Dear Secretary Cardona:

I write to share my views on the Department of Education’s (Department’s) current negotiated rulemaking process to improve protections for students and taxpayers defrauded by unscrupulous institutions of higher education (IHEs). I am encouraged by many of the Department’s proposals, but I believe more can be done to protect students and hold bad actors accountable.

Specifically, in Issue Paper 6, “Certification Procedures,” the Department proposes to increase oversight of institutions by requiring companies that “exercise control” over a proprietary or private nonprofit institution to sign a Program Participation Agreement (PPA). The Department, in this proposal, defines an entity as “exercise[ing] control” if it has 1) 50 percent direct or indirect ownership by either voting rights or by the right to appoint board members to the institution, 2) the power to block significant actions, 3) 100 percent direct or indirect interest in the institution, or 4) provided or will provide the financial statements to meet any of the underlying requirements for institutional eligibility. These changes have been proposed to help ensure that the Department can conduct “heightened oversight of institutions,” including to hold corporate owners liable for “taxpayer losses that may be incurred by the institution.”

While this initial proposal includes many overdue and worthwhile policy changes, it fails in two key aspects: it allows individual owners and leaders to evade scrutiny by limiting the PPA

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2 See Feb. Issue Paper 6, supra 1 at pg. 5.

requirement to corporate owners only, and it uses standards for determining control that are out of alignment either with existing or proposed regulations.

**Personal Liability**

In my August 16, 2021, letter to the Department, I requested that the Department use its existing authority under the *Higher Education Act of 1965* (HEA) to hold owners, executives, and board members of defunct for-profit and converted for-profit colleges individually responsible for liabilities of the institution to the federal government when these individuals were involved in and profited from the fraud perpetrated against students and taxpayers.

Under the HEA, the Department currently has authority to recover financial losses from individuals who “exercise substantial control” over education institutions, namely board members, the chief executive officer, other executives, or major owners. In this section of the HEA, the term “exercises substantial control” can be determined by the following factors:

1) the individual or entity directly or indirectly controls a substantial ownership interest in the institution;
2) “the individual, either alone or together with other individuals, represents, under a voting trust, power of attorney, proxy, or similar agreement, one or more persons who have, individually or in combination with the other persons represented or the individual representing them, a substantial ownership interest in the institution”; or
3) “the individual is a member of the board of directors, the chief executive officer, or other executive officer of the institution or of an entity that holds a substantial ownership interest in the institution.”

In current regulations related to institutional financial responsibility, the Department considers an individual to “exercise substantial control” if he or she 1) directly or indirectly holds, including with other members of his or her family, at least a 25 percent ownership interest in the institution; 2) represents through a voting trust, power of attorney, proxy, or similar agreements, either alone or with others, at least a 25 percent ownership interest in the institution; or 3) is a board member or other executive officer of the institution or an entity that holds a 25 percent ownership interest in the institution. This section of the regulations has been proposed to be deleted in its entirety in the Department’s proposed Issue Paper 4, “Financial Responsibility,” and not adequately addressed in Section 668.176 of Subpart L, as proposed.

**Fluctuating Thresholds to Determine “Control”**

Separately, in Issue Paper 5, “Changes in Ownership,” in a proposed section 600.21(a)(6), the Department suggests using a 25 percent threshold for ownership when identifying individuals and entities that are able to “substantially affect the actions” of an institution. The Department

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6 See id. at §1099c(e)(2)(A)-(B).
7 See 34 C.F.R. §668.15(f)(2).
proposes to use this 25 percent threshold in requiring institutions that experience a change in ownership to update their applications to the Department.\textsuperscript{9}

By contrast, the Department’s proposal in Issue Paper 6 fails to capture many of the owners that the Department itself recognizes are in a position to “exercise substantial control” over an institution or to “substantially affect” an institution’s actions. The proposal in Issue Paper 6, in addition to needlessly excluding individual owners, creates different thresholds for what the Department considers substantial ownership by adopting a significantly higher ownership interest threshold for the PPA requirement (50 percent) than is used in current and proposed regulations relating to financial responsibility and changes in ownership (25 percent).

While I commend the Department for its ongoing efforts to strengthen consumer protections and hold bad actors accountable, more can and should be done to ensure that owners and executives of predatory and unscrupulous institutions who participate in and profit from the institution’s fraudulent actions are held liable for the harm they inflict on students and taxpayers. I urge the Department review Issue Paper 4 and address how the proposed deletion of 34 C.F.R. §668.15(f)(2) might impact the analysis of “exercise substantial control.” Further, I strongly urge the Department to review the proposed regulations currently under consideration to ensure that the PPA requirements included in Issue Paper 6 are consistent with previous regulations and current proposals and enable the Department to use existing authority under the HEA to hold both corporate and individual owners of institutions accountable.

Thank you for your consideration.

Sincerely,

ROBERT C. “BOBBY” SCOTT
Chairman