ConsumersUnion®
POLICY & ACTION FROM CONSUMER REPORTS

September 16, 2015

Wendy Macias
U.S. Department of Education
1990 K St. NW, Room 8013
Washington, DC 20006

RE: Negotiated Rulemaking Committee; Public Hearings [Docket ID: ED-2015-OPE-0103]

Dear Ms. Macias:

Consumers Union, the policy and advocacy arm of Consumer Reports,[1] appreciates the opportunity to testify in response to the Department's plans to convene a negotiated rulemaking committee that will address procedures for asserting a defense to repayment of federal education loans, among other things.

We urge the Department to take full advantage of this opportunity to set clear rules of the road that will protect our college students from schools that saddle them with oppressive debts for a poor-quality education. The Department should define success for this committee as no less than a complete package of proposals to provide widespread relief for students as appropriate and meaningful accountability for problematic schools, using the full extent of its authority under the Higher Education Act.

This rulemaking presents a crucial opportunity for the Department to help right the many wrongs that certain unscrupulous schools have inflicted upon students in recent years. To that end, we urge the Department to:

- Apply automatic classwide loan discharges for students where the evidence warrants it. Consider a range of relevant evidence – including, but not limited to both state and federal enforcement actions or other findings, lawsuits, and documented student complaints.
- Allow discharges regardless of the type of federal education loan, and regardless of when the student borrowed.
- Create a clear, simple process for students who wish to assert an individual defense to repayment. The process should be standardized and easy to use; students should not need a lawyer to help them complete it.
- Leave room for states to do more. Nothing about the process the Department creates should preempt states that wish to provide additional relief to students within their jurisdiction.

[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

We also urge the Department to take up the following additional topics for this rulemaking:

- Prevent manipulation of cohort default rates and evasions of the 90/10 rule.
- Update regulations to expand access to loan discharges based on school closure or false certification.
- Ban the inclusion of arbitration clauses in enrollment contracts. Students deserve the right to have their day in court if schools harm or mislead them.
- Take remedial action to recover misused funds from schools and their executives.
- Monitor emerging issues in light of Corinthian Colleges' bankruptcy, to ensure students do not experience further harm. For example, the Department may want to consider requiring clearer accounting of Title IV funds held in trust for the Department and to be disbursed to students.

All too many students in recent years have ben subjected to aggressive sale pitches that some schools, especially for-profit career colleges, have made about great training and job prospects. Relying on these promises, students have taken on significant debts to attend such programs. In light of the massive and unprecedented collapse of Corinthian Colleges, students are struggling to find an end in sight to the harms they have experienced as a result of attending campuses that are now closing or being sold. Meanwhile, students at other colleges are still experiencing similar abuses, taking on onerous debts for questionable college programs.

The Department should take this opportunity to write rules that ensure students have fair and meaningful access to relief via defense to repayment. The time is past due to provide sensible avenues to remedy the well-documented harms that certain schools have caused students, so that students can get relief from illegitimate debts and move on with their lives.

Apply classwide cancellation, automatically, where sufficient evidence already exists. The Department has already indicated that it will look to existing evidence of wrongdoing to ease the burden on students to prove their claims against Corinthian Colleges.[2] We urge the Department to streamline even further and use such evidence, where sufficient to assert a defense to repayment, to establish *automatic* relief on a classwide basis for affected students.

Abuses at for-profit colleges are by now common knowledge. For example, according to an extensive two-year investigation by the U.S. Senate,[3] some for-profit colleges use aggressive marketing practices to specifically target people from underserved populations for recruitment. These students may have very little income and may be subject to other stressers that motivate them to seek a better life through education. Many for-profit schools have come under fire with state attorneys general for falsifying

[2] Press Release, U.S. Dep't of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015), *available at* http://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges.

[3] S. COMM. ON HEALTH, EDUCATION, LABOR & PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, S. REP. NO. 112-37, pt. 1 (2012).

job placement numbers to hide poor outcomes from potential students.[4] Meanwhile, students attending for-profit colleges are much more likely to drop out of their programs, and ultimately default on their loans.[5] Students in this position in particular should not have to bear the burden of affirmatively asserting a defense to repayment where the evidence already exists to justify debt cancellation.

While we appreciate the Department's efforts to date to determine existing evidence of wrongdoing that could make students eligible for classwide relief – such as the finding that Heald College campuses misrepresented job placement numbers in violation of California law[6] – we believe that it is still too burdensome to require individual students who attended Heald to submit additional paperwork asserting a defense to repayment. Where evidence exists that students systematically relied on schools' aggressive marketing and misrepresentations, and took on debts to attend the programs, those students shouldn't have to take extra steps to explain how they relied on false promises, or how to quantify the full extent of harm they experienced. The simpler and fairer approach would be to cancel their debts automatically.

The Department's own regulations provide precedent for automatic discharges. Pursuant to existing false certification regulations for Direct Loans, the Secretary reserves the authority to discharge a loan "without an application from the borrower" if the Secretary already possess information indicating that the borrower qualifies for the discharge.[7] Likewise here, students should receive automatic loan discharges if the Department possesses information indicating that those students are eligible for a loan discharge via defense to repayment.

Ensure that students with loans from all federal education loan programs can obtain relief via defense to repayment. The Department has made clear that the authority already exists to do so,[8] and it's important that this process remains as straightforward for the Department to administer as possible. It shouldn't matter what type of federal loan a student holds, or when the student borrowed; if evidence comes to light showing that a school took advantage of its students, the defense to repayment mechanism should be available to them. Anything less would produce inequitable results and fail to accomplish the committee's objectives.

---

[4] *See, e.g.*, Press Release, Attorney General Conway Files Lawsuit Against Third For-Profit School (Sept. 27, 2011), *available at* http://migration.kentucky.gov/newsroom/ag/nationalcollegesuit.htm; Press Release, AG Schneiderman Announces Groundbreaking $10.25 Million Settlement with For-Profit Education Company that Inflated Job Placement Rates to Attract Students (Aug. 19, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-1025-million-dollar-settlement-profit; Press Release, Attorney General Kamala D. Harris Files Suit in Alleged For-Profit College Predatory Scheme (Oct. 10, 2013), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-alleged-profit-college-predatory.

[5] S. REP. NO. 112-37, pt. 1, at 17.

[6] *See* Letter from Robin S. Minor, U.S. Dep't of Educ. To Jack D. Massimo, Corinthian Colleges, Inc. (Apr. 14, 2015), *available at* http://www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf.

[7] 34 C.F.R. § 685.215(c)(7) (2015).

[8] *See* Office of Postsecondary Education; Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee; Establishment, 60 Fed. Reg. 11004 (Feb. 28, 1995) (notice of intent to establish committee to create rules for defense to repayment applicable to Direct Loan, FFEL and Perkins loan programs).

Count a broad range of evidence as sufficient to assert a defense to repayment. The Higher Education Act directs the Department to define which acts or omissions that constitute a defense to repayment.[9] Department regulations from 1994 state that students can assert a defense to repayment if a schools' acts or omissions would give rise to a cause of action under applicable state law.[10] However, the Department has broad authority to define the scope of acts or omissions that trigger a defense to repayment – and we urge the Department to fully use this authority here. In addition to acts or omissions that would give rise to a cause of action under state law, we urge the Department to include state and federal enforcement actions, pleadings or other findings, as well as other criminal or civil lawsuits and documented student complaints.

If a student seeks to assert a defense to repayment on an individual basis, the process must be streamlined and simple to understand. Legal aid attorneys have been overwhelmed by the influx of students seeking assistance stemming from the collapse of Corinthian. Furthermore, as a general matter, free legal services are drastically underfunded and most students will never get to speak with a lawyer. The process the Department creates for asserting a defense to repayment must be designed with the assumption that most applicants are completing the process on their own.

Create a process that leaves room for the states to do more. While this process may become a primary avenue for students seeking relief, the Department's regulations should not in any way preempt state actors from providing additional relief or taking further steps to rein in abuses by bad actors.

In addition, we urge the Department to use this rulemaking to further rein in low-performing schools, and ensure that defrauded students can obtain relief through other mechanisms aside from defense to repayment. Schools need to be held accountable when their programs are doing little more than saddling students with taxpayer-financed debts that they cannot afford to repay.

Prevent misuse of forbearances and campus consolidations to evade the law. In recent years, some career colleges have engaged in tactics such as steering students into loan forbearances and deferments, as well as consolidating higher- and lower-performing campuses, to mask their students' widespread inability to repay their loans just long enough to keep them out of default for the purpose of calculating CDRs.[11] The overuse of forbearances, in particular, has enabled many for-profit career colleges to evade gainful employment requirements for Title IV funds eligibility, as both Senate research[12] and the Department's own investigations[13] have revealed.

The Department should update its regulations to clarify the circumstances under which a forbearance is "for the benefit of the student borrower"[14] compared with alternatives such

[9] 20 U.S.C. § 1087e(h) (2012 & Supp. III).
[10] 34 C.F.R. § 685.206(c)(1) (2015).
[11] S. REP. NO. 112-37, pt. 1, at 174-85.
[12] *See id.* at 176-79.
[13] Letter from Sec. Arne Duncan to Senator Tom Harkin, Chair, Senate Health, Education, Labor & Pensions Committee 3 (Feb. 27, 2013), *available at* http://www.protectstudentsandtaxpayers.org/wp-content/uploads/2013/10/Duncan_to_senate_cdr_20130217.pdf.
[14] *See* 20 U.S.C. § 1078(c)(3)(B) (2012 & Supp. III).

as income-driven repayment plans, and take steps to prevent evasion of gainful employment requirements more broadly.

The Department should also prevent the use of campus consolidation to similarly evade the 90-10 rule,[15] which requires for-profit colleges to obtain at least 10 percent of their revenue from non-Title IV funding sources.

Expand access to loan discharges on the basis of false certification. The Department should clarify and expand existing regulations to ensure that students subjected to fraud can obtain relief in a range of circumstances that constitute "false certification" on the part of the school.[16]

Current regulations set forth narrow circumstances under which a student can assert false certification. Discharges are available if a school falsely certified a student's ability to benefit from the specific job training offered or the student's high school graduation status, or where a forged signature or identity theft was involved.[17] However, the statute confers more room for interpretation. The Higher Education Act permits loan discharges where the school falsely certified a student's "eligibility to borrow" or where identity theft was involved.[18]

In recent years, several state attorneys general have sued for-profit career colleges for aggressively marketing career education programs that fail to meet the necessary accreditation requirements for students to obtain licensure or get any job in their field of study.[19] In addition, many schools have falsely certified students' academic progress despite their students' subpar performance in class.[20] If a school is engaging in practices that result in a student's failure to learn or have a fair shot at finding a job in a relevant field, then the school is likely making false representations as to the student's satisfactory academic progress – a basis for declaring the student ineligible to borrow

---

[15] *See* S. RPT. 112-37, pt. 1, at 159-74. These longstanding abuses are well-documented in the Senate report.

[16] *See* 20 U.S.C. § 1087(c) (2012 & Supp. III) (authorizing loan discharge if an institution closes before a student can complete course of study, or if a student's eligibility to borrow was "falsely certified" by the institution); 20 U.S.C. § 1091(a)(2) (requiring students to make satisfactory academic progress, as defined in subsection (c), in order retain eligibility for federal loans).

[17] *See* 34 C.F.R. §§ 682.402(e)(1)(i)(A-C), 682.402(e)(13) (2015) (FFEL regulations); 34 C.F.R. § 685.215(a) (2015) (Direct Loan regulations).

[18] 20 U.S.C. § 1087(c)(1).

[19] *See, e.g.*, Attorney General Suthers Announces Consumer Protection Settlement with Argosy University (Dec. 5, 2013), *available at* http://www.coloradoattorneygeneral.gov/press/news/2013/12/05/attorney_general_suthers_announces_consumer_protection_settlement_argosy_unive (Colorado); Press Release, Madigan Sues National For-Profit College (Jan. 18, 2012), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2012_01/20120118.html (Illinois); Dennis Domrzalski, *AG's Office Sues ITT Educational Services*, ALBUQUERQUE BUSINESS FIRST, Feb. 27, 2014, *available at* http://www.bizjournals.com/albuquerque/news/2014/02/27/ags-office-sues-itt-educational.html (New Mexico).

[20] *See, e.g.*, Ashlee Kieler, *Corinthian Colleges Employee: "We Work for the Biggest Scam Company in the World,"* CONSUMERIST, July 24, 2014, http://consumerist.com/2014/07/24/corinthian-colleges-employee-we-work-for-the-biggest-scam-company-in-the-world/ (current and former instructors ordered to ensure courses are impossible to fail); Kelly Field, *Faculty at For-Profits Allege Constant Pressure to Keep Students Enrolled*, CHRON. OF HIGHER ED., May 8, 2011, *available at* http://chronicle.com/article/Pawns-in-the-For-Profit/127424/ (former Kaplan instructors describe pressure to retain students at all costs).

further funds.[21] The Department should make false certification discharges available to students when such abuses take place.

Broaden access to closed school discharges. As with false certification, the Department's regulations are much narrower than the statute requires.[22] The regulations' time restrictions and paperwork requirements for applying for a closed school discharge pose significant barriers to students who were at some pointed defrauded by a school that later closed, leading to uneven and inequitable outcomes.[23] The Department should broaden access to this relief option as well.

Ban mandatory arbitration clauses in enrollment contracts as a condition of schools entering into program participation agreements. It is totally inappropriate to allow schools to invoke arbitration clauses to shield themselves from responsibility when they take advantage of students and taxpayers. Recent class actions against for-profit colleges have been stymied due to arbitration clauses in enrollment contracts, even in cases where students presented strong evidence of fraud and abuse, due to the preemptive effect of class action bans in arbitration clauses under current federal law.[24] Students are often unaware that these clauses are buried in the contracts until they have already experienced harm and are seeking relief. Outcomes in arbitration tend to skew heavily in favor the company requiring it, making it a woefully inadequate forum for people who have been harmed to obtain justice and be made whole.[25] For these reasons, the Department should take a stand against such clauses as a condition of being able to participate in Title IV programs.

Hold schools and their executives liable for misuse of federal funds. In addition, we urge the Department to use the full extent of its authority to recover funds from schools and their executives where evidence of fraud and abuse exists. The Department's existing regulations state that the Secretary may require repayment of funds – and impose fines or other sanctions – against schools that violate federal laws or engage in negligent or willful false certification.[26] However, the Secretary has even broader statutory authority to impose liability on schools, as well as personal liability on individuals "who exercise substantial control" over a school's operations, to ensure Title IV program integrity.[27] The Department should update its regulations to make clear that it will take aggressive action to recover misused funds from schools, and certain individuals as appropriate,

---

[21] *See* 20 U.S.C. §§ 1091(a)(2), (c)(1) (2012 & Supp. III) (in order to be eligible to receive aid, including loans, student must be making "satisfactory progress" in their course of study).
[22] The HEA simply states that if a school closes, the Secretary can cancel the loan. *See* 20 U.S.C. § 1087(c)(1).
[23] *See* 34 C.F.R. §§ 682.402(d)(1)(i) (2015) (FFEL regulations) (must withdraw no more than 120 days prior to school closure, unless exceptional circumstances apply), (d)(3) (sworn statement and other requirements to apply for discharge); 34 C.F.R. § 685.218(c)(1) (2015) (Direct Loan regulations) (imposing similar restrictions).
[24] *See, e.g.*, Bernal v. Burnett, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011) (citing Supreme Court precedent in *AT&T Mobility v. Concepcion* as grounds to compel arbitration).
[25] *See, e.g.*, CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, SECTION 5: WHAT TYPES OF CLAIMS ARE BROUGHT IN ARBITRATION AND HOW ARE THEY RESOLVED? 13 (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (in study sample, consumers obtained relief only 20.3% of the time, and only 12 cents for every dollar they claimed).
[26] 34 C.F.R. § 685.308 (2015) (Direct Loan regulations).
[27] 20 U.S.C. §1099c(e)(1)(B) (2012 &. Supp. III).

when they have harmed students and taken unfair advantage of access to the federal financial aid system. Students and their families deserve better – as do all of us, the taxpayers subsidizing these programs.

Monitor emerging cash management issues in light of Corinthian Colleges' bankruptcy. Finally, we have forward-looking concerns about failing schools that may have federal funds commingled with other revenue prior to their collapse. Given the ongoing challenges the Department is facing in its attempts to trace federal funds still held by Corinthian as part of its estate,[28] we believe that this could spell trouble for former students later on. It would be grossly unfair if defrauded students were unable to recoup at least some of their losses – or even worse, were pursued for disbursements they never received – due to Corinthian's or any other school's poor accounting practices. The Department should consider developing guidance for schools, especially those subject to heightened cash monitoring, as to the best way to account for Title IV funds in their possession.

We appreciate the opportunity to participate in the public hearings for this effort, and look forward to working with the Department on these important issues as the committee convenes.

Sincerely,

Suzanne Martindale
Staff Attorney

[28] *See* Motion at 6, *In re* Corinthian Colleges, et al., No. 15-10952 (Bankr. D. Del. Aug. 14, 2015).