



**PUBLIC HEARING ON BORROWER DEFENSES TO REPAYMENT REGULATION  
(DOCKET ID ED-2017-OPE-0076)  
U.S. DEPARTMENT OF EDUCATION  
JULY 10, 2017**

**STATEMENT OF CHERYL L. SMITH, SENIOR VICE PRESIDENT, PUBLIC POLICY  
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Thank you for the opportunity to present UNCF's views on the Department's notice to convene negotiated rulemaking on borrower defenses to repayment. UNCF's comments are informed by our 73-year history of promoting college success for minority students. We also represent private, regionally accredited historically Black colleges and universities (HBCUs) – institutions that provide an affordable and high-quality education for academically and economically disadvantaged students, with high levels of student satisfaction.<sup>1</sup>

Our detailed views on the borrower defense Notice of Proposed Rulemaking released last year were expressed in a [July 29, 2016 letter](#) submitted by UNCF and partner HBCU organizations to the Department on behalf of 101 accredited public and private HBCUs and 85 predominantly Black institutions. More recently, we expressed support for a new rulemaking in a [June 13, 2017 letter](#) to Secretary DeVos.

As the Department begins a new borrower defense regulatory process, we urge the Department to keep five major goals in mind:

- 1) Protect students harmed by fraud and predatory practices;
- 2) Restore Pell Grant eligibility for students impacted by school closures;
- 3) Ensure that the borrower defense regulation does not impose onerous burdens on HBCUs with unintended consequences;
- 4) Strengthen due process protections for both students and institutions; and
- 5) Address financial responsibility standards through a separate rulemaking.

## **Protect Students Harmed by Fraud and Predatory Practices**

UNCF supports an equitable, transparent and timely administrative process – and legal recourse without forced arbitration – for students harmed by institutions with a pattern of misconduct. The closures of Corinthian Colleges, Inc., ITT Educational Services, Inc. and other for-profit institutions have demonstrated the need for clear and consistent rules of the road that provide students appropriate relief when they have been harmed by institutions engaged in widespread fraud and predatory practices. In particular, the Department should allow the closed school discharge provisions in the current rule to go into effect, which would expedite relief for students impacted by abrupt for-profit school closures and enable all borrowers to receive earlier and accurate information about their loan discharge rights and options.

## **Restore Pell Grant Eligibility for Students Impacted by School Closures**

In addition, UNCF urges the Department to continue to identify students impacted by school closures and ensure that their Pell Grant eligibility is restored so that these low-income students have the necessary financial aid to finish their educational programs. Last fall, the Department announced it has the authority to restore Pell eligibility for such students. However, it is unclear how many students, in fact, have been identified and notified of their restored financial aid benefits. We also urge the Department to consider any regulatory changes that might be needed to expedite this effort. As you know, this policy initiative is critically important because students have a limited number of semesters in which they can receive Pell Grants to complete their education.

## **Ensure that the Borrower Defense Regulation Does Not Impose Onerous Burdens on HBCUs With Unintended Consequences**

There are other provisions in the borrower defense rule, however, that deeply concern HBCUs and should be revamped to prevent financial burdens and unintended consequences – not only for HBCUs, but also for other institutions, that are serving their students well.

UNCF remains concerned about the overly broad definition of ‘misrepresentation’ in the current regulation, which could unfairly leave HBCUs financially liable – with no time limitations – for frivolous claims for debt relief. Regulatory language should distinguish and prioritize claims based on systemic, purposeful and material misrepresentations, from claims based on minor and inadvertent errors. By making these distinctions, the Department can focus its resources on legitimate claims based on wrongdoing. At the same time, this would protect under-resourced HBCUs (and other institutions) from claims that lack merit but, nonetheless, would require them to spend precious resources on legal and other costs of participating in adjudicatory proceedings at the Department – resources that could be better spent serving the needs of students.

Further, the current regulation states that the Department will determine debt relief for borrowers and financial recovery from institutions after considering the value of educational services provided. However, the rule fails to establish clear standards for how relief and recovery will be calculated, which will lead to significant inequities if borrowers and institutions are treated differently. In addition, there should be a time limitation on recoveries from institutions to provide greater certainty regarding potential financial liabilities and facilitate record retention.

## **Strengthen Due Process Protections for Both Students and Institutions**

Additionally, due process protections should be strengthened. For example, the current regulation does not detail explicit timelines by which the Department will make debt relief determinations, which could leave both students and institutions in limbo for years. Nor does the current rule provide equal opportunities for engagement by institutions; it does not establish a process for institutions to appeal final decisions by the Department or request reconsideration based on new evidence – protections that are available to borrowers. Any future regulation should include due process protections that are equitable and transparent, and provide greater certainty for all parties.

## **Address Financial Responsibility Standards through a Separate Rulemaking**

Lastly, UNCF has provided significant feedback to the Department on the onerous financial responsibility and disclosure provisions in the current regulation, which would require private colleges and universities, including private HBCUs, to pledge collateral or letters of credit based on certain triggering events that may not relate to the financial condition of an institution. Moreover, the current regulation layers these new financial demands on top of existing but flawed financial responsibility standards that the Department has failed to fix.

UNCF believes that the use of cohort default rates as an automatic trigger for financial surety is not appropriate, is not an appropriate financial indicator, and has the potential to disproportionately harm HBCUs simply because their enrollment is comprised primarily of students who face financial and academic challenges to college completion. We know that cohort default rates are correlated with the socioeconomic status of an institution's student population and are impacted by external factors, such as economic and labor market conditions, that are not under the control of an institution.

Similarly, actions by accrediting entities, such as placing an institution on probation or show cause status may relate to a variety of issues and standards (e.g. academic, physical plant, governance) that may or may not relate to the financial condition of an institution. Had the discretionary trigger based on accreditation sanctions been applied in 2016, several HBCUs – some with acceptable financial responsibility scores – would have been required to secure letters of credit or other financial protection, imposing a significant financial burden.

These new financial requirements are a blunt instrument that could cause cascading negative financial impacts on small and under-resourced private institutions that are not engaged in misconduct. Further, mandatory disclosures of required financial protections based on ill-conceived criteria will put a “scarlet letter” on any HBCU impacted by these disclosure requirements, and will prejudice students against enrolling (or continuing enrollment) in otherwise successful institutions. The collective impact of the disclosure requirements would result in questions raised anew about the financial health and fiscal management of these institutions – by not only students, but also by alumni, donors, philanthropic and community partners, financial institutions, and Wall Street – not to mention the public and the press. Put bluntly, these requirements could lead to irreparable financial and reputational harm to some HBCUs that are, in fact, providing quality educational opportunities to students.

Last year, the Department chose to regulate and expand financial responsibility standards without proper notice to the higher education community and sufficient consideration of potential impacts. This year, the Department should establish a separate rulemaking committee solely concerned with

reevaluating financial responsibility standards for nonprofit institutions, with appropriate representation from individuals with financial expertise.

We also request that there be representation from the HBCU community on *any* negotiated rulemaking committees that are established.

## **Conclusion**

We look forward to working with the Department on regulations aimed at protecting students from bad actors, without harming HBCUs and other legitimate institutions that are working hard to bring real educational opportunities to students.

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<sup>i</sup> Gallup, Inc. 2015. Gallup-USA Funds Minority College Graduates Report. This survey found that 55 percent of Black HBCU graduates say their college prepared them well for post-college life versus 29 percent of Black graduates of other institutions.