and try to not repeat what has already been said. I have from our order from yesterday, Kelli and Barmak had raised their hands, so if you'd still like to make your points, Kelli and Barmak, the floor is yours with Kelli being first. And just as a reminder, we have Yael in on behalf of state AGs and Ashley here on behalf of minority serving institutions.

MS. JEFFRIES: And Brady, and maybe I missed this, I just wanted to make note that Jaylon has joined.

MR. ROBERTS: Okay great. Good morning, Jaylon. Brad, I see your hand. I think you're on mute right now, Brad.

MR. ADAMS: Yes, sir, I was just falling in line behind Kelli and Barmak, so they can go first.

MR. ROBERTS: Oh, gotcha, Okay. And just as another note, we do have Jessica on behalf of legal aid organizations, but Kelli, do you want to pick us up with where we left off yesterday?

MS. PERRY: Sure. I think are we we're talking about B right now. I think if we're on B, I will pass until we get to C.

MR. ROBERTS: Okay, understood. Barmak, did you want to speak to B?

MR. NASSIRIAN: I did. I am struggling, and this may just be my lack of understanding. I'm struggling with romanette two, the withdrawal of owners' equity, and the exception under capital letter A that reads "or is the equivalent of wages in a sole proprietorship or partnership or a required dividend or return of capital." And I have two issues with that. One of which is, I don't know, I mean, almost anything could be declared to be equivalent to wages. So, I don't know that creating an exception that large is advisable. But more importantly, I don't understand what a required dividend is, who would require the payment of dividends except the controlling board of directors or the controlling individuals?

MR. MARTIN: I, you know, don't feel comfortable answering that, right at this moment, I want to make certain that I get you a good response on that. I'll take that-- we'll take that back to our team. Steve, do you want to address that or should we?

MR. FINLEY: I think we'll get some internal clarification first.

MR. ROBERTS: Thank you, and Dave, I

see your hand as well. Brad, is it okay if I just jump to him as our advisor, great, okay. Yeah, Dave, go ahead.

MR. MCCLINTOCK: I would just provide my thoughts. Oftentimes, there could be required dividends for pass-through entities, so the entity itself does not pay taxes. It passes through to the owners, and there's operating agreements that require the dividends to be paid out to cover those taxes, and that's how it's often been addressed in these regulations, I believe, but I'm sure Greg and Steve will have further information.

MR. ROBERTS: Okay, thank you, Brad, go ahead.

MR. ADAMS: Yes, good morning. Can I go back to the previous page, it would be one romanette one A regarding debts and liabilities incurred from settlements. I may have missed us going through that yesterday. I would be on page 13 of the red line at the very bottom. We're good? So, conceptually, I do not have a problem with providing the Department with material settlements, but my read of this is there's no definition of materiality. So, I just want to confirm with the Department, the Department expects every immaterial lawsuit or settlement or anyone that has a settlement debt to be reported to the Department with [inaudible] threshold, so every trip and fall, every mild settlement from an employee, any severance agreement, and then the Department is going to take those dollars and recalculate the composite score every single time at every single institution in all sectors? I just feel as though that seems like a very large administrative burden, and especially through the larger, private and private nonprofit and public institutions that have these settlements all the time. I just want to confirm that the Department's expectation that if we had 100 dollars settlement, we have to report that within 10 days of incurring that payment is that how I read this?

MR. MARTIN: Right now, there is no minimum associated with it. Are you suggesting that there be a threshold?

MR. ADAMS: I do, I think that's administrative [inaudible] yes, yes, sir. I think that's an administrative [inaudible] both on the school and on the Department to report every single settlement, regardless of materiality. I would make that as a recommendation.

MR. MARTIN: Any comments on that?

MR. ROBERTS: And I do see, Dave, I

see your hand is up, but your video’s off, so you're not in the queue right now, but feel free to turn your camera on and if you want to weigh in on that.

MR. ADAMS: I thought Kelli was raising her hand on the video.

MR. MCCLINTOCK: That's, I turned, that, I just didn't lower my hand, sorry, Brady.

MR. ROBERTS: Okay. Apologies. Kelli was your point to Brad's?

MS. PERRY: Oh, sorry, and maybe I'm not reading this the right way, but I am reading this as you only need to report if one of these things is affecting your composite score. So, if you have, there's a doubt or likely that as a result of these things and your composite score is below at this point, it says one, then that's when you have a report. Not that you're reporting every debt and liability. Is that correct?

MR. ADAMS: I'm reading it as you have to recalculate to see if the composite score would be less than one. Not that you only have to do it if you are less than one.

MR. MARTIN: Let me get a clarification on that.

MR. ROBERTS: Okay, I just want to note that Professor Adam Looney has joined us, one of our advisors, so with that Barmak, please.

MR. NASSIRIAN: I was going to comment on my previous point, which I will do, but let me also comment on Brad's observation. You know, the definition of materiality, whatever it may be before accountants under FASB is in fact what the Department articulates here. Things become material insofar as participation in title IV is concerned based on whether an institution can satisfy the composite score threshold under the Department's regulations. And I believe it was Carolyn who observed that that 1.5, by the way, is the right threshold, something that I do agree with. So, I, you know, if it needs some wordsmithing great, but the concept is to say that if any of these events result in crossing the minimum threshold, that becomes actionable. So that's my comment on Brad's point. With regard to the observation on pass throughs and required payments, that is the way organizations get looted. The Department doesn't have any control over entities beyond the LLC participating in the program. You can only regulate that LLCs conduct. You know, if there's taxes due, you know, reach into your own pockets and pay it. If the participating school is going to be out of compliance, I would strongly recommend that language on their capital letter A at the end be struck.

MR. MARTIN: Okay. We'll note that recommendation.

MR. ROBERTS: Alright, Carolyn, I see your hand next.

MS. FAST: Thank you. I echo Barmak concern about that language and would like a little bit of clarification as to its meaning as well, but I would like to sort of return to the point that I was speaking yesterday, as I think it is relevant to this provision as well, that this provision would only apply to a proprietary institution with a score below 1.5 and would look only at whether the event created a recalculation where the school's composite score dropped below one. I think that it would be important to extend this provision to all proprietary schools, not just those who start off with a zone score, because this seems to create a situation where a school could be doing perfectly fine, but then have an incident that would result in a failing score, but would not be captured by this trigger, which seems like a really big hole in this in this protection. So, I would argue that that should not be limited to scores below 1.5 for proprietary schools. I also think in returning to my comment from yesterday that it's a problem that there is no consequence for any school that where the triggering event puts them from good standing into the zone rather than to below one. So, I understand that this is aimed at requiring a letter of credit, but in order narrowly, there would be other protections that would come into place for schools in the zone, such as placement in a provisional certification. And it seems to me that these triggers should mirror the traditional, you know, that structure so that if there was a problem that caused a trigger caused a significant change so that a school went from being in passing status to zone status, that there should be consequences, or rather protections, in place for those schools. So, I think that there needs to be a little bit of a modification to these provisions that relate to calculation of scores.

MR. MARTIN: Okay, thank you.

MR. ADAMS: I'll just add to it since I'm next in the queue. Anyways, I believe and correct me if I'm wrong, Greg, this pronouncement is not just proprietary schools. So, Carolyn, are you asking for a change to the language to only apply it to proprietary schools? This impacts everybody.

MS. FAST: I was looking at the language of perhaps I may have been looking at a different provision than you were looking at, but I was looking at the provision that has that is romanette two

A.

MR. ADAMS: Got it, got it, I'm sorry, I'm in the section before. My fault.

MS. FAST: Yeah, no, I know it's confusing because we're talking about two sections, sorry.

MR. ADAMS: On section, so on romanette one C above, I would like to just make a clarification here on the Borrower Defense. So, my understanding number one, is I liked that have a measurable concrete tool here to use at the 5 percent threshold, so thank you for giving us something to know what the number is, but my understanding that Borrower Defense is a two-step process. Step one is that the staffer decides whether or not to discharge the loan. And that does not mean the school is liable at that point. The second step is a hearing official at the Department that hears the case to determine whether or not the school is liable. So, the trigger in C here be based on the determination of the liability being incurred and not the initial step one with a staffer decides whether or not to discharge the loan.

MR. MARTIN: It's my understanding that it's when the, as it says here, once the claim has been adjudicated in favor of the barrower where such that the school would now owe it. But I will clarify, I will clarify that.

MR. ROBERTS: Steve, I see your hand.

MR. FINLEY: Yeah, I'll clarify that. This issue is about determining at the stage at which it's appropriate to get additional financial protections from the school because of a of an identified increased risk. And so, you're right, this is at the stage where the loans are discharged but prior to the establishment of that liability against the institution. It's a tenant of liability at that point, that could be that the Department could seek to establish against the institution.

MR. ADAMS: My request would be way to apply that because we're talking about financial responsibility into the liabilities incurred. It was very similar to the comment I made yesterday on B. Just because a lawsuit has been initiated does not mean there's going to be a liability that is actually incurred to the school to impact the financial responsibility. So again, this is for all schools, too, this is not any one sector. So, I just want to make sure that just because a student has a loan discharged does not require that the school is financially liable to impact their financial responsibility. That would be my request to make that change.

MR. MARTIN: We'll take back that request. I would point out that that it's equal to or greater than 5 percent of the total title IV HEA program funds. And they think you're going back to what Steve said we're looking at situations here that, you know, put the Department at risk for loss. So, and this is always about, you know, identifying at what point that occurs and taking some action in time to actually for, stall that or to get the financial protection necessary, if that looks like that's going to occur. And we wouldn't be talking about one Borrower Defense claim here, you know, 5 percent, I think is a significant volume. But we'll definitely take back the comment.

MR. ROBERTS: Okay, Jamie, I see your hand, but I just briefly want to welcome Emmanual to our day today. Morning, Emmanual. But Jamie, please go ahead.

MS. STUDLEY: I think I'm taking us back briefly to capital A, the debts liabilities issue. I think there may be a drafting improvement because it's hard to read. I know this is regulatory language, but whether I believe it sums up that you have to know whether it will change your score to know whether you need to report those items. And some of us may not know whether the school can calculate its composite score itself or whether the Secretary's determination might be different from what the school’s is. What if I had a 1.5 or 6 score that I recalculate my liabilities to know that it would fall below and therefore I needed to tell you. Or do I need to tell you so that the Department can recalculate it and know if it's fallen below 1.5? I just think it's not something we can rewrite as a group, but are you asking people to make that judgment and know if they need to tell you or to tell you about them so the Department can determine if that change was made, and that could relate to whether you're reporting a lot of separate little ones, whether you'll know what the difference is. I think the spirit is that you do need to know them, they could have an effect. I agree with the 1.5, but I plus one to Brad's point about not having because I thought it was report each one of these and the Secretary will tell you if it's caused a change seemed burdensome across all kinds of institutions, but that may not be the mechanism that's created here. So, I think the Department should just walk through what it wants in what form and in what and whether the institution can know that it has that obligation because the change has happened that would solve the materiality, the $100 item any school would be able to say no, no go or whoa we've had many hundreds and indeed we have shifted.

MR. MARTIN: Yeah, I agree that the language is written is not clear on that in that regard. So, we are we are seeking clarification on that. So as soon as I as soon as I get that from our staff I'll convey that to you. But I agree that as written, it's not as clear as it might be. So, it does require clarification.

MR. ROBERTS: Steve, I see your as well.

MR. FINLEY: I just want to point out, we're certainly open to the comments. What gets reported is actually addressed in Section (f)(1). So, perhaps the comment should be addressed to that Section because that I think this calculation is referring to the Department's calculation based on what gets reported.

MR. ROBERTS: Great, Jessica, I see your hand next.

MS. RANUCCI: Thanks, I'd like to make two points. First, as to previous when Carolyn and Barmak and others were speaking about the withdrawal of equity. I just want to underscore how important this is to students and the school situation that I described yesterday. The school wasn't paying its rent, wasn't paying its teachers, it wasn't paying its health insurance premiums for its teachers, it was taking money from students, and guess who it was paying, its principal, right? The students paid out of pocket. They never saw that money again. The chapter seven bankruptcy trustee said it's gone, we can't touch it. And, so, I think this is really an important protection as schools lie down and I just want to emphasize that. And I want to briefly respond to Brad on B and C under romanette one. I think that the settlements in the Borrower Defense claims are material to financial responsibility in two respects. One, is the direct causation that you are identifying, which is that it could require the school to incur a liability that could itself affect the school's financial status, but there's also an indirect way that there's a causal link there. I think that a school that has a tremendous amount of Borrower Defense claims is that financial risk for a number of indirect reasons as a school against whom the Department has made findings that there is misrepresentation or fraud. That's a school that's likely to have, for example, state law enforcement actions that might result in a judgment at the school that might have bad press so that the enrollment drops at the school that might have individual private lawsuits that might result in judgment. So, I think it's very reasonable for the Department to have financial triggers that come at an earlier stage of that process because we're not just talking about the direct impact on the bottom line, we're also talking about indirect impacts on the bottom line. And I think the same thing would be true for subsection B regarding federal and state settlements. And I think to a certain extent, A regarding other judgment.

MR. ADAMS: May I respond to the question? You know, there is a standard in accounting language that goes in addition to materiality. The likeliness to incur. There's no likeliness to incur here language, whether or not you'd know is likely that you would have a debt that might be incurred that threshold, an accounting is typically over a 50 percent likelihood. And there's just no definition here in either scenario of how likely is it, and how material is it to be a mandatory trigger? A discretionary trigger, you know, maybe it makes sense to move down below. But we’re talking about a mandatory trigger on something that may not be likely and may not be material.

MR. ROBERTS: Okay, thank you. Yael, please.

MS. SHAVIT: I agree with the comments

that Jessica just made, and I want to frame them a little bit differently. I think, Brad, you may be inaccurately characterizing these triggers, or at least speaking about them in language that suggests that they're punitive rather than protective. The goal here isn't to punish schools for any type of conduct covered in these provisions. It's to address what are real risks of financial instability. And I think that the triggering events have been written in a way that I think that captures that. But to do that well, the Department really can't wait until these types of liabilities are incurred. They need to be able to identify the risks, or the liabilities are incurred, ignoring these types of threats. In the case of an enforcement action by a federal or state agency, for example, or after successful Borrower Defense claims have already been adjudicated at a significant percentage of funding would result in basically an entirely deficient assessment of an institution's ability to meet its financial obligations. And it would, I would note, also prevent the Department from securing financial protection against losses until the point where the school would be considerably less likely to obtain [phonetic] the funds that it would need to provide that option.

MR. ROBERTS: Greg, I see your hand up, do you want to respond?

MR. MARTIN: Yeah, I'll take that that comment. I wanted to respond to Jamie's previous question for clarification and then following up on what Steve said about reporting requirements. So, if you look in the reporting requirements under F, it does say in accordance with we're not there yet, but in accordance with the procedures established by the Secretary, an institution must notify the secretary of the following events or actions. And under romanette one, it says for liability incurred under C one, romanette one A of this section, which is what we were just discussing "no later than 10 days after the final written notification of the judge to the institution of the judgment or final determination." So, it appears the way it's written, it would require notification, even though the actual triggering event is the recalculated composite score of less than 1.0. That the triggering event is the actual notification that the event would trigger, but the event that would require the school to notify the Department is the actual notification to the institution of final judgment or determination. So then there's nothing there now that would put a de minimis amount and so that appears to be the way it's written currently, but I know that there was some objection to that, so we'll take that back and discuss it.

MR. ROBERTS: Alright, thank you. Amanda, I see your hand next, but I just want to welcome Johnson to the table on behalf of legal aid. So, Amanda, please go ahead. You're muted right now, Amanda, sorry.

MS. MARTINEZ: Sorry about that. Clearly not enough days or a time with technology, still not learning can make mishaps. But this is more so a question and query as I'm reading this Section. I think my question kind of comes from this idea of if the policy goal is to ensure the financial stability of institutions, and you're trying to insert triggers-- for me, I'm hoping that these triggers come at the right opportune time to actually catch the institutions, you know, like whether or not they're financially healthy or potentially ending up at a point that's going to end up in a downturn for students. So, I'm hoping that these the changes actually come at that right time. And I think figuring out that right time is probably hard to do. But I think these are creative ways in which you're trying to ensure those triggers are put in place at that right time. So, I'm wondering with this question of timeline involved so that these regulations are really targeting at the right time for you all to then conduct action against the institution in part C, given that, you know, by the time Secretary has adjudicated claims, it seems as if it takes a long time, a lot of the burden is on the student to produce the evidence, and by the time it's actually happened that process has ended up in the Department's hand students have had years of, you know, trying to issue their claim that burden. And I'm just wondering do you think this trigger is really helpful at that point that says adjudicated claims in favor of borrowers, it's really taken a long time from what we know in the past and what we have cases currently to get. So, I'm wondering how useful you think that part of the timeline and Borrower Defense claims is the right time period, I just want to know what your internal thinking was there as a form of a triggering, you know, triggering tool. And then second, in that part, C and you state is equal to you want to make sure that the amount of loans discharged by that specific date is equal or greater than 5 percent. I'm wondering how you came up with the 5 percent and why you thought that that floor was the right amount to actually make use of this trigger? Based on past claims, you know, I just want to make sure there's use in this in this regulation to protect students and to make your tools actually work out a trigger.

MR. MARTIN: So, I think so. Just your question about, you know, at what point with respect to lawsuits where it becomes a trigger. I think we've tried in constructing these regulations, these proposed rules to strike a balance between what's fair to institutions and what the Department really reasonably needs to know or reasonably needs to include in determining whether or not to seek a surety from that school. And you'll note that with, for instance, the Qui Tam lawsuits or those brought by the by the state, we have determined that those are usually significant enough proportions to not wait until the until there's been a judgment or a settlement. We do understand that other lawsuits there are, you know, there are entities sued all the time that there could be instances where many times the students aren't successful. So, I mean, this was somewhat of a balancing act. And that's where we came down on it. Regarding the 5 percent, I think I might have Steve comment on that. I think that’s a sort of a valid percentage that we use in some instances. I know we use the 5 percent for determining when institutions have passed the threshold for not making timely returns of title IV funds for and we've used 5 percent pretty frequently, but I don't I don't know that I know exactly why 5 percent was chosen in this in this circumstance, except that it's we do have precedent for using for using 5 percent. But Steve can you address that?

MR. ROBERTS: You're muted right now, Steve.

MR. FINLEY: Under the Financial Responsibility Regulations, establishing liability and administrative liability greater than equalto 5 percent of an institution's annual funding triggers a past performance failure, the financial responsibility standards. So that's also the other reason that that's tied here is the financial risk of failing those standards triggers the need for surety.

MR. ROBERTS: Okay, Johnson, go ahead.

MR. TYLER: Hi, good morning. I just want to expand a little on what Amanda said. My concern is, you know, doing a Borrower Defense application is a huge amount of work and most students don't even know about it until the school is closed. So, if you really want see to have any useful application as a trigger for action by the Department of Education, I think you have to think of a different number percentage. I think 5 percent is way too high, honestly. I mean, just think about if you have a very large for-profit, there's one that has 100,000 students in it, you would need to adjudicate 5,000 claims before that would happen. That's a lot of resources by the Department of Education, and that puts the burden on the students to even know about this and to be able to navigate all the barriers of filing a Borrower Defense claim. It's not an easy thing to do. You've got to go online. You've got to fill out a lot of stuff. There are a lot of questions that are asked. I just don't see this ever achieving the laudable goal that the Department of Education wants here, which is to use Borrower Defense to inform them. I mean, I think more likely, what will happen if it stays like this is Borrower Defense will just be informing the Department of ED or the States as to when to sue. And this will be sort of an actor always looking in the rearview mirror rather than something that's being used prospectively. And you might want to consider, honestly, just the filing of so many claims. I mean, I don't know how you would adjudicate that many involving a large institution in a timely manner. You have to adjudicate all of them, over 300,000 claims out there right now that still need to be adjudicated, so, or maybe it's 250 I'm not sure what the number is, but there are a lot of claims that are standing there that need to be adjudicated.

MR. ROBERTS: Oh, sorry, go ahead, Greg. Sorry.

MR. MARTIN: I just want to make sure that what you're suggesting is that that it be based on just a number of filed file claims or a percentage based on filed claims?

MR. TYLER: It could be that, Greg, or it also could be, I mean, you could look and see what you think is a trigger that really gets everyone's attention and bring it down below that within the Department of Education. I mean, I don't think, honestly, I’m not sure this would protect any students whose schools have closed recently. You know, I understand there’s a history of Borrower Defense being litigated and what the rule is and how to apply the rule in different administrations and so forth. But I just don't think you're ever going to meet that threshold of 5 percent until, you know, every news article in the country is slamming the school. I think it's a very high rate. It's an easy bar that for schools for not actually have to deal with. It's just there's too much burden here. So, either way, but I think if you look at the 5 percent number, you would probably see that the Corinthians and all that would never have, I mean, Borrower Defense didn't exist back then. I'm not really sure that this would be a useful benchmark.

MR. ROBERTS: Steve, do you have

anything to add?

MR. FINLEY: And to just to add to what Greg said, these are mandatory triggers, right? So, if this threshold is crossed, the institutional would be required to post a letter of credit. There's also a discretionary trigger that will be covered when we go further through the document that says that when the secretary has identified a common group of pending loan discharge claims, the Department could require the institution to post surety at that point, as well. We're certainly open to ideas on not just a comment saying the threshold should be different, but coming up with a suggestion of what that threshold should be and why would also help our discussions and deliberations on these issues.

MR. TYLER: I'll think about whether we can come up with some other threshold that might make sense. I take that as an invitation. Thank you. And I [interposing] going to come back to the scene, thank you.

MR. ROBERTS: Gotcha. Thank you, Johnson. Kelli, please.

MS. PERRY: Thank you. First, I would like to say that the importance of financial responsibility, I think, is very important from a number of reasons. One, students should never be in a situation where their school closes. And that's what we're talking about here. Measures of how you determine whether or not a school is going to close. And I think, what we think, what we talked about yesterday a little bit was that the calculation has a score in these triggers are not necessarily doing the job that they need to do in order to determine whether those schools are going to close. And, so, as I think about these triggers, whether they'd be mandatory or discretionary, the question that I would have is, you know, is there evidence that the Department can share that shows that these are the right triggers, whether they be mandatory or discretionary, and maybe they should just be triggered in general? Maybe there shouldn't be two different classes of them that would show that the schools that have closed recently or in the past, but these were issues that those schools had. You know, this is important for students, but it's also important for institutions, as well, from the perspective of they may be financially responsible in the definition of they're not going to close and they could potentially be getting caught up in some of these triggers, whether it's mandatory or not, that could be very costly for institutions. You know, in reading through this, there's, you know, and we'll get to it eventually. I didn't see necessarily any changes, but in the section, as it relates to reporting, there's this whole concept of a preliminary determination by the Department, where a school has the ability to provide information as it relates to any of these triggers that shows that they are financially responsible before that final determination is made. And I hope that that's happening in in the cases as it relates to these triggers. Because it's hard, I think it's hard, at least for me, it's hard for me to provide any real substantive examples or rationale for some of these, because I don't know if this is the reason that schools are closing. So, I think I guess in summary, I guess my question is, is there any evidence that shows that these are the triggers that would show that the schools have closed or are closing?

MR. MARTIN: I don't I don't know what data, you know, whether we have data on this to publish as, you know, that could actually tie school closures to one of these events. These are events that that we are aware of through our compliance activities that have caused instability at institutions. And I think, you know, we need to bear in mind what we're trying to do here is to try to find ways of identifying where schools may be financially unstable, you know, in time to get some type of surety from them, you know, before a school would go to go under or close. I don't know that any one of these is, you know, certainly we see, for example, withdrawal of owner equity being a problem at schools where they are financially unstable, where that has caused, where they've taken money out of the school. But if you're asking me, do we have actual data where there's been a study done on that, I don't think we have that. But I would throw it out to the negotiators. If you have suggestions for other, you know, other types of triggers that you feel may help the Department identify where a school is stressed or in danger of closing, we would be open to hearing what those are. These are the ones that have identified that we think would. Again, I don't think anything is perfect. I don't think there's any way we can find a mechanism to, in every case, identify that the school might be on the verge of closing or that if a school does close was the actual reason was, it could have been precipitating events. So, I'm not sure that we can we can do that. What we're trying to do is come up with the best identifier as possible. We think we've done a pretty good job here. But again, we are open to hearing from the committee any other solutions or ideas you might have.

MS. PERRY: Thank you, Greg. And I

just, you know, just to repeat what I said yesterday, I do think that based on that response, and the fact that this is not working all the time, and I’m not saying that it’s ever going to work all the time, because it won't. But the importance of really looking at the composite score in these triggers as it relates to schools that have closed in the past and why that's happening. And, so, I guess, you know, if I were to be making a recommendation, I think I would I would say that the triggers are important. I don't know if the distinction between a mandatory trigger and a discretionary trigger is necessary, so I would possibly recommend combining them just into triggers with the thought that they are preliminary determinations, and that schools do have the ability to provide data that that shows that they are financially responsible. Because not all schools are bad actors, and some of them do get caught up in this and end up having to pay substantial amounts of money for letters of credit that could be used elsewhere. I mean, I realize that there are bad actors, and I get that, and I'm hopeful that those will be identified, but I'm just looking at the other side of it where, you know, as a mandatory trigger, if it's a situation where, you know, definitely need clarification on A when it talks about debt and liability. Because if it is, in fact, that any debt or liability that you incur as a result of that needs to be reported to the Department, that is extremely burdensome and not something that institutions are going to be able to do. I can understand it if that is material enough to affect your score that you would report it to the Department, but every single one of those colleges and universities get those every day. And, just, there's no way that they would be able to provide that information to the Department on a regular basis.

MR. MARTIN: Thank you.

MR. ROBERTS: Thank you. I see Brad's hand next, go ahead.

MR. ADAMS: Thank you, and I agree with Kelli's point 100 percent. And going back to what Mr. Finley just mentioned, that we're talking about mandatory triggers that allows the Department to require a letter of credit. So, the way I read this is just by filing a lawsuit that may not result in a material, or likely result of a material finding, would allow the Department to require an institution to post a letter of credit. Letter credits are expensive, and frankly, they put small, nonprofit schools out of business relatively quickly. So again, posting a letter of credit is not something that every institution can just immediately do, especially when it's a 10 percent threshold of title IV revenues. So, I just want to be clear that having no definition in here of what is material to an institution and then having a letter of credit having to be posted is a big deal.

MR. ROBERTS: Thank you. I see Barmak's hand next.

MR. NASSIRIAN: I want to just make some general comments in response to Brad and Kelli's points. There's a great line in the Sun Also Rises, where one character asks the other one, how did you go bankrupt? And the answer is two ways: gradually and then suddenly. And if I were to characterize what the Department has done historically, and is attempting to do here, the composite index, the composite score is the Department's attempt at detecting going bankrupt gradually. It has done a terrible job of it, and I have enormous empathy for Kelli and so many nonprofit institutions that pose absolutely no risk, and just by virtue of the fixed assets they have to their students or to the taxpayers of this country that are then burdened by an artificial and rather problematic calculation that forces them to post letters of credit and makes life expensive for them. The triggers we're talking about here, these are frankly belated indices of going bankrupt suddenly. The hill to die on for the nonprofits is the substance of the calculations that generate the composite score. All of the practices that are that are now proposed as triggers, all the events that are being proposed as triggers here, are almost exclusively concentrated in the most predatory segments of the for-profit sector. And candidly, I find them, I mean, posting a 10 percent letter of credit. Yeah, it's expensive, but guess what, 90 cents on the dollar will have to be covered by the taxpayers when the institution ends up collapsing. So, I wouldn't worry too much Kelli about this stuff. I do think you have legitimate concern with regard to the to the overarching practices that determine financial responsibility. But these are the, I mean, again, let's not make the theoretical the paradigm here. In practice, what we've seen is that these are practices that prevail in the worst segment of the for-profit sector.

MR. ROBERTS: Thank you. I'm not seeing any other hands and recognizing we did jump around a little bit. Greg, do you want to do you want to tee up for just a quick check on the reg text as it exists now so we can move on?

MR. MARTIN: Well, I know we have a couple of outstanding questions. Hopefully, some of them, at least I tried to address the philosophy behind what we were doing here. And again, I want to throw out the invitation to if you have, because we've heard a lot of discussion here about the extent to which these triggers identify at risk institutions, and obviously the Department doesn't have a hammerlock on knowledge of all of those, so if you have ideas, we like to hear them. What I'd like to do is walk through the remainder of the mandatory triggers. And then when we're done with that, we can have a discussion of the remainder of those triggers just so we can get through this subparagraph. If that's alright?

MR. ROBERTS: So, Aaron, would you like to bring up that document: issue paper number four?

MR. MARTIN: So, we're going to start with teach out plans.

MR. ROBERTS: And that is romanette three.

MR. MARTIN: Romanette three. There we go. So, I'll walk through these through the end of the of the mandatory triggers and then we can entertain comments and questions at that point. So again, continuing with the mandatory triggers, the institution is required to submit a teach out plan or agreement for reason described in 602.24(c)(1) that covers the closing of the institution or its branches or additional locations for state actions. If the institution is cited by a state licensing or authorizing agency for failing to meet state agency requirements and the agency provides notification that it will withdraw or terminate the institution's licensure or authorization if the institution does not take any steps to come into compliance. And then we moved on to romanette five for publicly traded institutions. Publicly traded institutions are subject to one or more of the following events, and we made a few changes there with respect to these are technical changes, and you can see here that we put in SEC actions. Actions that the Security and Exchange Commission might take. I made a couple of changes to make sure the terminology is correct, you can see there under exchange actions, the National Securities Exchange on which the institution's securities are listed notifies the institution it is not in compliance with the exchange exchange's listed requirements or its securities are delisted. So just some clarification there. And also SEC reports the institution failed to require a file that required an annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under the applicable regulation cited there. Under romanette six, on nonfederal education assistance funds. The most recently completed fiscal year the proprietary institution did not receive at least 10 percent of its revenue from sources other than federal educational assistance, as provided in 668.28 and those are the 90/10 regulations. The surety provided under this requirement will remain in place until the institution passes the 90/10 revenue test. And this was, you might recall, this was once a discretionary trigger that would be moved onto the into the mandatory triggers. We've also moved the cohort default rate to mandatory trigger. And that remains what it was just moved to the main triggers part. And we have a new mandatory trigger related to contributions and distributions. This mirrors a particular kind of financial manipulation we have seen from proprietary institutions. In past cases, owners have made contributions to an institution near the end of one fiscal year and then withdrawn those contributions at the beginning of the next fiscal year in an effort to inflate the school's finances before the fiscal year ends. This trigger would apply if the removal of that contribution would mean the school would have a composite score of less than 1.0. So, you can see that reflected there, if the institution made a contribution in the last quarter of the fiscal year and then made a distribution during the first two quarters of the next year. So, put in the money and then took it out. The removal of such contribution up to the distribution results in a recalculated composite score of less than 1.0. And finally, here, after the end of the fiscal year in which the Secretary has most recently calculated the institution's composite score when the institution is subject to two or more discretionary triggering events as defined in paragraph D, those events become mandatory triggers. And this is a technical edit to clarify the timing of the existing regulatory requirement, which says that the institution is subject to two discretionary triggers, becomes subject to them automatically as a mandatory event. So that takes us through the end of mandatory triggers. I'll entertain any comments or questions now before we move on to paragraph D, discretionary triggering events.

MR. ROBERTS: Yeah, Greg, I see some hands already, and I just want to note Brad and Jamie's comments that as much as negotiators can, just because this is a lot of information, if folks can as best to their ability to withhold comments on later romanettes, so that we can progress through in roughly order as they appear in the document. So, with that, if folks want to maybe start with romanettes three and four, teach out plans and state actions, I am happy to open it up. Aaron, would you bring down the document? Thank you. So, with that, Jamie, please.

MS. STUDLEY: Yes. Simple suggestion on concern about teach out plans as a mandatory trigger. If an institution by choice wisely decides to close a branch or additional location, for example, it has to do a teach out plan to show how students will be served either by other programs of theirs or by shifting to other institutions. It can be completely innocent. It can be a very wise thing done by a thriving institution. To make that a mandatory trigger, I think is overbroad and could have the kinds of effect Barmak was just talking about that are not related to financial health. It's possible that the solution is to put it into discretionary triggers, or to distinguish teach outs that are related to closing obviously belongs there. But closing of a branch or additional location can be a prudent thing done by a healthy institution. It should not trigger to not be a mandatory trigger.

MR. MARTIN: I do want to point out that so where we say that the institution is required to submit a teach out plan or agreement for its for reason listed in 34 CFR 602.24(c)(1), that covers the closing of any of the branches or additional locations. And just to clarify-- I don't know what this addresses your entire comment or not, Jamie, but those conditions are for a private institution. The institution's auditor expresses doubt about the school's ability to operate as a going concern or indicates that an adverse opinion or finding of material weakness exists, or the accreditor places the institution on probation or equivalent status, and or the Secretary places the institution on provision of program participation agreement and requires submission of a teach out as a condition of that change of status. So, it is limited to those.

MS. STUDLEY: So I should have started my comment by asking what 602.24(c)(1) was?

MR. MARTIN: Yeah, and I'll take the blame. Maybe I should have clarified that when I was going through it, but I but I didn't, so I'll take the blame for that.

MS. STUDLEY: If those are the conditions, then that's perfectly reasonable. I thought when you summarize that you were saying that it covered [audio]. That responds to my concern.

MR. MARTIN: Thank you.

MR. ROBERTS: Thank you. Jessica, please.

MS. RANUCCI: Thanks. This might unrespond to your concern, Jamie, but I think that the Department should consider some of the triggers that are in C two. I think these might have been a part of the last neg reg that I was on, I have a vague memory of them, but I think that some of the triggers in C two are things that would make sense. Like the agency acts to withdraw [inaudible] suspend the accreditation of the institution. So, I just I don't think it's necessarily worth us talking through each one of those, but I think the Department should look at C two and see if any of those should be considered in addition to C one.

MR. MARTIN: We will note that consideration in C two, thank you.

MR. ADAMS: Hello, everyone. Romanette four, again, this is similar to my comment on the previous federal lawsuit, comment is once again if there's an issue between a school and a state, many times the state works closely with the institutions on modern and moderate compliance challenges, and so there be no materiality threshold here or likely to occur threshold, this proposal gives state regulators federal power. An aggressive state regulator that wants to put an institution out of business that understands this provision would basically just be able to issue a compliance finding and, all of a sudden, there's a mandatory trigger that require a letter of credit. So again, just because the state has issued some sort of notice should not require a potential letter of credit for being posted. It needs to be likely and needs to be [audio]. Thank you.

MR. MARTIN: I think the Department's, you know, when we look at this, our position is, in reading this, the institutions have been cited by the state licensing or authorizing agency for failing to meet state agency requirements and that agency provides notice it will withdraw or terminate the institution's licensure. I'm not saying I don't appreciate your comment on where you're coming from, I think that when you have a situation like this where notice has been provided that a state intends to withdraw or terminate the institution's licensure or authorization, that means at that point that that school is automatically no longer eligible to participate. So, I think that we have a huge interest in in looking at when something like this happens, this is a very serious, this isn’t just a run of the mill action by the state, this is a pretty serious event. So, it's something that, though I take your point that it might not ultimately result in that, there is a clear indication that that's a very good possibility. So, I think that we need to be proactive here and in a position where we're' securing the interests of the federal government and also the interests of students attending that institution.

MR. ADAMS: To me, I'll respond. So, you know, the state attorney general is outside of higher education. So, things have gotten pretty political on other issues. And there's all kinds of lawsuits that have been filed with the federal government on various things. So, the concern here is if you have one state AG that gets aggressive to terminate an institution's license for who knows what, they could then be required to post a letter credit. So, again, it is, giving states a lot of power here under this the way this is written.

MR. MARTIN: I would just add, you know, I'm not, certainly every viewpoint here is welcome, I think that we're not we're not making any judgment here as to the motivations of an attorneys general. We're simply saying that if this occurs, that the occurrence of it, irrespective of motivation or anything else, is an indication that that school may have its licensure revoked. And that that's going to be a loss of eligibility that we need that we need to be aware of and be able to take action. So, I just want to clarify that, but thank you for your comment, we've noted it.

MR. ROBERTS: Thank you. And thank you, Emmanual, for clarifying what the reference to romanette three was in chat but Carolyn, please go ahead.

MS. FAST: Thank you. First, I wanted to echo Greg's point that the determination by the state agency is going to affect whether a school can continue in title IV regardless. So, this is a really, I think, a critical kind of trigger because pretty much the school is going to is risking losing state authorization, that's an indication of an enormous risk for that the school is going to be become ineligible for title IV. I also wanted to make one further point, which is that all of these triggers are important and significant steps forward in improving the overall system of trying to detect financial problems before they happen. I think they're all useful, but in the general comment, they are all only as useful as protections that are going to be put in place once the trigger happens, which I sort of mentioned before. Those triggers, as I understand it, are set out in a different regulation, and they provide for the Department to require a letter of credit when these triggers have been triggered to move the minimum of 10 percent of the school's title IV for the year before. If I'm understanding this correctly, please correct me if that's not right, and my concern is that that is not always enough and does not look at things like Borrower Defense potential liabilities, which can span more than one year. They could span a longer period of time, meaning that the taxpayer the potential liability and cost is of the school closing [inaudible] is quite a bit larger than just looking at the, you know, a small percentage of the title IV for the year before. So, what I'm suggesting is that it would make sense to build into the requirements for a letter of credit that that the Department based the letter of credit decision not only on one year's worth of title IV for the previous year, but also what are the Borrower Defense liabilities? What are closed school discharge liabilities looking like? Are there other outstanding liabilities? Because this 10 percent of one year's title IV might not do it, especially when you're talking about a trigger of like 5 percent of Borrower Defense, you know that's already been adjudicated. That's all I wanted to say. Thank you.

MR. MARTIN: Thank you.

MR. ROBERTS: Okay great. Barmak.

MR. NASSIRIAN: Several points. One of them to go back to Jamie's observation and even earlier than that to Kelli's concerns, it seems to me that posting a letter of credit is entirely unnecessary, even when alarming circumstances may otherwise trigger it. If the entity in question has sufficient net identifiable assets exclusive of goodwill to cover its liabilities, and there is no reason if a campus may be required to post a teach out. But if it has sufficient land and buildings and other assets, why force it to go out and post a letter of credit when you already know you have enough to go after should something bad happen. That allays some of the sort of unnecessary costs that may push somebody over the line. So that's one issue. I wanted to talk about the publicly traded language here. With regard to SEC actions, I really would encourage the Department to contemplate far less severe adverse actions by the SEC than revoking registration. Again, revoking registration is the final nail in the coffin, basically. But if you're tying your wagon to that horse, I mean, you know that by the time that happens. Odds are the entity’s already collapsing without much by way of recourse. So, I would suggest there are other adverse actions that may be earlier harbingers of trouble that may be better indices for you to act. And with regard to exchange action again, being delisted from an exchange is oftentimes sort of one of the final steps in the collapse of the publicly traded company. If you recall, ITT was trading on pink sheets before it collapsed. What I suggest in its place would be to require some kind of market capitalization threshold vis-à-vis the federal dollar. Frankly, the unearned tuition dollars at risk. That would be a better index of where an entity may be in extreme trouble than being delisted by the exchange.

MR. MARTIN: Thank you.

MR. ROBERTS: Okay. Debbie, please.

MS. COCHRANE: I wanted to comment on the state action piece in particular. And to highlight a couple of things that other folks have already said, it feels like what this provision is really getting at is the loss of state authorization, which would automatically trigger a loss of title IV eligibility, and Barmak just described that as the final nail in the coffin. To pick up on something I said yesterday related to gainful employment rule and stability, states are the closest to the ground when it comes to school closures. States as a matter, state agencies are not looking to close institutions because they know exactly what that means for the students and for the other surrounding institutions. So I, you know, I do want to push back a little bit on the notion that Brad brought up about states being kind of, maybe, anxious to go there. I just don't see that in my experience. That said, I do think that there are other state agency actions that should be considered in here. States may have misrepresentation or fraud based on the severity of the findings. They may be able to compel refunds for students, and none of those, it would take a lot for those to get to the point where there's a real threat of loss of state authorization on the table. But I do think, and I completely I do agree with Brad that there are some state actions that are just not relevant for this purpose, you know, late fee payments or improperly formatted documents, those kind of things. But if the goal here is really to identify markers of serious problems as soon as we can, so that way we can take appropriate action. I think you need to consider a broader array of state actions here.

MR. MARTIN: Thank you.

MR. ROBERTS: Alright. Kelli, please.

MS. PERRY: My comment has to do with the new section contributions and distributions. Greg, when you introduced this, you specifically mentioned that this had to do with proprietary institutions. So, I would request that that actually be added [phonetic] in this. Only because I'm concerned that nonprofits and publics don’t get pulled into this. So, for example, I mean, it talks about an institution making a contribution and then it being dispersed, but if you were to apply it to a nonprofit, for example, and it's not the institution making a contribution, but if you had a donor that made a contribution or a pledge, you could potentially be recording that. And then, God forbid, this doesn't happen very often but if there was something that that pledge had to come off the books, then you potentially could read into this. I just want to make sure that this is not the intention of what you're trying to get to here, because you did explain it as a proprietary issue.

MR. MARTIN: I want to point out that, when I described it, I didn't set the regulation limit. We put the regulation in there because of practices we've noted at proprietary institutions where owners had put money in and pulled it out. So that's why we did it. So, you're saying you think there should be clarifications here for other types of institutions? I'm not certain.

MS. PERRY: Well, when if you're talking specifically about a contribution being put in and then pulled out, I mean, that's not something a nonprofit would do. But you would have a situation where you could potentially have a donor that would give a pledge or which would be a pledge, right, and for some reason, that has to come off the books at a later period of time. Or you could have a situation where you know a donor does make a contribution and then that that contribution is dispersed in the next quarter. So, I just I don't think that the intent of what you were trying to do here relates to that, but I just want to make sure that there's not ambiguity as it relates to that.

MR. MARTIN: In the instance you just pointed out, I don't know what the effect of that would be. I'll have to take that back with me.

MR. ROBERTS: Alright. And again, just to remind folks, if we can keep feedback in an approximate order, I think that's probably most helpful for the Department. But please, Yael.

MS. SHAVIT: Thanks. This feels now like ages ago, but I do need to respond to something Brad said. Brad [audio] referring to romanette four, I believe, but referenced numerous times actions by state attorneys general. So, I want to clarify that my understanding of that provision is that it doesn't relate to state AG actions, but to state higher regulatory actions. And with respect to those agencies, I do want to emphasize that there are considerable due process requirements for state licenses or other actions like that taken. These actions were not taken arbitrarily. They're not taken for political reasons. And I think it's important to emphasize that. I do want to note that to the extent that Brad's comments were intentionally referring to actions taken by state AGs relevant to the discussion of romanette one. I want to state again, state AGs have been on the forefront of [inaudible] conduct by for-profit schools, and we've needed to take these actions, not because they're political, but because they're an imperative for protecting students where federal regulations have not gone far enough. Hopefully, we can help remedy that in this committee. But we have numerous examples of enforcement actions brought against schools that schools have drawn out for years before declaring bankruptcy at the moment that a judgment is affirmed. And to the extent that the committee needs this, or the Department does, I'm happy to offer those examples, but they certainly confirmed the necessity of mandatory triggers related to enforcement actions being filed by state AGs. Thank you.

MR. ROBERTS: Brad, please.

MR. ADAMS: Yes, if it's okay, I'll go to point six. But Yael is accurate, I misstated AGs on point four when it was about state agencies, but my comment around materiality of the state action with the state agency still stands. So, thank you for pointing that out. On item six, moving past four, if that's okay on the 90/10? Or would you like to stay through point four at this point, Brady?

MR. ROBERTS: Well, I'll turn to the committee. Does anyone have any anything they'd like to add on romanettes three or four? Otherwise, please Brad, feel free. I'm not I'm not seeing anyone immediately raise their hands or reacts, so go ahead.

MR. ADAMS: Okay, thank you. On point six, around 90/10, there's currently regulations already in place that include sanctions for institutions that fail 90/10, specifically at 668.29 paragraph C. Further, the failure to comply with 90/10 is a proxy, and the failure to make 90/10 does not necessarily mean you are not financially responsible. You could be having a very strong financial year and fail 90/10. It does not represent any certain measurable impact on the school's financial responsibility, so I believe this should be moved to a discretionary trigger.

MR. MARTIN: Obviously, the Department feels that it that it belongs as a as a mandatory trigger. I do take your points. The failure of 90/10, though it may not be indicative of a of severe financial problems on the part of the school, is an indication that the school may be in danger of losing eligibility due to 90/10. So that is why we've placed it in here because again, these are all indicators of when a school ceasing to operate would or it could be imminent, and so a failure of 90/10 is one of those circumstances, so we believe that that it is appropriate to have it as a mandatory trigger. We will take your objection to that. And I would ask if anybody else has opinion about that. It's the Department's position that it belongs as a mandatory trigger.

MR. ROBERTS: And then Steve, I see your hand up. If you want to add anything. You're muted.

MR. FINLEY: Thank you. An institution that fails 90/10 for one year may pass the next year, or it may not. If it doesn't, it loses eligibility. At the point it loses eligibility, the Department doesn't get letters of credit from ineligible institutions. Letters of credit represent surety that the Department can use to try to recoup some of the losses that are likely to be associated with an ineligible institution. So, the time to require the letter or credit is leading up to that year where an institution at least is at risk of losing eligibility. And that's the logic underpinning this.

MR. ROBERTS: Okay, Barmak.

MR. NASSIRIAN: Steve made a very compelling explanation, which is what I would have also tried to offer, not quite as well. But I want to go back to Kelli's point about contributions and distributions. I understand the concern about, you know, the sort of ambiguity of the term contribution. But even if you consider donations as contributions, certainly refund of donations wouldn't count as distributions. This is clearly related to for-profit capitalization practices. And if the Department wants to satisfy everybody by adding that in the case of for-profits, that's fine. But I wouldn't significantly alter this because this is one of the ways in which people game the system. I would also argue that the threshold should be 1.5 not 1.0, for what it's worth. Finally, and I don't know when the right time for this is, in this enumeration of triggers, there is a significant item missing, which is loss of eligibility for other federal programs due to noncompliance, particularly those programs that would have consequences for title IV, say, the GI Bill. So, at some point, I don't know if that's captured somewhere else or whether you need to add it. But that's a particularly good trigger because it tends to be smaller amounts and can serve again as an early warning system for bigger trouble coming down the road. So, acting on those triggers may be helpful to the Department.

MR. MARTIN: Thank you.

MR. ROBERTS: Brad, please.

MR. ADAMS: Okay. So, on romanette eight, contributions and distributions, just want to ask if the Department has thought about the fact that privately held S corporation's taxes flow through an owner’s personal income tax return and not through the school's income statement like a C Corp? Thus, S corporation owners are required to pay quarterly IRS tax payments in order to be in compliance with the IRS law. So, not allowing contributions to be taken or to pay taxes and then being in trouble with the IRS does not seem appropriate. To confirm, and then I also want to confirm with the Department, that's question one. Question two is again, no threshold of materiality here. So, to confirm, us as school, all schools, not just proprietary, but all schools are required to notify the Department every time there is a contribution or distribution in quarter four or subsequently in quarter one or quarter two? We don't have to report anything in quarter three. But if we make an infusion equity infusion in quarter one, how do we know yet if we're going to make a distribution for quarter one or quarter two at that time? Practically speaking and this kind of goes back to the notification of every single lawsuit, I am not understanding how the Department is going to be able to, from a burden point of view, keep up with every single in and out without a materiality threshold here. Is the Department really going to recalculate a composite score every time equity infusion or equity distribution for 9 months out of the year occurs within a school? That happens thousands of times, potentially at some institutions.

MR. MARTIN: The provision here is it's necessary to stop instances of gaming that we've seen quite frequently with the contributions being made in the last quarter. And just to make certain the institution passes and then and then and then withdrawn in the next quarter. So, the reason it's here is to address the ongoing concern that we have over what has become a practice that is not at all rare. And so we feel the need to address that and have a mechanism in place to control for that. We're not we're not saying in these regulations that an institution cannot make a contribution and then remove it. The trigger is the removal of such contribution up to the amount for distribution results in recalculated composite score of less than 1.0. So, I would disagree that it precludes any types of distributions, rather contributions and then removals. It's to address a certain a certain element of a certain practice of gaming.

MR. ADAMS: And who is responsible for the recalculation of the composite score? Can you clarify that because it's not written as is. It’s only to cover gaming to quote you. As it is written, my read is any contribution or distribution made in 9 months out of a fiscal year has to be reviewed, and I just want to make sure I'm reading that correctly. So maybe I'll defer to Steve on this.

MR. MARTIN: Yeah, Steve has his hand up. I'll yield to Steve.

MR. ROBERTS: You're muted, Steve.

MR. FINLEY: Thank you. There is a more detailed description of what the reporting requirements are for this provision in section F. And so, I suggest taking a look at those and then we would welcome input on fine tuning them from everyone.

MR. ROBERTS: Barmak, go ahead. Sorry, sorry, Brad, go ahead.

MR. ADAMS: Section F does not specify thresholds, am I accurate in that it doesn't specify anything on the dollar amount? So, a $10 distribution or infusion is required to be reported. Is that correct?

MR. FINLEY: I think it's prepared in a different way to trigger the reporting requirements in certain circumstances. We welcome suggestions on ways that you might like to see that modified.

MR. ROBERTS: Barmak, please.

MR. NASSIRIAN: Yeah, just a quick point that that nothing in this reg prevents anybody from paying their taxes. What they can't do is they can't loot the company to pay their taxes. They should pay their taxes out of pocket like the rest of us. The notion that somehow it's an entitlement for a subset of institutions, just because of their corporate form, to use school resources derived from title IV to pay taxes is just laughable. I mean, I just feel like you owe taxes, pay your taxes. You just can't take the money from the school if it results in a deterioration of its financial circumstances below the threshold, which, by the way, is overly generous here, I again emphasize 1.5 not 1.2. But again, it just struck me as kind of a false choice to say you either pay your taxes or comply with this reg.

MR. ADAMS: Barmak, I think that was directed to me? S Corp's don't work that way, sir. They don't. The taxes generated from income from the school will run through the owner's personal tax return, and they are required to take equity distributions to pay those taxes incurred from schools income. So, that is a factual statement that owners have.

MR. NASSIRIAN: Can they not add new contributions at that point to cover those taxes?

MR. ADAMS: The taxes were incurred because the school had a net profit. The school makes a million dollars that requires seven or $300,000 in taxes just to keep the numbers round. That $300,000 has to be taken out as an equity distribution unless they just have an extra $300,000 in a personal investment somewhere. But that has to come from the school as an equity distribution. And we do have to pay, those owners do have to pay quarterly estimated tax payments on that.

MR. NASSIRIAN: And if that weakens the institution's finances, you think the taxpayers should take that risk?

MR. ADAMS: No, I ask for a materiality threshold, sir.

MR. NASSIRIAN: $300,000 sounds pretty material to me on a million bucks, no?

MR. ADAMS: Well, there's $700,000 there, hopefully remaining, right? So again, I don't want to debate that, but at the end of the day, a C Corp, the taxes are paid directly from the school. In S

Corp, they're paid through the individual. That's the point of the comment.

MR. MARTIN: Well, the debate's interesting, but we need we do need to move on. So, I would say, Brad, if you want to, you know, write up something for us to take a look at about how you feel that that's that situation is problematic regarding the contributions and distributions. We would be glad to take a look at that.

MR. ROBERTS: Okay, not seeing any other hands on through romanette eight. Greg, do you and Aaron want a tee us up just for a quick check if that's helpful for the Department? I know there's a lot that is going to be invited in terms of soliciting new feedback and guidance. But I did want to give the committee an opportunity just to briefly offer their support or lack of support with a temperature check. I just got a message. Sorry. I see Jamie's hand. Emmanual, I see your hand as well as up and I don't have your video on right now so you didn't appear immediately.

MR. MARTIN: I didn't see that. I'm sorry.

MR. ROBERTS: No, I didn't see it, it's my fault. Emmanual, please go ahead.

MR. GUILLORY: I just want to make a

comment that we are all here to make sure as we're looking at financial responsibility, that institutions are not precipitously closing and impacting students. And obviously, we want to take care of the bad actors and want to make sure that those institutions that don't have the best interests of students in mind no longer exist. But we don't want to, by default, punish the good actors who care about students and who want to make sure students have access to postsecondary education, make sure they have access to a quality program, make sure they're able to go out and get that job and achieve whatever their dreams are. And with that being said, as I look back to the 2016 rule, 2019 rule, what's being proposed, the Department has used the 1.0 threshold because even though technically if you are under 1.5, you are not financially responsible, that is technically correct. There is a zone alternative. An institution can be a part of between 1.0 and 1.4 and they have to do certain things such as heightened cash monitoring, those other metrics like that. But they do not have to post a letter of credit. If you're under 1.0, then you have to post a letter of credit of 10 percent of your title IV HEA funds. However, according to the language here, if you meet a mandatory trigger or discretionary trigger, or if you are not financially responsible and subsection

B of the section that we're talking about, then you have to post a letter of credit that is no more than half or not less than half of your title IV funds. And so I believe the Department used the 1.0 composite score threshold because, I can't speak on behalf of the Department I don't work there, but I want to say the intent is not to close the institutions down. So, the Department doesn’t want to shut the doors. The Department, I would think, wants to get rid of the bad actors. And so, if we move that threshold up to 1.5, then you're asking an institution that has under 1.5 to then post letter of credit that is no less than half of their title IV HEA program funds when they don't have to do that under the regular composite score calculations. In addition to that, I wanted to also share that within the private nonprofit sector. We do have 339 institutions, or around that number, that have under 250 students. So let's remember that there are institutions out there that are really good actors that are small, that are tuition dependent and that could get, as my colleague Kelli had mentioned with clarifying some of the language under contribution, contributions and distributions. So, I know that we don't want to penalize institutions by literally shutting them down when we have these additional layers of credit being added.

Thank you.

MR. ROBERTS: Thank you. And Jamie, Imthink your comment is relevant because I think what we're going to move on to next is this discretionary trigger events, so please.

MS. STUDLEY: Okay, thank you. Number two strikes me as interesting and dangerous. It reads, although I'm not the poet that Barmak is, as two rights do not equal wrong. I can so easily imagine two discretionary triggers that the Secretary and his or her discretion would determine were not areas of concern about an institution. It doesn't seem logical for them, because of the fact that they both happen in a cycle, to become a mandatory trigger for risk protection. For example, we've seen enrollment drops in institutions around the country after natural disasters like hurricanes, fires and in our case, typhoons, and an institution could also have a planned closure and teach out that is fully intentional in a very constructive action in which there is no risk and no students were hurt. To have the combination of those become a mandatory trigger when the Secretary is determined that they are each innocent, seems odd. And in those cases, a trigger, I understand unless a triggering event is resolved before a subsequent event, but you can't resolve the effect of the typhoon on enrollment. You can continue to manage the institution effectively. So, in the absence of those being problems, I'm puzzled. Maybe I should just do it as a question to the Department. What were you trying to accomplish with two discretionary triggers creating a mandatory trigger? And I realize that some of this language is old and maybe you have experience with its implementation.

MR. MARTIN: Thank you. This is not a new one. We did make some clarifying changes to it. You know, a multiple discretionary trigger is an indication of their being, they are discretionary triggers, but they are nonetheless indicative of problems. So, you know where more than one exists, it's our belief that that raises it to a different level. But we'll certainly take back your concerns and comments about that.

MS. STUDLEY: Yeah, I guess the question is should the Secretary have the discretion to determine whether those two, each one by itself, would not be a problem, but as a matter of discretion, determine whether it becomes a mandatory problem?

MR. MARTIN: Okay, thank you.

MR. ROBERTS: Okay. Thank you, everyone. Greg, is it helpful now just to briefly requeue the document again with the acknowledgment that there is a lot of back and forth. I just think it might be helpful so the Department.

MR. MARTIN: Yeah, Aaron, can queue it up.

MR. ROBERTS: Great. Thank you, Aaron. Alright, is everyone clear on what the Department is soliciting your expression of approval or lack of approval on this temperature check? I don't think we're there quite yet, unless, Greg, do you want to move to discretionary or do you want to take a quick check on?

MR. MARTIN: No, let's do a check on mandatory discretion. That's an awful lot going through, let's just do mandatory and then we'll move on.

MR. ROBERTS: Yeah, it's a lot. Alright, so if everyone wouldn't mind just a brief show of thumbs again. Thumbs up, is support, sideways, you can live with it, thumbs down, serious reservations. Just a quick read on where the committee is on this this section on mandatory triggering events. The center of the frame as much as possible. Alright, I'm seeing a number of thumbs down. We have heard folks' objections, but you are welcome to come off of mute if you have anything new to add for the Department to consider when they take back this document.

MS. PERRY: I know I've said this

already, but my only reservation, and maybe it's just that I didn't necessarily understand the clarification, has to do with the debt liabilities and losses, and just making sure that it's not having to report every single one of those unless it affects the composite score.

MR. ROBERTS: Alright. Appreciate it. So, with that, Greg, are you ready to go and Aaron ready to go to the next section, which would be discretionary triggering events, that would be subparagraph D?

MR. MARTIN: Yeah. Yes. Just to reiterate, we're going to look at discretionary triggering events. There are a number of them. And what I propose to do is to go through them all. As I said, there are quite a number of them, but in the interest of time, I'll go through them all and then we'll have an opportunity to comment on them or for any questions, any other type of discussion. I would like to go back to something Brady suggested that when we do that, we try to go through it in order and the order that they appear in the proposed regulatory text. That way we can keep some order and it's, I think, a lot easier for the people at the Department who are taking notes on all this to keep that straight. And if you have comments about something later on, you know, make a note of those and make those comments when we get down to that, when the discussion moves to that section. So, with that, I'll start and go through these. So, looking at the discretionary triggers. We see the first change here is the accrediting agency actions. We're revising an existing discretionary trigger for accrediting agency actions. While probation actions would technically be covered by the teach out agreement and the mandatory triggers, we include both probation and show cause or equivalent actions because not all agencies use consistent terminology. So, the institution was placed on probation or issued a show cause order or placed on an accreditation status that poses an equivalent or greater risk to its accreditation by its accrediting agency for failing to meet one or more of the agency's standards. Moving down to two. It is a violation of a loan agreement. And this is maintaining an existing discretionary trigger related to violations of loan agreements, so I won't go into that one. You'll note that the state authorization and 90/10 triggers have been moved to mandatory triggers, so they are removed from the text related to discretionary triggers. Fluctuations of title IV volume, and there's a significant fluctuation between consecutive award years or a period of award years in the amount of direct loan or federal Pell Grant funds, or a combination of those funds, received by the institution that cannot be accounted for by changes in those programs. And this is a discretionary trigger that's been added back previously included in the 2016 Borrower Defense rules related to fluctuations. We feel these fluctuations may be indicative of significant enrollment declines, which have often preceded college closures or may be associated with aggressive recruiting practices that would manifest themselves in great increases in numbers. The next one is four, which is high dropout rates. High annual dropout rates is calculated by the Secretary. We have maintained a discretionary trigger on high annual dropout rates, an element included in the HEA related to selection of institutions for program reviews. We often see precipitously high withdrawal rates from schools that are on the verge of closing. Five is interim reporting. This is a new discretionary trigger which allows the Department to seek financial protection on the basis of additional and interim financial reporting, which schools may be required to do if they are in certain statuses with the Department and have concerns about the school's financial circumstances or compliance with financial responsibility rules. So, for an institution required to provide additional financial reporting to the Department due to a failure to meet the financial responsibility standards in subpart L, or due to a change in ownership, there are negative cash flows, failure or of other liquidation ratios, cash flows that significantly missed the projections submitted to the Department, or withdraw rates that increase significantly. Moving on to six. The Secretary has pending claims for borrower relief discharge under 685.206 and has formed a group a process to consider those claims under 685.402. And this is a restored and revised discretionary trigger related to a large number of outstanding Borrower Defense claims. This revision means that Secretary may utilize this claim when he has opted to form a group process to consider Borrower Defense claims, indicative of a sufficient number of claims. The group process was negotiated in the Department's rulemaking that wrapped up last year, and the details will be forthcoming in the in the NPRM. An institution discontinues a significant share of its academic programs. And finally, or the institution closes most of its locations or obtains approval from the Department to close most of it most or all of its ground-based locations while maintaining its online operations. We’ve added this discretionary trigger for discontinuation of a significant share of academic programs, which may occur prior to the closure. And the second element there relates to closure of ground-based locations while still maintaining an electronic or an online process. And again, these actions may precede the closure of large chain institutions, so we’re concerned about the instances where that occurs, and the Department would utilize both claims on a discretionary basis. So that is those are all the elements of discretionary trigger. So, at this point, we'll open up the floor for discussion or questions. Thank you.

MR. ROBERTS: Yeah. And Aaron, if you wouldn't mind bringing down the document. And Brad, I appreciate your suggestion for the mandatory triggers. If folks want to maybe focus on one and two right now. And feel free to post in chat just so I can remember, I have a comment on four or five or something like that. Just keep us roughly in order. But with that, Jamie.

MS. STUDLEY: Thank you, Mr. Roberts. Accrediting agencies, I believe that the first item is a wise change. This moves from show cause as the baseline for an accreditor action that would be a discretionary trigger to an earlier in the process or a more it less even less rigorous than show cause by moving one step forward toward probation or equivalent action. We think that makes sense. Accrediting agencies have the job of looking forward. Financial responsibility and composite scores audits and ratios are by definition, historic. Accreditors take very seriously our responsibility for looking at financial sustainability, looking forward and at risk and student protections, and we can look at things like governance and board expertise, financial plans, plans for debt, realistic enrollment projections or unrealistic enrollment projections, history and trends for the institution and what's happened to other institutions that we think, may help us understand what the trajectory of an institution might be. Accreditors have been adding new financial tools and frequency. WASC, for example, takes an annual look at financial issues for all of our accredited institutions. But the combination of what the Secretary can do on the financial responsibility scores, plus the ability to take into account on a discretionary level probation and other sanctions makes sense, as the Department is so actively seeking ways to get out ahead of and predict when financial risk exists.

MR. MARTIN: Thank you.

MR. ROBERTS: Alright, thank you. Jessica, please.

MS. RANUCCI: Thanks, Jamie. I just wanted to make a point that's largely in line with that, but just at one level up, which is, I think that, these discretionary triggering events are very important. I'm very glad that the Department has given more of them, and I just want to point out two things. One is discretionary is discretionary. Obviously, the Department at any time, if these become nonsensical, can decide not to use them as a triggering event, right? So, the Department is just giving itself discretion to move against, I think we're calling bad actors, your school's likely to precipitously close. Including in circumstances that we might see in the future, that would be covered under here. And I would note also that the subsection B itself that we skipped over that and just went into the subsections has some limiting language there so that it looks to me as if the Department has to make a finding that the event is likely to have a material adverse effect on the initial condition. I think again, that should assuage some of these are the discretion is cabined, then it would be applied in ways that make sense. And I think, Jamie, I haven't read this before you made your last point, but that might go to your last point about the combination of discretionary factors. And if something similar to that would be able to written into the combination of two discretionary equals and mandatory, then I think that might exclude the situation that you're talking about. So, there might be an easy fix there for the Department.

MR. ROBERTS: Jamie, I see your hand's up, is it a holdover from your prior comment? Okay. Okay, not seeing anything else on one and two. Any comments from the committee on fluctuations in title IV volume or biannual dropout rates. Marvin, please.

MR. SMITH: Yeah, I think Emmanual was first.

MR. ROBERTS: Oh, was he? I apologize Emmanual, please.

MR. GUILLORY: Thanks, Marvin. I was just going to say a concern here is the two mandatory or two discretionary triggers equaling the mandatory trigger. I do appreciate the language that says likely to have a material adverse effect on the financial condition. However, if the Department hasn't had the opportunity to determine whether or not it actually has that, and an institution happens to fall into two of the discretionary triggers, then it's automatically mandatory. And then they may have to post a letter of credit that at least half of their title IV HEA funds. And I think that’s problematic. So, hopefully the Department can just explain a little bit more of when they make that determination and how that then equates with the two discretionary equals mandatory. And another thing I'd like to highlight, and what we're going to get to this later, is in section 668.175 subsection C. There's a language that arguably contradicts the two discretionary triggers equals one mandatory because of this language here in the section , it does say that one of any of the following in the mandatory trigger section in discretionary trigger section will then mean it is not financially responsible. So, I want to highlight that, but I know we'll talk about that later. Thanks.

MR. ROBERTS: And Steve, I see your hand if you want a response.

MR. FINLEY: No, I was just going to ask Emmanual for some clarification. Where are you seeing the reference to the mandatory 50 percent? Because I just want to make sure we're not talking apples and oranges here? Failing financial responsibility triggers usually just triggers a letter of credit of at least 10 percent. And there is a provision that says you can post a 50 percent letter of credit or higher to demonstrate that you are financially responsible. But that's usually a separate issue.

MR. GUILLORY: Yes, Steve. That's a great question. It's on page 21, section 668.175 subsection C, financial protection alternative for participating institutions. It reads that a participating institution that is not financially responsible because it does not satisfy one or more of the standards of financial responsibility. And it lists section 668.171, B, C, or D. So that is literally the mandatory triggering section or the discretionary triggering section or the section before that, that just explains financial responsibility, it says that that institution then would have to submit an irrevocable letter of credit that is acceptable and payable to the Secretary for an amount determined by the Secretary that is not less than one half of title IV HEA program.

MR. FINLEY: Right. So this is an area where we can clarify this issue. 175 institutions that meet the standards in 175 are financially responsible. Failing the financial responsibility triggers and participating with a letter of credit of at least 10 percent with provisional certification is the option available for institutions that fail the financial responsibility standards. So, everything we’re talking about this morning is a letter of credit at least of at least 10 percent, right? If you meet 175, you are financially responsible, you can qualify to be fully certified, and you're posting a letter of a credit of at least 50 percent.

MR. GUILLORY: Exactly. So, in order to be financially responsible, if you do not satisfy one or more of the standards that includes mandatory standards or discretionary standards, then you have to post a letter of credit to be considered.

MR. FINLEY: And that's been that way for years. That's nothing new.

MR. GUILLORY: So, I'm bringing that up with the committee because as we're talking about mandatory triggers, which is not, so mandatory triggers and discretionary triggers came up in 2016 Obama regulations. Before that, there were no triggers. So that's why people were so upset in 2016 because of the idea of triggers, and it was new to people. But now this has been on the books for quite some time. So, with this language here and talking about triggers and the fact that two discretionary would equal one mandatory, and if that is the case, in order for an institution to then be considered financially responsible, they have to post a letter of credit because of those triggers and meeting them of at least 50 percent. That is concerning.

MR. FINLEY: Or they can, I just want to make sure we all understand. They may also participate as an institution that's provisionally certified with a much smaller letter of credit. So, this doesn't mean this is the only option available to them. And that's what I was afraid some people were understanding earlier based on your remarks.

MR. GUILLORY: Okay, can you just correct me if I'm wrong though, the provisional certification piece is only if they fall below 1.0 of the composite score set alone.

MR. FINLEY: No. If you hit a trigger, you can be provisionally certified and provide a letter of credit of at least 10 percent, as well. You fall in the category of an institution that's not financially responsible.

MR. GUILLORY: But that's only if you recalculate the composite scores below 1.0.

MR. FINLEY: No.

MR. GUILLORY: Okay.

MR. FINLEY: You can have an institution that hits a trigger like past performance, which has nothing to do with the composite score. It's a mandatory failure of the financial responsibility standards. And that one cannot be cured by posting a 50 percent letter of credit because it's a mandatory failure. But all these other things we're talking about could be cured by posting a 50 percent letter of credit, but the institution will have the option to be provisionally certified with a letter of credit of at least 10 percent. So, it's not the cliff effect you're describing unless it's very important that the institution want to be financially responsible. And, you know, meet that separate criteria. And if that was confusing, I apologize, but I hope it was clarifying the issue.

MR. GUILLORY: Thank you.

MR. ROBERTS: Okay, thank you. Marvin, now I see your hand, please.

MR. SMITH: Yeah, I was just curious about fluctuations in title IV volume, and do fluctuations mean increases or decreases? And is there a percent you have in mind or a dollar amount you have in mind, or are you trying to be deliberately vague about that? And then I wonder if changes in enrollment could impact fluctuations, and whether you should be specific on that in that statement. But it just that paragraph confuses me.

MR. MARTIN: Well, it's an acknowledgment of the reality that large fluctuations from year to year in in the amount of loans and title IV volume in general can be indicative of there being problems at the institution. And, you know, so either significant enrollment declines or increases. We keep it to title IV because that's principally what we're what we're interested in is, you know, the administration of the title IV programs and title IV volumes. So we keep to that. But yes, I think that certainly an increase or decrease, and we'd be looking to either one could certainly tie to increases in enrollment or decreases in enrollment, but we have we have kept it to volume. We don't give any specific percentage increase or decrease that would cause us to invoke this this trigger. If there is any interest in the floor on far from the floor of proposing something or suggesting that we should have something else here, we would be willing to entertain that. However, we do feel that we need to have this discretion to look at where these large fluctuations occur. And then, you know, because they don't just occur in a vacuum, there's generally something behind a large fluctuation in volume like this.

MR. ROBERTS: Barmak, please.

MR. NASSIRIAN: With regard to fluctuations, you know, some of these enrollment changes may be attributable to external causes, the macro economy, pandemic, et cetera, et cetera. So, you may want to you may want to sort of limit it to anomalous fluctuations or fluctuations that may be attributable to external factors but that have a material adverse effect on the finances of the institution for what that's worth. I actually had a question with regard to the letters of credit, and it's a sort of somewhat hypothetical because obviously you have to assume that the composite score is actually adequate that it's sufficiently predictive of stability or lack thereof as to serve the purpose for which it was devised. The question becomes why you would create a path of least resistance for an otherwise unqualified entity to come into the casino with 50 cents on the dollar and be fully certified or worse yet, allow an otherwise on ineligible unqualified entity to come in with 10 cents on the dollar? It just strikes me as really, really risky. It's unbelievable to me. And more importantly, I would point out that there seems to be no adjustment over time. [Inaudible] was on provisional for a full decade I understand on the basis of a 10 percent letter of credit from a decade earlier. I mean, that's just it. I just need some explanation of why it is, we talk about standards of financial responsibility. To put it very plainly, I suspect, and it's too bad that Congress tends to invent terms. But financial responsibility has to have a meaning. And I suspect the plain English meaning of it is credit worthiness for the totality of the liabilities, including unearned tuition, not just federal tuition, just unearned tuition on the books. So again, assuming that the composite score, which I know it doesn't quite do this, but if the composite score were to be deemed an adequate predictive tool, why would the Department satisfy itself with 50 cents on the dollar for a full satisfaction and 10 cents on the dollar for provisional satisfaction of financial responsibility?

MR. MARTIN: I'll take that, and then I'll turn it over to Steve if he has anything else to add. I would point out that these are long established thresholds that we don't propose to change in these regulations, which in and of itself doesn't, you know, is not necessarily indicative of anything. But they are established. I just disagree with the assertion that a 50 percent letter of credit is not a, you know, is not, oh, you can say 50 cents on the dollar, but it's a major thing for an institution to get 50 percent of its volume. That's quite a lot. I don't work in that division where they do that. But Steve is probably more aware of how many institutions actually go that route as opposed to seeking the other the other means available to schools, which is the 10 percent letter of credit and provisional certification, as Steve just described. But I think with the latter, that is with the provisional certification, we do have quite a lot of leverage on the school. Once it's provisionally certified, we can decline to fully certify it again. So, I think that there is a quite a lot of protection there. And then with a 50 percent letter of credit, I do believe that's a significant letter of credit, but I'll turn it over to Steve if he wants to make any further clarifications regarding that.

MR. FINLEY: I won't add a lot, except to say that I appreciate the question being asked periodically because it's important, and I think it's important to understand that a letter of credit is different than an assurance that an institution has the resources that could be accessed if needed to pay liabilities, right? A letter of credit is funds on hand available on demand to the Secretary to satisfy liabilities arising under the title IV programs. And the smaller letter of credit, as Greg noted, is in conjunction with the provisional certification, which also greatly increases the Department's ability to remove a bad actor by revoking its approval instead of terminating its approval through a more formalized administrative hearing procedure. Why is a 50 percent letter of credit enough? And this was the amount that was determined in the past as being acceptable, and as

Greg notes, very few institutions actually choose this option compared to providing the smaller letter of credit in conjunction with the provisional certification. But I think it's kind of like a great bedrock question to ask about this whole structure for financial responsibility and how the Department tries to mitigate the financial risks.

MR. ROBERTS: Okay, thank you. Brad, please.

MR. ADAMS: Thank you. I agree with several of the comments in the chat, and I'll be brief because I made the same comments in the administrative capability section. But the vagueness in the fact that you can't measure several of these statements, how any school can operate under these thresholds, when two of them require a letter of credit to be posted. Just a couple of them here: fluctuations in title IV what is a significant fluctuation? The definition of that high dropout rates: what can we specify is a high dropout rate? Do they vary by segment in our industry? You know, discontinuation of a significant share of academic programs. What is significant: is that greater than 50 percent, what is the definition there? Pending Borrower Defense claims. Like I mentioned earlier, if it's pending, there's no actual liability that's been incurred. So, we'll propose language. I did have a broader question for the Department when we're talking about what is in mandatory and what is in discretionary. 87an you discuss why we move triggers between the two, and two years after the current triggers and regulations took effect? Is there any data to support that the triggers we put in place two years ago didn't work that we need to make these moves? But what is the data behind what makes it mandatory and what makes two discretionary and how do they fall in each bucket?

MR. ROBERTS: Greg, any immediate response?

MR. MARTIN: Well, there's no doubt about the fact that, you know, when we look at which are mandatory and which are discretionary. There's some element of policy discretion there, you know, based upon what the Department's scene out there, what we what we feel is necessary to safeguard the interests of the programs, taxpayers and students. I don't know that we have, you know, was there actual statistical data on which all of us was based? No, but certainly the experience of people who are involved in financial oversight of institutions that are out there in compliance is extremely valid. And I would point out, and I would reiterate, that with all of these that the position the Department's in, we have billions of dollars of risk with these programs and we are held accountable for instances where we did not properly, or it's been suggested, that we didn't do enough to determine when an institution was going to close. These disclosures put thousands of students out of their education, on the streets, so to speak, and create a great deal of disruption, and require us to, in many cases, discharge millions of dollars of loans. So, I think that Department has a compelling interest in having, and again, not to suggest all these are perfect, but to have triggers that can help us to get some surety in advance. Obviously, has been pointed out, it doesn't it doesn't cover all of our losses or all student losses. But, I think these are reasonable. We could argue all day over what constitutes significant or what constitutes high. And it's true that there is a certain level of discretion involved here, especially with discretionary triggers. We do say, as has been pointed out, that we look for these to have a materially adverse effect on the financial condition of the institution and that that, too, is subject to discretion. But I don't think that we can remove all of that discretion from these regulations. We're open for any suggestions from anyone from the table has about it. But you know, a lot of this is just protections we feel we need to safeguard these programs.

MR. ROBERTS: Thank you. So, Sam, I see your hand, and then I'll invite any feedback for the Department on items five and six. So, Sam, go ahead.

MS. VEEDER: Thank you. I also want to address that point about fluctuations in title IV income. It's still unclear to me whether that includes both increases and decreases. Also want to say I'm not inclined to put restrictions in to make a strict definition for that or dropout rates. I appreciate the discretion that the Department needs to look at these factors in combination with each other. But then I worry now with two discretionary triggering a mandatory, this trip up a good actor as an example. I many, many, almost 30 years ago, worked at an institution that was all female when I started working there and made a decision to go coed. Very small institution, still open and viable, you know, by all definitions, a good actor and respected regional institution. But it increased significantly title IV when that enrollment increased by adding male students. And, so, are increases a trigger here on title IV, and is there an opportunity to explain what that was for? Because I could see how it's unclear to me if an increase is detrimental to the Department when it's advantageous to the institution. Probably so for bad actors, but not for good actors.

MR. MARTIN: Yes. To answer your question, it is both fluctuations involving both increases and decreases, and the Department is not suggesting that every fluctuation is a problem. We're simply saying it may be indicative of a problem. So, we take your point, and we look typically this would be looked at, well, you know, if it was a huge fluctuation when we might, we would look at it over the course of years. Obviously, when the Department compliance officials are looking at these fluctuations, they would be in contact with the institution and looking at the institution's explanation for why those fluctuations occurred. So, it wouldn't be done in a vacuum. We wouldn't just look and go, oh, there's a fluctuation. We're going to go out and require a letter of credit.

MR. ROBERTS: Alright, thank you. Jamie, please.

MS. STUDLEY: Since I was part of asking those questions about the definitions, I think Sam made a lot of my points about not wanting to take away the secretary's ability. This is discretionary by the Secretary to say and the Department that we see a potentially troubling dropout withdrawal or enrollment fluctuation. So, on my part, it’s not an effort to tie the Secretary down, but if it is something that should be watched by multiple reviewers, like states and accreditors, it might be useful to know how the Secretary uses that or looks at it. Is it truly a very individualized situation that's fairly extreme? Or if there are charts or definitions that are used to get at that, might there be value in sharing those or pointing those out? But I think the fact that an institution has the opportunity to say yes, we had a substantial decrease, but we believe it was temporary crisis, or it is true that upward fluctuations can can be troubling for a number of regulatory reasons. The institution has to have the capacity to support it, it has to fit with what they're doing, it has to be well planned and realistically priced in order to maintain a stable institution. So, I think it’s appropriate that it go both ways. So, I don't think it's a problem, but it could be an opportunity for interchange or alerting others of us to what might be problematic. And institutions to know what they might need to respond to if the Secretary triggers a question or concern.

MR. MARTIN: Thank you. Thank you.

MR. ROBERTS: Great. Thanks, Jamie. Any other comments on discretionary triggers anything on seven or eight or anything that has not been mentioned yet? We welcome folks to hop in. Otherwise, Greg and Aaron. Oh, seeing Amanda, yeah, please go ahead.

MS. MARTINEZ: I know there was questions in the chat, but I just kind of want to have an out loud conversation and just have it in the record, just so for those in the public who can't really see the chat. In the discretionary section four item four, high annual dropout rates, I'm wondering, this stipulates that it's high annual dropout rates are calculated by the Secretary. I'm just wondering how does the Secretary calculate this, like what systems does it use to calculate? And how does it define dropout rates? What is their definition? Is that retention rates? Does that include withdrawal rates, how broadly defined do you make that definition of dropout rates? What is high? Is there a threshold for that? I know there's different questions in the chat related to this specific item, but I just wanted to see if there was a quick response just so that if we can provide additional recommendations here or help with providing a definition that's clear and potentially more suggestions on how to expand this part so that it actually targets, it's a trigger, especially for triggering or finding out if there are higher dropout rates, for instance, disaggregated by race and ethnicity, or even for Pell Grant recipients or First-Generation students. I think that's another that would be a suggestion here that we can write on and submit. But just on the former questions, wondering if there's a quick response there on definitions?

MR. MARTIN: I'm not aware of the so if what you're asking is where this has been made an issue, what was the calculation used? I don't know. Steve, do you know which calculation formula was used for that? I can go back and find out for you, it's a good question. I don't think we have any prescribed threshold for it, but as far aswhat formula we used to do the calculation, I'm not aware of the top of my head. I'll have to inquire about that.

MS. MARTINEZ: No problem. Thanks, Greg. But hopefully you'd or the Education Department would be would say that you're inviting us to help also maybe expand this part.

MR. MARTIN: We welcome we certainly welcome any suggestions to us.

MS. STUDLEY: Okay, great. I just wanted to hear that.

MR. MARTIN: Yeah. Yes, we do.

MR. ROBERTS: Always an invitation, always. Jessica, please.

MS. RANUCCI: Thanks. This is just a minor point on number six, related to what Johnson was talking about this morning. I think that there I really think the Department [inaudible] strongly think about adding a number of Borrower Defense claims as a mandatory trigger. But if it doesn't, I think it should consider adding that as a discretionary trigger in addition to what is here and number six. They're similar, right, because obviously the Secretary would decide to do a group discharge if there has been a set of claims, but I don't think that the Secretary should have the discretion to make that a mandatory trigger only if the Secretary has also used his discretion to make it a group discharge, there might be circumstances or a group process. There might be circumstances where one, but not the other, makes sense. And, so, it would just make if the Department again, I think you should please consider doing mandatory. But if you don't, I think that numbers should be there and include a number of claims, maybe by enrollment, it probably doesn't make sense to do by loan volume since there's no dollar figure yet, but whatever makes sense.

MR. MARTIN: Okay, thank you.

MR. ROBERTS: Thank you. Yael, please.

MS. SHAVIT: Yeah, I'd like to follow

up on that point. I agree, I think it adds to levels of discretion unnecessarily, right? So, the formation of a group process is discretionary, though I recognize if the proposed language about state AG requests makes it into a final rule that there's a presumption that a group will be formed. But that aside, it seems like given our history of how long it's taken, the Department consider group claims submitted by state AGs, where we've laid out in painstaking detail similarities between students. Just taking that history for what it's worth, the Department may spend some amount of time considering whether or not to form a group or the bounds by which it will decide which borrowers are in which group that may be affected by considerations that shouldn't affect whether or not the Department can consider a volume of Borrower Defense claim as a discretionary trigger. I'm thinking as well in the context of receiving requests from state AGs that outline a significant volume of claims in the period of time between the Department receiving such information from the state and actually going ahead and forming a group under that under that section. So, I agree with Jessica. I think there should be some language added to allow the Department to consider a number of claims, even in the context of a group not having been formally formed yet.

MR. MARTIN: So just make sure what's being asked here, so currently it says the Secretary is pending claims for discharge and has formed the group process. So, you're suggesting even where, let's say a group wasn't formed, that there was a certain number of claims?

MS. SHAVIT: Potentially. I mean, just to give an example, a group might be might be formed for specific cohorts, right? You might pick specific programs at an institution for specific years where the claims are similar, right? But you might also still have received many claims from borrowers across programs for different cohort years. I imagine that the Department's consideration about how to form a group may require decisions and time that don't impact the question of whether or not the presence of a large volume of Borrower Defense claims is a problem that should be taken into consideration as a discretionary trigger, right? You might ultimately form multiple groups for the same institution. In cases of misconduct that spans across different programs in different cohorts. So yes, it's to give the sort of follow along with the goal of giving the Department discretion to consider things that are relevant here I think the Department has a little bit more discretion in this area.

MR. MARTIN: Thank you.

MR. ROBERTS: Okay, great, thank you. Greg, if you and Aaron want to tee up the discretionary triggers, we can get a quick read on where the committee is on this again with the ever present invitation for more dialog and modifications that the Department can consider. So, we're looking at subparagraph (c)(1) through, I believe, eight. Alright.

MR. MARTIN: These are all in the D, paragraph D.

MR. ROBERTS: Oh yeah, correct, sorry not C, D. So, with that Aaron if wouldn't mind bringing down the document. Thank you. And again, if I could see everyone's thumbs nice and high. Alright. I see at least one thumb down. Again, invite folks to come off with me if there's anything new that they want to add to this piece. Alright thanks, appreciate it. Okay, great. Thank you for that discussion. And Greg, I'll turn it back over to you. The following sections are there is modifications, but it's kind of spread out. So, I'll leave it up to you what you want to tee up for discussion.

MR. MARTIN: Well, you know, let's just go through these, there aren't that many here in these sections, the first we'll first look at E, which is recalculating the composite score. This is not new. We just changed we just are updating a cross reference there. So, we have not added anything to E under recalculation of composite scores. We can move down to F, which is reporting requirements. So, we can take a look at one, in accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events. And you see romanette one and then romanette two has been added for a lawsuit under paragraph ©(1) romanette one B of this section, no later than 10 days after the institution is served with the complaint and 10 days after the suit has been pending for 120 days. And these reporting just a little bit of background here,’we've established several new or revised reporting requirements to align with the changes in the triggering events, including both discretionary and mandatory. And these include reporting on federal, state or Qui Tam lawsuits, contributions and distributions made to and from a school. Updated language related to actions against publicly traded institutions. Updated language related to state and accredited actions which are now combined as reporting requirement in romanette six and discontinuation of academic programs. So, we can move on as we're working through the reporting requirements here down to romanette four which is what you see added there. For a contribution and distribution under paragraph (c)(1) romanette eight not later than 10 days following each transaction. So again, this keys back to the to the triggering events. And under romanette five for provisions related to a publicly traded institution under paragraph C romanette five of this section no later than 10 days after the date that the SEC issues in order suspending or revoking the registration of the institution's securities pursuant to the Exchange Act, noted there or suspends trading of the institution's securities on any national securities exchange. And then we moved to B where we have some revisions there. The National Securities Exchange on which the institution's securities are listed, notifies the institution of noncompliance with the rules of the relevant securities exchange delist the securities or the institution voluntarily delist its securities. And then we have added here for a state or agency action under the applicable citations of this section. Ten days after the date on which the institution is notified by the state or accrediting agency of the action. And we have added under nine, romanette nine, for the discontinuation of academic programs provision in paragraph (d)(7), no later than 10 days after the discontinuation of the programs in the institution's fiscal year, affecting at least 25 percent of the students. And then I think that that is about it until we get to D, public institution. So, we can stop there. We have a few minutes if we can open up discussion and we have, what Brady, four minutes?

MR. ROBERTS: That’s correct, yes. So, I see Brad, and Brad I think we have time for your comment and then maybe one more a response and then we will head to our lunch. So, Aaron, if you wouldn't mind bringing down the document? Brad, please go ahead.

MR. ADAMS: Okay, last comment before lunch. At the very top, I guess this would be one double I, the lawsuit notification 10 days after the institution has served. I just want to confirm again, I think I know the answer, but just to confirm, that if a student slips on ice outside their dorm room and sues within 10 days, every single time that happens, we are going to be notifying the Department regardless what it was or the materiality or anything else? Every single lawsuit in ten days is being served going to the Department?

MR. MARTIN: Well, I'll put disclaimers, the words are yours. But I think that, as I would say this as currently written, is there de minimis amount that under which it would not have to be reported right now? No, but we'll certainly take that back and look at it.

MR. ADAMS: Yeah, it's not only de minimis, it's also within the settlement agreement with the employee. I mean, does Department want to know that every single time? I guess there's also the, I guess, the merit of the case as well, is there are any.

MR. MARTIN: So, you would be suggesting that you what you would like to see here if it would be a de minimis amount and have settlements with employees?

MR. ADAMS: I'll come up with language, Greg. [Inaudible] debate here, but yeah.

MR. MARTIN: Well, yeah, whatever you come up with, we'll certainly be willing to take a look at.

MR. ROBERTS: Yeah, I think I saw a hand, but it went down and recognizing, oh, Steve, please.

MR. FINLEY: By George, I was muted. I think this section is tied to the Qui Tam lawsuits. So, I don't know that this would be, I think this is distinct from the other litigation that Brad may have been mentioning just then. But it's a point that we can all clarify.

MR. ADAMS: Maybe then it's single I I'm trying to clarify then instead of double I. Again, I have to go reference, but.

MR. MARTIN: In any event, we'll get we'll make sure we have clarification on that.

MR. ROBERTS: Okay, great. So, I'm not seeing any additional hands, I loath to rush us to, oh, Kelli please. I spoke way too soon.

MS. PERRY: I didn't raise my hand because it's going to take me longer than 30 seconds to explain what I'm thinking, so I was hoping I could do it when we come back from lunch.

MR. ROBERTS: Oh, I gotcha. Alright. So we'll hold off on any checks on romanettes, what is it, one through nine. And I guess with that, we can take a break for lunch, and I'll see everyone back here at 1:00. Thank you so much for this morning's discussion.

MR. MARTIN: Thank you, everybody.

Appendix
Department of Education, Office of Postsecondary Education
Zoom Chat Transcript
Institutional and Programmatic Eligibility Committee
Session 1, Day 3, Morning, January 20, 2021

From Ernest Ezeugo to Everyone:

I can see you.

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

I am continuing on behalf of legal aids for financial responsibility.

From Johnson (P) Legal Aid to Everyone:

Jessica is representing the legal aid community

From Travis (P) Servicemembers & veterans to Everyone:

Barmak is continuing for servicemembers and veterans

From Jamie Studley (P) Accrediting agencies to Everyone:

+1 to Brad, some level would be prudent.

From Anne Kress (P) Comm Colleges to Everyone:

+1 @Brad, this makes sense, there should be a threshold of materiality.

From Jamie Studley (P) Accrediting agencies to Everyone:

RE liability and settlements: it seems it ay be one report a

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

I suggest that there is a materiality threshold to 1 in A to reporting any and all settlements and to confirm if the department will recalculate the composite score every time.

From Emmanual Guillory (A)-PNPs to Everyone:

Hello everyone! I am here. Had some trouble with the link this morning.

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

Carolyn's point is quite right: (ii)(A) should apply to all prop schools regardless of score

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

Request to change C to when the liability is incurred and not when the claim is made.

From Anne Kress (P) Comm Colleges to Everyone:

+1 @Jamie

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

+1 on Jamie's point: ED needs to articulate what real-time reporting institutions must provide in cases of adverse events listed here

From Ernest Ezeugo to Everyone:

+1 Jessica

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

+1 Yael

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

+1 to Yael

From Sam (P) Fin Aid Admin to Everyone:

+1 Yael

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

Johnson is going to substitute in for me for a few minutes.

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

+1 Yael

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

To syncopate a point that Carolyn made earlier re (ii)(A), all for-profit schools should be subject to this: any school whose score would drop below the minimum threshold (which should always be the passing score of 1.5) as a result of withdrawal of owners' equity should be restricted from internal practices that would allow insiders to loot the corporate entity and hand empty coffers back to the taxpayers

From Ernest Ezeugo to Everyone:

+1 Johnson's concerns

From Carolyn Fast (P) Consumer Advocates/Civil Rights Organizations to Everyone:

+1 Johnson's concerns about BD claims

From Jaylon Herbin (A) Consumer Advocates Civil Rights & to Everyone:

+1 Johnson's concerns

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

+1 on Johnson's point

From Yael Shavit (A) -- State AGs to Everyone:

+1 on Johnson's point

From Anne Kress (P) Comm Colleges to Everyone:

+1 @Johnson—this goes to the heart of the regulatory goal of setting triggers and putting in place meaningful and impactful ones

From Anne Kress (P) Comm Colleges to Everyone:

+1 @Kelli Does the dept have evidence that these triggers worked? Provided timely and effective notice that protected students?

From Yael Shavit (A) -- State AGs to Everyone:

+1 Barmak

From Jamie Studley (P) Accrediting agencies to Everyone:

Materiality in a sense is answered by the test itself -- does the debt or liability put the institution below 1.5?

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

+1 Barmak

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

can we take comments on this by letter or maybe two letters at a time? this is a lot of information to cover all at once.

From Jamie Studley (P) Accrediting agencies to Everyone:

+1 to Brad's suggestion to go item by item so we don't jump around

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

+1 to Jamie's comment

From Kelli Perry (P) - Private, Nonprofit Institutions of Higher Ed to Everyone:

+1 to Jamie's comment

From Jamie Studley (P) Accrediting agencies to Everyone:

The Dept is fully entitled to respect in this way the determination by its triad partner, a state, at a level serious enough to withdraw licensure

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

+1 to Jamie

From Carolyn Fast (P) Consumer Advocates/Civil Rights Organizations to Everyone:

+1 to Jamie

From Emmanual Guillory (A)-PNPs to Everyone:

34 CFR 602.24(c)(1) refers to a teach out plan and not a teach out agreement. The 2016 regulations also use the term "plan" regarding this section as well.

From Emmanual Guillory (A)-PNPs to Everyone:

Also, for further clarification, the letter credit amount for institutions that are not financially responsible due to "one or more of the standards of financial responsibility under Section 668.171(b),(c), or (d), or because of an audit opinion or going concern disclosure described under Section 668.171(h)" is one-half of the title IV, HEA program funds and not 10 percent.

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

+1 to Barmak's first point

From Carolyn Fast (P) Consumer Advocates/Civil Rights Organizations to Everyone:

+1 to Debbie's point that broader array of state actions should be considered

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

I agree Debbie on that the significance of the state action should be considered.

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

contributions and distributions refer to LLC capitalization

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

Kelli is correct

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

it reads as she stated

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

Are we moving past IV now?

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

Yael is accurate. I misstated AGs when point IV was about state agencies. The comment around materiality of the state action being considered stands

From Carolyn Fast (P) Consumer Advocates/Civil Rights Organizations to Everyone:

+1 to Barmak's comment about contributions/distributions trigger

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

Barmak unfortunately that is not the way S corps work

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

Emmaunual has his hand up

From Jamie Studley (P) Accrediting agencies to Everyone:

again, the materiality question is addressed because the test is whether it drops the school's score below

From Jamie Studley (P) Accrediting agencies to Everyone:

my comment is about (2) -- two triggers -- not sure if you're at that one yet, or just wrapping through (viii)

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

I am still not clear who recalculates the composite score. The school, the auditor, the department?

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

+1 to Emmanual's comment

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

+1 to Jamie.

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

+1 to Emmanual's comment

From Jamie Studley (P) Accrediting agencies to Everyone:

good thought, Jessica, about seeing if it's possible to align the material adverse effect language in (d) discretionary with (2) above about two discretionary events.

From Sam (P) Fin Aid Admin to Everyone:

+1 Marvin, and same concept related to defining (or remaining vague) about "high" dropout rates

From Jamie Studley (P) Accrediting agencies to Everyone:

Are there definitions of significant fluctuations or high annual dropout rates, since those are not new?

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

Agree with Jamie's question about how dropout is defined. Also wondering if these are calculations ED makes public and/or share with triad partners.

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

+1 to Jamie's comment in the chat

From Amanda Martinez (P), Civil Rights to Everyone:

+ 1 Jamie's question and is drop out defined differently than withdrawal rates

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

these LOC provisions may be customary and traditional, but the sad fact is that they have not worked to protect students and taxpayers. LOCs are expensive to obtain: that's a feature, not a flaw. The 10% LOC has become the de facto path of least resistance for fraud.

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

I would like to request that the department provide data that supports how the previous closed schools would of been caught by these triggers and how we landed on what is a mandatory trigger vs a discretionary trigger.

From Sam (P) Fin Aid Admin to Everyone:

+1 Jamie - and it is possible that the enrollment/Title IV funds increase is a result of predatory recruitment practices.... but not always so

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

I would second Brad's data request, not because lack of predictive efficacy would invalidate these fairly reasonable safeguards, but because such a lack of efficacy would point to the need for additional predictors of institutional collapse

From Barmak Nassirian (A) Servicemembers & Vets to Everyone:

+1 on Jessica's point re # of BD claims

From Carolyn Fast (P) Consumer Advocates/Civil Rights Organizations to Everyone:

+1 to Jessica

From Jamie Studley (P) Accrediting agencies to Everyone:

Thanks, Sam. Agreed

From Johnson (P) Legal Aid to Everyone:

+1 to Yael and Jessica on volume of borrower defense claims causing discretionary trigger.

From Jamie Studley (P) Accrediting agencies to Everyone:

can you explain (ii) -- why? and why the second notification?

From Jamie Studley (P) Accrediting agencies to Everyone:

is (ii) qui tam cases?

From Johnson (P) Legal Aid to Everyone:

I think this section refers back to the earlier section on AG, Qui Tam, fed suits.