

What Is Negotiated Rulemaking at the US Department of Education?

Michael Brickman

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Key Points

- For decades, negotiated rulemaking has been used by administrations of both parties to enact major changes to Department of Education rules.
- While negotiated rulemaking was initially intended to make rulemaking less adversarial, it takes about 1,000 days and often adds additional hurdles without fundamentally changing the incentives or outcomes.
- Congress should at least reconsider whether negotiated rulemaking is a net benefit when it next reauthorizes the Higher Education Act and, more broadly, set a higher bar for the enactment of new regulations than for the repeal of failed ones.

The Administrative Procedures Act (APA), first passed in 1946, requires that all federal agencies obtain public input before formulating, amending, or repealing a regulation. Specifically, they must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”¹ Due to this requirement, the process of developing a rule, submitting it for public comment, and then incorporating that feedback into a final regulation with the force of law often takes years (Figure 1). The process for repealing a regulation is essentially identical to the process for enacting a regulation.

Aside from concerns with the length of the “notice-and-comment” process, which often correlates with the page length of final rules, regulated parties complained for many years that this process of obtaining public input had become a mere formality that barely affected the final policy. They wished they could simply work with their regulators directly to develop fair rules that protect the public and other stakeholders without being onerous.

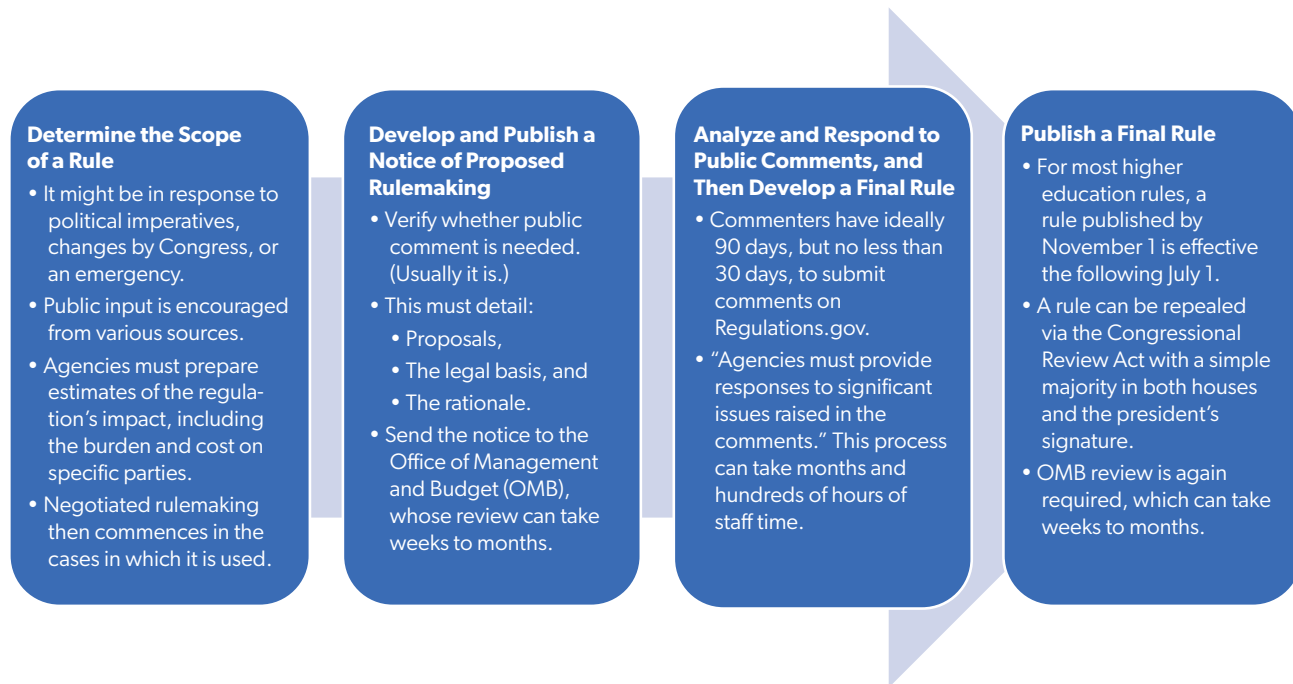
“Neg-Reg” in Theory

In 1982, an obscure federal agency called the Administrative Conference of the United States (ACUS) took note of this and agreed that the relationship between federal regulators and regulated parties was too “adversarial,” with parties often perceiving their role in the process as “positioning themselves for the subsequent judicial review,” rather than contributing to a constructive policy solution.² It predicted improvement if both sides could sit at a table and work out their competing interests.

Since it was already the case that “lawsuits challenging rules are regularly settled by agreement on a negotiated rule,” ACUS thought it might make more sense to give agencies the option to negotiate some regulations from the start, before the APA process of public notice and comment. Thus, negotiated rulemaking (also known as “neg-reg”) was born.

The idea was simple: Anyone likely to have a significant stake in a rule being considered should come to Washington, DC, and sit in a conference room for

Figure 1. The Notice-and-Comment Regulatory Process



Source: ICF, *The Reg Map: Informal Rulemaking*, 2020, https://www.reginfo.gov/public/reginfo/Regmap/REG_MAP_2020.pdf.

several days or weeks with agency staff, scientists, and other governmental or nongovernmental experts to find as much common ground as possible and craft a rule that works for all. This way, these parties can find the most efficient and amicable way to get the most value per dollar in improved safety, environmental protection, or some other aim. For these reasons, in developing neg-reg, ACUS focused significantly on rulemaking related to "highly technical standards" on which expert input and meaningful collaboration could make the most difference.

As this new procedure gained attention, members of Congress in the committees overseeing the Department of Education thought a similar process might work for higher education issues. So when it reauthorized the Higher Education Act (HEA) in 1992, Congress mandated that all regulations relating to Title IV of the HEA (e.g., Pell Grants, student loans, and accreditation) must go through a process of negotiated rulemaking before notice and comment.

There were political benefits to this. For conservatives, negotiated rulemaking meant a hope of hamstringing executive overreach. This has happened.

In recent years, the entire process has taken about 1,000 days to complete. In turn, Congress also required that many of the typically progressive-leaning higher education constituencies be at the table for all future negotiations. This came in the form of an explicit directive from Congress to include at least one representative of "students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies" on negotiating panels.³

However, other parties, such as taxpayers, may not have a similar chance to directly share their views and see their interests represented. And the inclusion of students, while admirable and politically astute, often has had the effect of muddying the discussion because few current students (even at the graduate level) typically have the expertise necessary to offer specific regulatory amendments. These students might also be serving as formal or informal activists for powerful organizations with an interest in the rules.

The mandates also ignored many of the ACUS recommendations, including that negotiated rulemaking

be a “supplemental rulemaking procedure” that “should be viewed as experimental” and that any enabling “legislation should contain a sunset provision.”⁴ If a given administration did not see value in crafting a rule with outside parties but was required to do so anyway, the process risked being just as superficial as notice-and-comment rulemaking.

A rulemaking covering the entirety of federal rules governing college accreditors, student loans, or financial responsibility for colleges and universities often leaves too many permutations to raise, debate, and agree on in just several days of debate. Thus, while neg-reg was intended to make rulemaking less adversarial, it often adds additional hurdles without fundamentally changing the incentives or outcomes beyond potentially delaying action, for better or worse.

Neg-Reg in Practice

The goal of neg-reg is consensus, and the agency’s proposals and the conversations during the rulemaking sessions naturally determine whether that goal will be achievable with the parties at the table. To launch a negotiated rulemaking, the department must first notify the public that neg-reg will take place and on which topics. It then solicits input on those topics through public hearings, which were once in person but, since COVID-19, have mostly been virtual. An invitation is then sent for nominations for individuals to serve on a negotiating panel, and it often includes additional specificity to the topics. Nominees must fit into one of the interest group categories the department defines, which must at least include those groups outlined by Congress but may be expanded to others as well. (It is worth noting, however, that this cadence is typical, but the specific announcements made in each notice have varied.)

The nominees are selected by the department in a fairly opaque process and added to one or more negotiating panels (or subcommittees reporting up to a main committee). Members selected might serve as either a primary negotiator or alternate negotiator for one of the chosen constituency groups. Primary negotiators usually have the ability to speak and vote on any questions raised during the sessions, while alternates do not unless they agree to switch places for a given topic or the primary is absent. However, some of these rules are negotiated by the participants themselves before the

substantive conversations kick off and documented in a “protocols” document. Negotiators might also add new constituencies to the panels. At each meeting, the department will provide regulatory proposals or text for discussion and feedback. Negotiators will then respond to these proposals with revisions or counterproposals. Some topics, such as technical changes, may receive immediate agreement, while others may be brought up at several meetings.

To reach consensus, parties must agree on not simply a set of broad changes but a complete set of revised regulatory text. Adjusting language, sharing competing marked-up regulatory text, and fighting over semicolons are commonplace.⁵

Note just how strange this process might appear to the uninitiated. On a good day, the mix of special interests, activists, lobbyists, and political promises contributing to a piece of legislation or notice-and-comment rulemaking may appear to those outside the Washington, DC, bubble as at a minimum vaguely corrupt. An in-depth explanation of neg-reg might even cause lifelong Beltway players to blush.

In typical policymaking procedures, accusations such as “The lobbyists wrote this regulation” are often levied against political opponents and may or may not contain varying degrees of truth. In neg-reg, however, that is literally what happens, in full view of all those who may freely attend in person (before COVID-19) or watch on the department-provided livestream. While it may be argued that the transparency is an improvement over previous methods, decisions about who is at the table and what they will discuss happen behind closed doors and are a crucially important game that department leadership must explore in depth before a negotiation even begins.⁶

The first crucial question the department must ask itself is whether it is more useful to be collaborative or combative. Is the department better off having a compromise rule that achieves less of what it wants but stands up better to public and legal scrutiny? Or is it more useful to let everyone say their piece, send them home without an agreement, and proceed to propose a rule as if the neg-reg never happened? Historically, major higher education negotiations rarely achieve consensus.

Even if negotiators reach consensus, the department must follow the APA notice-and-comment process. However, the benefits to consensus can also be large.

Under Secretary Betsy DeVos (in rulemakings on which I worked), many traditional higher education stakeholders were skeptical of her plans but eventually agreed to a compromise on topics such as accreditation, distance and competency education, and even First Amendment issues.

So far, this has given DeVos's regulatory actions more staying power than others from the Trump era, such as gainful employment and borrower defense to repayment, which Secretary Miguel Cardona's team has reversed (with negotiations that also did not achieve consensus). While achieving consensus is hard work that requires genuine compromise, it also might be encouraged if the more traditional higher education stakeholders in the room believe they are better off compromising with a secretary who has been vocal that higher education must change its ways.

The department can also set the tone in negotiations with the materials it provides negotiators. In some negotiations, the department has provided negotiators with broad "issue papers" outlining the types of changes that might be considered. In others, it immediately provides marked-up regulations showing the specific changes proposed. The former leaves open more possibilities but wastes time with blue-sky oratory. The latter, for better or worse, keeps negotiators focused on a discrete set of issues.⁷

Trade-offs like these must be considered at each step of the process. Details about the department's path can give clues to outsiders about the extent to which it is determined to reach consensus (and therefore the extent to which it sees legal or political risks in the absence of consensus) or the speed at which it hopes to move. For instance, outsiders might ask:

- Does the Education Department appoint an ideologically diverse or homogenous panel?

About the Author

Michael Brickman is an adjunct fellow at the American Enterprise Institute, where he focuses on higher education and cutting-edge innovation in education reform. He concurrently advises companies, nonprofits, and investors on the innovations changing how we work and learn.

- Is the department open or opposed to adding additional stakeholder groups if asked to do so?
- Does the department show its cards with its proposals or spend a lot of the negotiating time on preambles, principles, and other activities that may be an effort at either open-mindedness or running out the clock?
- Does the department consider meaningful revisions to its initial positions or reject alternatives out of hand?
- Is the department willing to go above and beyond through procedural changes to achieve a compromise (e.g., finding data that are requested, adding additional time to negotiations, and considering input from outside experts)?

Conclusion

Negotiated rulemaking has now been used by administrations of both parties to enact major changes to Department of Education rules. Some of the Biden administration's most significant proposed changes are still in development. While neg-reg has likely not met many of its intended goals, it has certainly slowed rulemaking down.

On the one hand, this might have resulted in more deliberately crafted rules or forced the rejection of more half-baked or politically fringe ideas. However, it has also forced administrations to spend the better part of a presidential term simply reversing what the previous administration did, with little opportunity for forward momentum. Congress should at least reconsider whether negotiated rulemaking is a net benefit when it next reauthorizes the HEA and, more broadly, set a higher bar for the enactment of new regulations than for the repeal of failed ones.

Appendix A

Table A1. Negotiated Rulemaking Timelines, 2012–24

Recent Negotiated Rulemakings	Result	Notice of Intent Date	Announcement of Hearings Date	Final Public Hearing Date	Request for Negotiator Nominations Date	Negotiations Date Range	Notice of Proposed Rulemaking Date	Final Rule Date	Effective Date	Duration of Process
2012–14: Program Integrity ⁸	No consensus. It established requirements for institutions with distance education students to receive authorization in each state and recognize reciprocity agreements.	5/1/12	5/1/12 (Updated 4/16/13, 4/30/13, and 5/13/13)	6/4/13	11/20/13	2/19/14–5/20/14	8/8/14	10/23/14	7/1/15	1,156 days
2012–14: Violence Against Women Act ⁹	Reached consensus. It updated regulations regarding reporting crimes that occur on college campuses.	4/16/13	4/16/13 (Updated 4/30/13 and 5/13/13)	6/4/13	9/19/13	1/13/14–4/1/14	6/20/14	10/20/14	7/1/15	806 days
2012–14: Gainful Employment ¹⁰	No consensus. It established accountability and transparency frameworks for gainful employment programs.	4/16/13	4/16/13 (Updated 4/30/13 and 5/13/13)	6/4/13	6/12/13	9/9/13–12/13/13	3/25/14	10/31/14	7/1/15	806 days
2015–16: Borrower Defense ¹¹	No consensus. It gave students access to processes to seek debt relief.	8/20/15	8/20/15	9/16/15	10/20/15	1/12/16–3/18/16	6/16/16	11/1/16	7/1/17	681 days
2017–18: Borrower Defense ¹²	No consensus. It revised the standard for adjudicating borrower defense claims and those arising from schools that close. It reversed some changes relating to arbitration and class-action waiver bans.	6/16/17	6/16/17	7/12/17	8/30/17	11/13/17–2/15/18	7/31/18	9/23/19	7/1/20	1,111 days
2017–18: Gainful Employment ¹³	No consensus. It rescinded the 2014 gainful employment regulations. The department separately expanded the College Scorecard.	6/16/17	6/16/17	7/12/17	8/30/17	12/4/17–3/15/18	8/14/18	7/1/19	7/1/20	1,111 days

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Recent Negotiated Rulemakings	Result	Notice of Intent Date	Announcement of Hearings Date	Final Public Hearing Date	Request for Negotiator Nominations Date	Negotiations Date Range	Notice of Proposed Rulemaking Date	Final Rule Date	Effective Date	Duration of Process
2018–19: Distance Education and Innovation ¹⁴	Reached consensus. It amended the regulations related to distance education, recognized competency-based education and subscription payments, and made other changes to promote innovative programs.	7/31/18	7/31/18	9/13/18	10/15/18	1/17/19–3/12/19	4/2/20	9/2/20	7/1/21	1,066 days
2018–19: Teacher Education Assistance for College and Higher Education (TEACH) Grants and Faith-Based Entities ¹⁵	Reached consensus. It prevented religious-affiliated students and institutions from being denied access to federal aid programs and amended the TEACH Grant program regulations to minimize the number of TEACH Grants converted to federal Direct Unsubsidized Loans.	7/31/18	7/31/18	9/13/18	10/15/18	1/17/19–3/12/19	12/11/19	8/14/20	7/1/21	1,066 days
2018–19: Accreditation and State Authorization ¹⁶	Reached consensus. It amended the regulations governing the recognition of accrediting agencies and revised some state authorization rules.	7/31/18	7/31/18	9/13/18	10/15/18	1/14/19–3/28/19	6/12/19	11/1/19	7/1/20	701 days
2021–22: Affordability and Student Loans—Income-Driven Repayment (IDR), Borrower Defense, Public Service Loan Forgiveness, and Other Topics ¹⁷	Reached consensus on four of 12 issues, including Ability to Benefit. It amended the regulations in seven areas affecting the Direct Loan Program and several areas that also affected the Perkins Loan Program or the Federal Family Education Loan Program.	5/26/21	5/26/21	6/24/21	8/10/21	10/4/21–12/10/21	Primary: 7/13/22 IDR: 1/11/23	Primary: 11/1/22 (Corrected 7/6/23) IDR: 7/10/23	Primary: 7/1/23 IDR: 7/1/24	1,132 days
2021–22: Pell Grants for Prison Education Programs ¹⁸	Reached consensus on Pell for prisoners. It implemented statutory changes that extended Pell Grant eligibility to confined or incarcerated individuals and implemented statutory changes that required proprietary institutions to obtain at least 10 percent of their revenue from sources other than federal education assistance funds.	5/26/21	5/26/21	6/24/21	8/10/21	10/18/21–11/10/21	7/28/22	10/28/22 (Corrected 11/17/22)	7/1/23	766 days

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Recent Negotiated Rulemakings	Result	Notice of Intent Date	Announcement of Hearings Date	Final Public Hearing Date	Request for Negotiator Nominations Date	Negotiations Date Range	Notice of Proposed Rulemaking Date	Final Rule Date	Effective Date	Duration of Process
2021–22: Institutional and Programmatic Eligibility (Gainful Employment, Changes in Ownership, and Other Topics) ¹⁹	No consensus. It changed regulations to provide a clearer and more defined but also more stringent process for institutions undergoing changes in ownership and control. It also reintroduced an expanded and strengthened gainful employment rule.	5/26/21 (Updated 10/4/21)	5/26/21 (Updated 10/4/21)	10/27/21	12/8/21	1/18/22– 3/18/22	5/19/23	Gainful employment: 10/10/23 Financial responsibility and Ability to Benefit: 10/31/23	7/1/24	1,132 days
2023–24: Student Loan Debt Relief ²⁰	In progress. It would forgive student loans in the wake of the Supreme Court's ruling that earlier loan forgiveness was illegal.	7/6/23	7/6/23	7/18/23	8/31/23	10/10/23– 12/12/23	TBD	TBD	TBD	TBD
2023–24: Institutional Quality and Accountability ²¹	In progress. Its topics are still unclear, but they could include revisions to earlier rulemaking on accreditation and distance education, along with regulation of third-party servicers and online program management organizations.	3/24/23 (Corrected 4/4/23)	3/24/23 (Corrected 4/4/23)	7/18/23	11/29/23	1/8/24– 3/4/24	TBD	TBD	TBD	TBD

Note: Blue cells indicate negotiations under a Democratic presidential administration. Pink cells indicate negotiations under a Republican presidential administration. Source: Author's compilation, using cited sources.

Appendix B

Examples of protocols documents include:

- **Secretary Arne Duncan (2013–14).** “U.S. Department of Education Negotiating Committee—Program Integrity and Improvement 2014 Organizational Protocols.”
- **Secretary Betsy DeVos (2018–19).** “U.S. Department of Education Negotiating Committee—Accreditations and Innovation 2019 DRAFT Organizational Protocols.”
- **Secretary Miguel Cardona (2021–22).** “2021 Negotiated Rulemaking Affordability and Student Loans Committee Organizational Protocols.”

Example lists of negotiators (from gainful employment rulemakings) include:

- **Secretary Duncan (2013–14).** “Negotiated Rulemaking 2013–2014—Gainful Employment.”

- **Secretary DeVos (2017–18).** “Accreditation and Innovation Negotiated Rulemaking Committee 2019.”
- **Secretary Cardona (2021–22).** “2022 Negotiated Rulemaking Institutional and Programmatic Eligibility Committee January–March 2022 Revised January 18, 2022.”

Example documents for negotiators to consider and debate include:

- **Redlined Regulation (from the Accreditation Rulemaking, 2018–19).** “Religious Inclusion in Title IV Grant Making.”
- **Issue Paper (from the Income-Drive Repayment Rulemaking, 2021–22).** “Issue Paper #10: Creating a New Income-Driven Repayment Plan Session 1: October 4–8, 2021.”

Notes

1. Administrative Procedure Act, 5 U.S.C. § 553, <https://www.archives.gov/federal-register/laws/administrative-procedure/553.html>.

2. Administrative Conference of the United States, “Procedures for Negotiating Proposed Regulations,” June 18, 1982, <https://www.acus.gov/document/procedures-negotiating-proposed-regulations-o>.

3. Regional Meetings and Negotiated Rulemaking, 20 U.S.C. § 1098a.

4. Administrative Conference of the United States, “Procedures for Negotiating Proposed Regulations.”

5. Examples of protocols documents under Secretaries Arne Duncan, Betsy DeVos, and Miguel Cardona, respectively, include US Department of Education, Office of Postsecondary Education, “U.S. Department of Education Negotiating Committee—Program Integrity and Improvement 2014 Organizational Protocols,” <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii-draftprotocols2014.pdf>; US Department of Education, Office of Postsecondary Education, “U.S. Department of Education Negotiating Committee—Accreditations and Innovation 2019 DRAFT Organizational Protocols,” <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/finalprotocols.pdf>; and US Department of Education, Office of Postsecondary Education, “2021 Negotiated Rulemaking Affordability and Student Loans Committee Organizational Protocols,” <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/protosept21.pdf>.

6. Examples of lists of negotiators under Secretaries Duncan, DeVos, and Cardona, respectively, include US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking 2013–2014—Gainful Employment,” August 15, 2018, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainfulemployment.html>; US Department of Education, Office of Postsecondary Education, “Accreditation and Innovation Negotiated Rulemaking Committee 2019,” <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/listofnegotiators.pdf>; and US Department of Education, Office of Postsecondary Education, “2022 Negotiated Rulemaking Institutional and Programmatic Eligibility Committee January–March 2022 Revised January 18, 2022,” January 18, 2022, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/revnegregcommist508.pdf>.

7. Examples of documents for negotiators to consider and debate include one on redlined regulation and an issue paper, respectively. See US Department of Education, Office of Postsecondary Education, “Religious Inclusion in Title IV Grant Making,” <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/religiousinclusiontitleivsession2.pdf>; and US Department of Education, Office of Postsecondary Education, “Issue Paper #10: Creating a New Income-Driven Repayment Plan Session 1: October 4–8, 2021,” September 29, 2021, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/10idrplan.pdf>.

8. For program integrity: US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking 2013–2014 Program Integrity and Improvement,” August 15, 2018, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html>; US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking Committee; Public Hearings,” *Federal Register* 77, no. 84 (May 1, 2012): 25658–60, <https://www.federalregister.gov/documents/2012/05/01/2012-10488/negotiated-rulemaking-committee-public-hearings>; US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking Committee; Public Hearings,” *Federal Register* 78, no. 73 (April 16, 2013): 22467–69, <https://www.federalregister.gov/documents/2013/04/16/2013-08891/negotiated-rulemaking-committee-public-hearings>; US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking Committee; Public Hearings; Correction,” *Federal Register* 78, no. 83 (April 30, 2013): 25235–36, <https://www.federalregister.gov/documents/2013/04/30/2013-10104/negotiated-rulemaking-committee-public-hearings-correction>; US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking Committee; Public Hearings,” *Federal Register* 78, no. 92 (May 13, 2013): 27880–82, <https://www.federalregister.gov/documents/2013/05/13/2013-11287/negotiated-rulemaking-committee-public-hearings>; US Department of Education, Office of Postsecondary Education, “Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings—Title IV Federal Student Aid Programs, Program Integrity and Improvement,” *Federal Register* 78, no. 224 (November 20, 2013): 69612–14, <https://www.federalregister.gov/documents/2013/11/20/2013-27850/negotiated-rulemaking-committee-negotiator-nominations-and-schedule-of-committee-meetings-title-iv>; US Department of Education, Office of Postsecondary Education, “William D. Ford Federal Direct Loan Program,” *Federal Register* 79, no. 153 (August 8, 2014): 46640–58, <https://www.federalregister.gov/documents/2014/08/08/2014-18673/william-d-ford-federal-direct-loan-program>; and US Department of Education, Office of Postsecondary Education, “William D. Ford Federal Direct Loan Program,” *Federal Register* 79, no. 205 (October 23, 2014): 63317–32, <https://www.federalregister.gov/documents/2014/10/23/2014-25266/william-d-ford-federal-direct-loan-program>.

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