National Council of Higher Education Resources

NCHER

September 16, 2015

Submitted via the *Federal e-Rulemaking Portal*
http://www.regulations.gov

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

Re: Docket ID ED-2015-OPE-0103

Dear Ms. Macias:

On behalf of the National Council of Higher Education Resources (NCHER), thank you for the opportunity to provide comments concerning the Department of Education's announcement of its intent to establish a negotiated rulemaking committee to develop regulations on determining which acts or omissions of an institution of higher education may be asserted as a defense to repayment.

NCHER is a nonprofit trade association that represents a nationwide network of higher education assistance agencies that administer education programs that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our members have a long history of servicing and collecting on federal loans made under the Federal Family Education Loan Program (FFELP) and private student loans. A number of our members also currently have contracts with the U.S. Department of Education to service and recover federal Direct Loans. Many of our members, including state agencies and state-designated authorities, also provide higher education access, outreach and financial literacy programs, counseling, and delinquency and default aversion services.

By way of background, we note that Title IV, Part D of the Higher Education Act provides that the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense for a loan made under the Federal Direct Loan Program.[1] We assume this is the statutory basis for the regulation to be negotiated by the committee. The regulations for the Direct Loan Program already provide that, "in any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under state law."[2] The Plain Language Disclosure that is used in conjunction with the Master Promissory Note for Federal Direct Stafford and Unsubsidized Stafford Loans (MPN) mirrors the regulation, as it states that in certain cases the borrower may assert as a defense against collection that the borrower's school did something wrong or failed to do something it should have done, but only if what the school did or did not do would give rise to a legal cause of action under applicable state law. Because the borrower defense to repayment feature has

[1] 20 U.S.C. 1087e(h).
[2] 34 CFR 685.206(c).

seldom been used and due to the publicity stemming from the unfortunate problems faced by borrowers who attended Corinthian Colleges, we believe it is appropriate for the Department to expand on the existing regulation so that all parties have a clearer understanding of the criteria the Department will use to identify acts or omissions of an institution that constitute defenses to repayment of Federal Direct Loans under the regulation and MPN.

We also note that based on our experience, fraudulent acts or serious misrepresentations by institutions of higher education are rare. However, where they have occurred and student are harmed, redress in the form of some level of debt forgiveness is appropriate.

In these comments, NCHER offers two principles and a comment which we believe should guide development of a revised regulation. First, since the regulation and the contractual protection embedded in the MPN refer to legal causes of action under applicable state law, the statutory and common law of the governing state law must be taken into consideration. As Joseph A. Smith, Jr., the Department's Special Master for Borrower Defense has stated, "If the relevant evidence, considered as a whole, would not support a state law cause of action, then the acts or omissions asserted cannot be the basis of a defense to repayment."[3] One state law feature is the applicable limitation of action period. A borrower does not have a cause of action under the applicable state law if the applicable statutory period has expired. Second, we believe the interests of all stakeholders, including the school that the borrower attended, need to be respected. The Department's notice of intent to establish a negotiated rulemaking committee states that it intends to address the standards and procedures the Department will use to determine the liability of the institution participating in the Federal Direct Loan Program for amounts based on borrower defenses. Thus, there could be financial liability for the institution. For this reason, fundamental fairness requires that the regulation respect the school's right to offer its side of events involved. Third, we note that the current regulation provides that the Secretary will not assert a claim against an institution after the period for retention of records.[4] This limitation makes sense.

Thank you again for the opportunity to share our views on this important topic. If you have any questions about these comments, please contact me at (202) 822-2106 or jbergeron@ncher.us.

Sincerely,

James P. Bergeron
President

[3] First Report of the Special Master for Borrower Defense to the Under Secretary, September 3, 2015, p. 4.
[4] See 34 CFR 685.206(c)(3); 34 CFR 685.309(c); and 34 CFR 668.24.