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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
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