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Leadership and Advocacy

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August 1, 2016

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue, SW
Room 6W232B
Washington, DC, 20202

Dear Mr. Gaina:

On behalf of the higher education associations listed below, I write to offer comments on the Notice of Proposed Rulemaking (NPRM) regarding borrower defenses to repayment that was published in the *Federal Register* on June 16, 2016 (Docket ID ED-2015-OPE-0103). This comment letter addresses recommendations related to the NPRM's provisions on borrower defenses to repayment. Comments on the NPRM's changes to current financial responsibility standards will be addressed in a separate letter.

Overview

We believe it is important to begin by clearly stating the two overarching principles that inform our comments in this letter.

First, we strongly support efforts to provide clear and consistent processes through which borrowers who have been defrauded or harmed by the institutions they attended may seek debt relief. Recent high-profile events have highlighted the importance of having proper mechanisms to address this need. The NPRM makes many important steps in this regard, and we commend the Department for these efforts.

The Department should have the means to protect former students who have been harmed by the colleges they attended while simultaneously continuing to improve its Title IV gatekeeping and subsequent monitoring of participating colleges and universities so that unscrupulous institutions are not allowed to remain part of the Title IV program. This will help provide needed relief for wronged borrowers while also helping to deter future institutional abuses.

In crafting the final rule, the conditions under which borrowers may seek to discharge a loan should be made as clear as possible. The final rule needs to provide a framework that can be plainly understood by students and institutions to ensure that the defense to repayment is used appropriately to provide relief where warranted.

Second, it is critical that the process is fair and that the final rule establishes procedures to ensure that institutions can present their perspectives in the determination of any claims brought against them. Legitimate institutions must be assured adequate consideration

because the federal government will seek to be reimbursed for funds it has used to provide debt relief to borrowers.

With these principles in mind, we again stress that we support the overarching goals of the regulation. We have no tolerance for any institution that would defraud students—these bad actors must be held accountable. Our comments here focus on a limited number of areas in which additional definition and clarity are needed to improve the final rule. These clarifications are meant to ensure the rule is targeted to provide borrowers relief from clear examples of serious and egregious wrongdoing, while at the same time provide a fair process for institutions.

Administrative Issues

The NPRM does not specify a reasonable timeframe by which victims of fraud must have their claims addressed. The process for consideration of individual and group borrower defense claims could continue indefinitely. Under the proposed regulations, upon submission of a borrower defense claim, a borrower's loan would go into forbearance for a loan not in default or collection would be suspended for a defaulted loan. Without a specified time limit for the resolution of claims by the Department, borrowers could see interest accumulating, theoretically for years, while awaiting resolution.

Our concern about this is heightened by the likelihood that publicity following the issuance of the final rule may generate, at least initially, a substantial number of new applications for relief that could overwhelm the Department's administrative capacity. It is not clear that the Department has an adequate number of trained personnel capable of serving as fact-finders and adjudicators, particularly as the processes outlined in the proposed rule have the potential to be time-intensive and to require significant contact with borrowers. It is critical that the Department specify a period of time within which all claims should be resolved. This would benefit both borrowers and institutions, as we will describe in the following paragraphs.

Although the preamble to the NPRM notes areas to which borrower defenses would not apply, the proposed regulatory language does not establish clear guidelines and procedures to handle the dismissal of frivolous or otherwise unwarranted claims. We suggest that, at a minimum, the Department should have a process to expeditiously ascertain whether borrower defense claims meet a threshold of material and significant harm to borrowers, before reviewing the claims. This would help ensure that frivolous claims or those based on immaterial errors are weeded out and would facilitate the timely handling of meritorious claims.

Another procedural concern is that there is no established standard for what qualifies as a "group" under a group defense to borrower repayment. This raises the possibility of organized and systemic abuse of a system intended to provide relief to victims of fraud. The current structure will encourage lawyers and other third-party consultants to find potential groups to work with to raise claims the Department would identify as group

claims. Such lawyers and third-party consultants may have arrangements with borrowers to be paid a contingency fee based on the group's success. The possibility of such arrangements creates added incentives to bring claims, and we have already seen numerous media accounts detailing ongoing efforts of this type. We are concerned about the detrimental effect this could have on borrowers who might be preyed upon by unscrupulous for-profit entities, making false promises of relief in an effort to obtain a fee.

Finally, we believe the NPRM would be improved with the inclusion of a statute of limitations on the filing of claims. We recognize that in some instances, it could take some time before fraud by an unscrupulous institution may become apparent. Any limitation must ensure that borrowers have sufficient time to seek relief. At the same time, we believe that some defined period could help encourage borrowers to file claims when evidence is most readily available. In addition, we note that typically, institutions are legally required to maintain relevant records for three years. The Department should balance these interests when determining the appropriate period. We support the six-year limit on borrowers' ability to be reimbursed for past loan payments based on breach of contract and misrepresentation included in the NPRM.

In addition, the time limit that applies to loans disbursed prior to July 1, 2017 should be clarified. The preamble seems clear that these loans come under the provisions of the current law and the processes in the NPRM. But there seems to be some confusion/conflict about this in the proposed regulations in Sec. 685.206[1] and Sec. 685.222, specifically the time limits and bases for older borrower claims. Adding to the confusion, Sec. 685.212 (k)(1)(ii) (A) and (B) draws a distinction between the two processes.

Defining the Type and Nature of Claims

In attempting to define the circumstances under which a defense to repayment could be asserted, the NPRM understandably seeks to ensure that no reasonable incident of fraud would be excluded. In doing so, however, the NPRM includes excessively broad language that could create significant uncertainty.

The proposed regulations would substantially expand the types of claims a borrower could bring as a defense to repayment. The three new types of borrower defense claims set out in the proposed regulations are broadly defined, with no meaningful limitations.

For loans first disbursed on or after July 1, 2017, a borrower defense would be defined as "an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided," and that meets the elements of one of the new borrower defense claims:

1. Breach of contract

[1]We note that Sec. 685.206(c) refers to the order of objections for defaulted Direct Loans as being in Sec. 685.222(a)(1) to (6). It appears that this reference should be to Sec. 685.222(a)(6).

2. Substantial misrepresentation
3. Non-default, favorable contested judgment

As drafted, the new borrower defense claims are vague and should be clarified to focus on examples of serious and egregious misconduct. We would like to focus your attention on the following issues, which we believe are of the most concern:

- The term "provision of educational services" in the definition of a borrower defense is an attempt to focus the scope on acts or omissions relevant to the institution's academic programs. We agree with the Department's goal in the use of this language but believe the phrase is too broad and could be considered to encompass all campus activities. We would suggest clarifying the definition to focus on the underlying issue. For instance, "the provision of educational services related to the program of study" might be a clearer definition.

- For purposes of the breach of contract borrower defense claim, the Department takes the position that what constitutes a contract between the institution and the borrower will depend on the circumstances of each claim, without regard to applicable state law or institutional statements regarding what constitutes a contract. Further, the Department makes clear in the preamble that even immaterial contract breaches may provide a basis for borrower relief. This is an attempt to address situations where representations across a range of materials would represent an overall breach of contract. Considering the scope of materials covered, the Department should include language clarifying that the circumstances they are considering represent systemic efforts encompassing material breaches of contract and identify the general standards that would be used to make those determinations.

- The proposed regulations expand the definition of "misrepresentation" in ways that could capture inadvertent errors. For example, the rule does not require knowledge or intent on the part of the institution and can entail omissions of information, where such omissions make the statement false, erroneous, or misleading. Although the Department argues in the preamble that there are protections against frivolous claims of misrepresentations, the Department should include language in the regulation itself clarifying that any misrepresentation must be "material and substantial" in order to serve as the basis for a borrower defense claim.

- To the extent the Department suggests any limitations on the new borrower defense claims, those limitations are primarily described in the preamble, which is subregulatory guidance and will not be part of the final rule. This creates uncertainty as to whether such limitations will be applied in practice. Further, even where the Department describes limitations—such as with respect to noncompliance with the Higher Education Act and sexual and racial harassment allegations—the Department leaves open the possibility that such limitations may not apply if the underlying facts otherwise support a borrower defense claim. This creates the possibility that the rule

would effectively allow any type of claim because ostensibly excepted claims may be restructured as breach of contract or misrepresentation claims.

Due Process

Borrowers and institutions are best served by the establishment of a clear and robust process that includes basic procedural safeguards to ensure that accurate decisions are made as expeditiously as possible. As drafted, the proposed regulations set forth two sets of procedures, one for individual borrower defense claims and one for group borrower defense claims. Unfortunately, those procedures are vague, fail to provide opportunities for meaningful participation by institutions, and lack basic due process protections.

- Neither set of procedures makes clear whether the Department will formally solicit institutional input or the extent to which such input will factor in the Department's decision.

- The individual borrower process requires the Department to identify to the borrower the records the official considers relevant to the defense, but leaves to the Department's discretion whether it will identify those documents to the institution. Moreover, the individual borrower defense procedure does not even require the Department to inform the institution of the Department's determination whether to approve the borrower defense and any relief provided. And the proposed regulations also are silent on the process that may be used to collect from the institution any amount of relief resulting from the borrower defense. The institution would have no ability to appeal the merits of a decision, even though the borrower would have the opportunity to request reconsideration of the claim based on "new evidence," and the Department would have the opportunity to reopen the claim at any time based on such evidence. In all these cases, the regulation should specify procedures to provide for institutional involvement in these actions.

- Under the group borrower process, the Department would have complete discretion to determine whether a group claim is appropriate and who should be in the group. The proposed regulations offer no objective standards for determining when a group claim is appropriate (by contrast, see for example, Rule 23 of the Federal Rules of Civil Procedure for class actions.) This should be provided in the final rule. Further, although the group process suggests that the Department will allow the institution to provide a response, the proposed regulations offer virtually no detail regarding how the fact-finding process will be conducted. This process also should be detailed in the final rule.

- The NPRM states that institutions will be notified regarding the basis of group borrower defense claims being brought against them "when practicable." While this language is intended to address situations where institutions have closed and notice is therefore impossible (or irrelevant), it would be better to simply state this clearly rather than include ambiguous language regarding notice.

Consolidated Loans

The new borrower defenses would apply retroactively insofar as they are unclear as to whether consolidation of loans that were made before July 1, 2017 would be treated as a loan first made on or after July 1, 2017; if so, the proposed regulations would apply new standards retroactively.

The regulations are confusingly written in terms of which borrower defenses apply to Direct Consolidation Loans, i.e., the defenses for loans first disbursed prior to July 1, 2017, or the defenses for loans first disbursed on or after July 1, 2017. The Department seems to have in mind that where a borrower asserts a claim with respect to a Direct Loan that was consolidated, the applicable borrower defenses would depend on the date on which the first Direct Loan for which a claim is asserted was disbursed. Where a borrower asserts a claim with respect to a consolidated loan that is not a Direct Loan (e.g., FFEL, Perkins, or other eligible loan), the applicable borrower defenses would depend on when the Direct Consolidation Loan was made, not when the underlying loan was made. Such a situation means that in certain cases—where loans other than Direct Loans were first made before July 1, 2017 and are consolidated into a Direct Consolidation Loan that was first made on or after July 1, 2017—the new borrower defenses will have retroactive effect.

Conclusion

We strongly support the goals of the NPRM and believe that the proposal includes many important improvements to help ensure that borrowers who are defrauded by an institution can receive the debt relief to which they are entitled. As you work toward a final rule, we urge you to continue to clarify the regulatory language to ensure that it will best serve borrowers, hold fraudulent institutions accountable for their misconduct, and ensure a fair process for legitimate institutions.

Thank you for the opportunity to comment on this NPRM. We appreciate your attention to our concerns.

Sincerely,

Molly Corbett Broad
President

On behalf of:
American Association of Community Colleges
American Council on Education
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges

Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Council for Christian Colleges and Universities
Council for Higher Education Accreditation
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
Thurgood Marshall College Fund
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On behalf of the higher education associations listed below, I write to offer comments on the Notice of Proposed Rulemaking (NPRM) regarding borrower defenses to repayment that was published in the *Federal Register* on June 16, 2016 (Docket ID ED-2015-OPE-0103).

As we have noted in a companion letter, it is clear that the Department is tackling a difficult problem and is proposing valuable remedies for borrowers who have been misled or defrauded by their institutions. We strongly support the Department's efforts in the NPRM to curb abuses and support harmed students.

We support the overarching goals of the NPRM: to streamline the debt relief process for borrowers who have been defrauded and hold these institutions accountable. However, some provisions could be improved to better meet these goals while minimizing unintended consequences. Our companion letter comments on a limited number of issues related to the borrower defense portion of the NPRM. In this letter, we focus specifically on the NPRM's proposed changes to the financial responsibility standards.

The NPRM represents a significant shift in the Department's approach to determining whether an institution is financially responsible and the consequences for being found "not financially responsible." As proposed, these provisions are likely to result in adverse and unintended consequences for many institutions. The effects of the NPRM may be particularly harsh for smaller, tuition-dependent nonprofit institutions, many with a mission of serving low-income and first-generation students. Such a dramatic re-envisioning of the financial responsibility standards is particularly troubling in light of the widely known problems with the Department's current method for determining an institution's composite score—a process which often is inaccurate and can lead to deeply misleading indicators regarding the financial health of the institution.

When the original elements of the financial responsibility regulations were determined over 20 years ago, they resulted from a deliberative and inclusive process that started from two basic principles. The first principle was that the goal of these regulations was to prevent the sudden or precipitous closure of an institution, leaving students in the lurch. The second was a recognition that the composite score methodology was not

perfect and that there was a need for an alternative process to cover institutions that may be financially weak, as indicated by a lower composite score, but nonetheless viable. This evaluation would be done on a case-by-case basis via the "Zone Alternative."

The changes proposed in the NPRM would fundamentally alter these core principles. The inclusion of a number of automatic triggering events that are not related to financial solvency, including actions by accrediting agencies, institutional cohort default rates, and dropout rates, would inappropriately shift the emphasis of these regulations from financial oversight to much broader accountability measures. Such measures may be worthy of discussion and enhancement, but they are not indicative of an institution's financial health and should not be included in this NPRM.

The triggering provision entitled "Other events or conditions" would give exceptionally broad and undefined authority to the Secretary of Education. This provision provides the Secretary with the authority to determine "that an event or condition is reasonably likely to have an adverse impact on the financial condition, business, or results of operations of the institution," and deem that a triggering event. This provision seemingly allows the Secretary to deem something that is irrelevant to an institution's financial health to be a triggering action, with all the attendant consequences of that determination. For example, because of the calculations involved, a small, private nonprofit college might show a significant change in the amount of federal aid it disburses in terms of percentage, when the actual numbers may be relatively low.

These consequences are substantial. The cost to an institution of securing a line of credit can be high, and one may need to be purchased for three consecutive years. This imposes a costly and undue burden on institutions that would otherwise be financially sound. The fact that the amount needed to be secured for meeting one trigger would stack with other triggering events only serves to magnify the impact on institutions, considering the wide scope and large number of triggers. It is not hard to foresee a set of circumstances in which an institution that may not be financially robust but is fully capable of meeting its financial obligations is driven into closing as a result of one or more automatic triggers being enforced. Such a result will not serve students' interests.

Further, the proposed thresholds for whether a trigger is material are set far below accepted materiality standards, due to the "lesser of" construction. This means that for almost all institutions, from small theological seminaries to large research universities, the NPRM sets a materiality threshold of $750,000. The NPRM also relies on a term ("current assets") that is not used by private nonprofit institutions, and would necessarily introduce confusion and result in widely varying interpretations. Accounting standards do not require classified financial statements from nonprofit organizations. Further, the definition of current assets differs between nonprofit and proprietary entities. The inclusion of such a threshold points to a lack of participation in the rulemaking process by individuals with detailed knowledge of institutional finances. While we are opposed to the inclusion of financial responsibility triggers in the NPRM, if this provision were to remain, it should be significantly revised to reflect a meaningful gauge of an institution's exposure.

The concept that the Department should recognize the limitation of the composite score is particularly meaningful to institutions, since the inaccuracy of the composite score calculation by the Department has been repeatedly demonstrated in the last few years. As previously noted, current regulation addresses this problem to some degree by employing the "Zone Alternative." This allows schools scoring slightly under the 1.5 composite score threshold to be considered financially responsible under certain conditions. Under the NPRM, however, the Zone Alternative has been gutted and would no longer be an available option for many financially viable institutions.

Currently, certain events experienced by institutions "in the zone" must be reported to the Secretary. This gives the Department's case management teams some discretion with regard to the stringency of any additional monitoring that might be required. The NPRM would turn these events into mandatory triggers for the Secretary to impose provisional certifications and require letters of credit from institutions that are financially viable, by the Department's own reckoning. Superseding the procedural structure of the Zone Alternative through the use of automatic triggers, as this NPRM proposes to do, would therefore effectively nullify the ability of these institutions to demonstrate their financial health before sanctions are imposed.

Financial responsibility standards are meant to ensure that Title IV funds are protected and that institutions will not close suddenly, leaving student borrowers without any recourse. This is a valuable goal, and while there are significant flaws in how the composite score is currently determined, the overall approach is a sensible one.

However, the new proposals contained in this NPRM would undermine the effectiveness of the Department's financial oversight of institutions. These new provisions would replace a thoughtful process based on each individual institution's unique circumstances with a process based on numerous new and overlapping automatic triggers that are tied to indicators that are vague or unrelated to an institution's financial standing. The proposed rules then inflict further reputational damage to institutions mistakenly caught up in this web by requiring them to publicly disclose on their home page the fact that they have been required to provide these financial assurances to the Department.

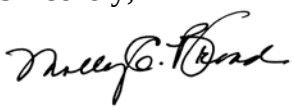
The ultimate effect, were this section of the NPRM to be promulgated into final regulations, would be to layer damaging penalties on institutions that are serving students well and that would otherwise meet their obligations under Title IV. We urge you to decouple assessing an institution's financial standing with the worthy goal of trying to establish regulations to protect borrowers who have been defrauded of their education and consider the variety of financial responsibility issues—current, proposed, and upcoming FASB changes—in a separate process.

We believe we have clearly demonstrated the harm that would be caused by the changes to the financial responsibility standards contained in this NPRM and why these proposed provisions should not be included here. But at a minimum, given the complexity of these proposed changes and the concerns they raise, we urge the Department to review the public comments and issue a revised NPRM. This would at

least afford better clarity about the Department's intentions regarding various aspects of the proposed rules and provide an opportunity for more specific and targeted comments from the community.

Thank you for the opportunity to comment on this NPRM. We appreciate your attention to our concerns.

Sincerely,



Molly Corbett Broad
President

On behalf of:
American Council on Education
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Council for Christian Colleges and Universities
Council for Higher Education Accreditation
National Association of College and Business Officers
National Association of Independent Colleges and Universities
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