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Protection and the Unseen

Holding Executives Personally Liable under the Higher Education Act

By Daniel A. Zibel & Alice W. Yao

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Protection and the Unseen:

Holding Executives Personally Liable under the Higher Education Act

BY DANIEL A. ZIBEL & ALICE W. YAO[1]

ABSTRACT: In establishing the student aid programs in Title IV of the Higher Education Act, and in committing to provide billions of dollars annually to institutions of higher education, Congress emphasized that owners and executives must be held personally accountable for financial losses that result from the acts of their institutions. Although the U.S. Department of Education routinely assesses liabilities against institutions, the prospect of recovering from institutions with substantial liabilities is often uncertain and, to our knowledge, the Department has been unsuccessful in using its authorities under the HEA to administratively impose personal liability on an institution's owners and executives. By exercising its authority to require institutions, owners, and executives to have "skin in the game" using the enhanced enforcement mechanisms we describe in this paper, the Department would better protect taxpayers and lead institutions of higher education towards less risky and predatory behavior.

Introduction

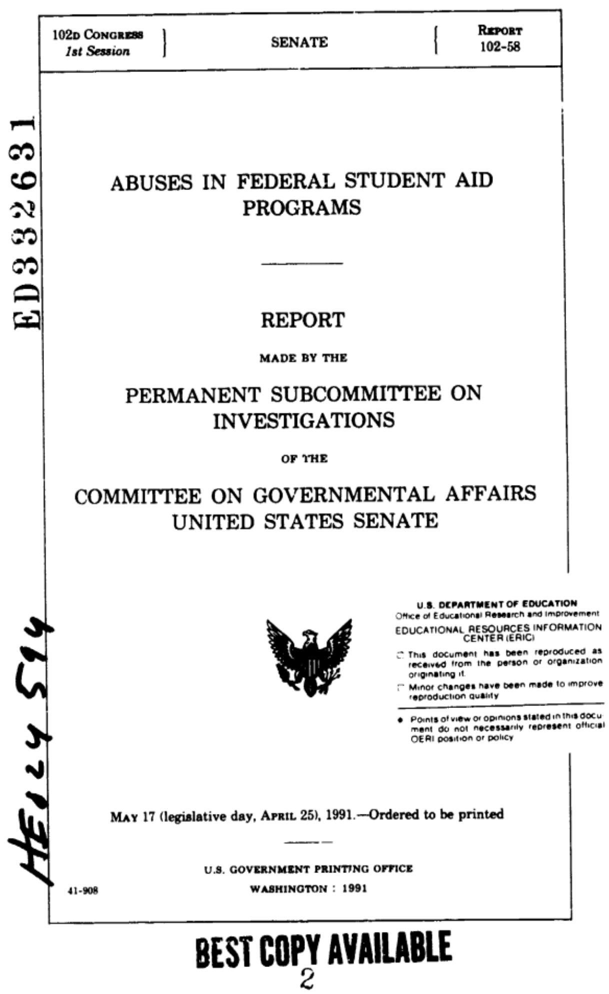
In vesting the U.S. Department of Education with authority to run a taxpayer-funded, multi-trillion student lending and grant program, Congress made clear that institutions of higher education ("IHEs") must bear responsibility for financial losses they cause to the United States. This proposition is articulated throughout the Higher Education Act of 1965 ("HEA"), as amended, including in the provisions setting the boundaries for institutional eligibility in the student financial aid programs. More specifically, to participate in the Title IV programs, an IHE must establish its ability to "meet all of its financial obligations," including those liabilities and debts incurred to the Secretary. The HEA is also replete with references to how the Department "may" require institutions to submit "financial guarantees" sufficient to satisfy certain of its liabilities,[2] "shall" require institutions to be financially liable for certain failures associated with the Direct Loan program,[3] and "shall" pursue claims against an IHE for losses associated with certain loan discharges.[4] Collectively, these authorities establish Congress's clear instruction that taxpayers not bear the burden when an institution collapses or fails to meet its obligations to students or the government.

But Congress did not stop there. In fact, on the heels of a bipartisan Senate investigation reporting on abuses in the federal student aid programs led by Senator Sam Nunn and in connection with the 1992 reauthorization of the HEA, Congress added provisions giving the Department authority—and in some cases a mandate—to recover financial losses from individuals who "exercise substantial control over [an] institution," *i.e.,* individuals who "directly or indirectly" control a "substantial ownership interest in the institution," and individuals who are "member[s] of the board of directors, the chief executive officer, or other executive officer of the institution or of an entity that holds a substantial ownership interest in the institution" (collectively, the "Institutional Control Group").[5]

These provisions were not mere happenstance, but were specifically recommended by the Department's Inspector General, who testified before the U.S. House of Representatives Committee on Education and Labor that:

> "the HEA should be amended to require owners of corporate proprietary schools to be personally liable for school losses. Current law allows Title IV participation by corporate proprietary schools, but does not

provide a means of holding school owners personally liable for losses caused by a school's failure. Thus, when schools close or otherwise fail to meet their financial responsibilities, owners are able to escape with large personal profits while the taxpayer and student are left to pay the bill."[6]



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REPORT

MADE BY THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

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The cover of 1991's Senate Investigation, which uncovered many of the same problems that persist to this day.

In addition, the Inspector General recommended that the law "ensure that school owners are held personally liable for the accuracy of information, claims or other statements on which institutional eligibility is based."[7]

Yet despite this unambiguous Congressional intent and the clear statutory language, to our knowledge, the Department has never successfully used these authorities to impose and collect administratively assessed liabilities from members of an Institutional Control Group who exercise "substantial control" over an IHE with unpaid administrative debts to the Department.

In recent years, when major for-profit college chains, such as Corinthian Colleges, Inc., or ITT Technical Institute, have closed under the weight of federal and state law enforcement investigations, taxpayers have borne a substantial financial burden. When an IHE closes, students who attended that institution at or near the time of closure have a right to a discharge of all federal Direct Loans taken to finance enrollment at that institution.[8] The Department may incur other liabilities as well. For example, after ITT Technical Institute filed for bankruptcy, the Department asserted a proof of claim in the bankruptcy proceeding estimating over $230 million owed to the Department from the bankrupt entity from not only closed school loan discharges, but also for borrower defense discharges, excess Pell Grant funds, and unaccounted funds from other Title IV programs.[9] That estimate subsequently increased to approximately $440 million.[10] In addition, as of January 2017, the federal government had approved the discharge of approximately $558 million in student loans for borrowers from Corinthian Colleges.[11] At the same time, the executives that ran these institutions into the ground were paid millions each year,[12] and one ITT executive even claimed that he was owed millions more in severance and deferred compensation while the company was in bankruptcy.[13]

This scenario is by no means unique to ITT or Corinthian. The closures of other for-profit institutions have also cost taxpayers significant amounts of money resulting from discharged student loans. In addition to the cost of ITT Technical Institute's closure, as of May 2019, the Department had recently "discharged more than $43 million in student loans for borrowers who attended [closed] programs operated by Education Corporation of America, Dream Center Education Holdings, Vatterott College, and Charlotte School of Law."[14] It is unclear how much, if any, the Department has recovered from the losses caused by these institutions.

And while the Department has the authority to require institutions to post a "letter of credit" or other form of financial surety to guard against losses to taxpayers, those letters are often woefully insufficient. For example, when the

Department requires an institution to post a letter of credit, the amount of that surety is typically set between 10% and 50% of the previous year's Title IV draw. But closed school discharges do not simply relate to the previous year's Title IV amounts—and can require the Department to discharge the entirety, not just a percentage, of numerous years of student debt. Indeed, even the $94 million surety secured by the Department of Education in the months leading up to ITT's collapse proved inadequate.[15]

Although the Department has—and uses—a process[16] to impose administrative liabilities against institutions, that process is largely insufficient to recover the amounts discharged in federal loans[17] if an institution has closed or otherwise ended its Title IV participation. This is because the process hinges upon the Department's administration of Title IV programs.[18] Unless the institution continues to participate in the Title IV programs, or the institution or a member of the Institutional Control Group owns or controls a different institution—scenarios in which the Department controls the continued flow of Title IV funds[19]—the Department's administrative authorities to collect financial liabilities lack a clear enforcement mechanism.

Even when a closed institution enters bankruptcy and the Department has the opportunity to make a claim to the entity's estate, the Department is often in the position of an unsecured creditor,[20] or simply does not collect liabilities at all. For example, in 2019, the Department assessed more than $12 million in institutional liabilities against now-defunct WyoTech-Long Beach, which was part of the Corinthian chain. The Department expressly noted, however, its establishment of liabilities was "not a demand" that WyoTech pay the liabilities, and that the Department "will seek recovery of this liability only in accordance with applicable bankruptcy law," suggesting that it has no intent to "seek to recover" the liability from members of the Institutional Control Group.[21] Likewise, Park West Barber School filed for bankruptcy on April 26, 2016.[22] On June 2, 2016, the U.S. Bankruptcy Court for the Middle District of North Carolina ordered any potential creditor to file a proof of claim by September 2, 2016. As per the court's order, any creditor "who do[es] not file a proof of claim or before [that] date will not share in any distribution from the debtor's estate."[23] The Department did not do so, but *more than nine months* later, in June 2017, the Department established, via a Final Program Review Determination, a liability of more than $19.8 million, which it said was "not a demand for payment" and which it would seek to recover "in accordance with the laws governing bankruptcy."[24] When the Chapter 7 Trustee certified in a court filing that the Park West estate had been fully administered, she confirmed that the U.S. Department of Education neither stated a claim to assets nor received a distribution from the estate.[25]

Imposing personal liability for corporate misdeeds is a tool widely available to civil law enforcement.

Imposing personal liability for corporate misdeeds is a tool widely available to civil law enforcement. For example, in September 2015, Deputy Attorney General Sally Yates issued a memorandum (the "Yates Memo") within the U.S. Department of Justice ("Justice") in which she described how "[o] ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."[26] As Yates wrote, this form of "accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."[27] Even in the context of for-profit colleges, the U.S. Securities and Exchange Commission has reached settlements with corporate executives—at levels criticized as resoundingly insufficient[28]—for wrongdoings to investors, albeit not to students, under the Securities and Exchange Act.[29]

This paper is part of a series drafted by Student Defense that explores underused authorities in the HEA, and which highlights how a reinvigorated Department can protect students and taxpayers—even absent any new legislation or regulations. The goal of this paper is to highlight the mechanisms that the Department can use to better protect taxpayer interests and incentivize owners and executives to act in the best interests of students. By promoting and exercising authorities, the Department can protect taxpayers from financial losses and carry out the clear intent of the HEA, and its 1992 amendments, by ensuring that institutions that leave taxpayers on the hook, and those who control them, do not profit while students suffer.

Statutory Authorities to Require or Allow the Assumption of Liability by Individuals for Financial Losses to the United States

The HEA includes an array of authorities that either *require* the Department to hold certain individuals personally liable for losses to the government or gives it the authority to do so. These authorities are not mutually exclusive; an institution may incur financial losses to the Department on any number of bases,[30] and the Department may use one or all of these authorities to require the assumption of liability by one or more members of the Institutional Control Group.

First, and most broadly, to the extent "necessary to protect the financial interest of the United States," the Secretary may require a member of the Institutional Control Group to assume personal liability for "financial losses to the Federal Government, student assistance recipients, and other program participants" for funds under Title IV.[31] In addition, with the same language about protecting the financial interest of the United States, the Secretary may also require "financial guarantees" from such individuals in an amount "determined by the Secretary to be sufficient to satisfy the institution's potential liability to the Federal Government, student assistance recipients, and other program participants for funds under [Title IV]."[32]

These two authorities apply broadly to members of the Institutional Control Group. By statute and regulation, the Secretary "generally considers a person to exercise substantial control over an institution" if:

> (i) the individual directly or indirectly controls at least a twenty-five percent ownership interest in the institution;
>
> (ii) the individual, either alone or together with other individuals, represents, under a voting trust, power of attorney, proxy, or similar agreement, one or more persons who have, individually or in combination with the other persons represented or the individual representing them, a twenty-five percent ownership interest in the institution; or
>
> (iii) the individual is a member of the board of directors, the chief executive officer, or other executive officer of the institution or of an entity that holds a twenty-five percent ownership interest in the institution.[33]

Thus, any individual who is a member of the board of directors, the CEO, or other executive officer of the institution may be held personally liable. In addition, any individual who directly or indirectly controls at least twenty-five percent of the institution or is a member of the board, the CEO, or other officer of an entity that holds at least twenty-five percent of the institution may also be held personally liable.

This section of the HEA does not limit the types of events that give rise to these liabilities. Accordingly, for example, if a student loan borrower submits a "borrower defense" claim—*i.e.*, asserting a "defense to repayment" of a federal loan based on an act or omission of the IHE—the Department can assess that liability to the institution—*i.e.*, making the IHE liable for the costs of loan discharges. In the borrower defense context, the Department has regulations specifically setting forth the process by which it can recover financially from the IHE.[34] In other contexts, *e.g.*, for closed school loan discharges, the Department uses a program review to administratively assess a liability.[35] In such a case, if the institution itself, for whatever reason, does not pay that liability, the Department can use these authorities to impute the liabilities to, or require assumption by, one or more members of the Institutional Control Group.

Second, Congress established certain situations in which student loan borrowers have a right to a discharge of their federal student loans, *e.g.*, where the student is "unable to complete the program in which such student is enrolled due to the closure of the institution," where the student's eligibility was "falsely certified" by the institution, where the individual's eligibility was "falsely certified as a result of a crime of identity theft," or where the institution "failed to make a refund of loan proceeds which the institution owed to such student's lender."[36] In cases where these standards are met, the Secretary has been instructed by Congress to "discharge the borrower's liability," to "repay[] the amount owed on the loan" (in the case of Federal Family Education Loan Program ("FFEL") loans), and then to either settle the loan obligation or "pursue any claim available to such borrower against the institution and its affiliates and principals."[37] Unlike with respect to borrower defense discharges, this statutory language is mandatory, evincing Congress's clear intent for the Department to recover from the institutions or its "affiliates and principals" when these discharges are granted.

Third, under the HEA, any individual who the Secretary determines exercises "substantial control" over an institution and is "required to pay, on behalf of a student or borrower, a refund of unearned institutional charges to a lender[] or to the Secretary," but "willfully fails to pay such refund or willfully attempts in any matter to evade such payment," shall be held liable not only for the amount of the refund, but also that same amount as a penalty owed to the Department.[38]

Finally, although not as explicit, other provisions in the HEA highlight the importance Congress placed on collecting from those who have caused financial losses. For instance, the HEA requires the Department to include, in the Direct Loan Agreement ("DLA")[39] with IHEs participating in the Direct Loan program, provisions requiring an institution to "accept responsibility and financial liability stemming from its failures to perform its functions pursuant to the [DLA]."[40] While this authority, on its face, only applies to an "institution," and not an individual, if an institution can be held financially liable for losses to the United States, the Department can, under the authorities noted above, require personal assumption of liability. In addition, the HEA directs the Department to promulgate regulations that establish "reasonable standards of financial responsibility and appropriate institutional capability" for institutions participating in Title IV, HEA programs, "including any matter the Secretary deems necessary to the sound administration of the financial aid programs, such as the pertinent actions of any owner, shareholder, or person exercising control over an eligible institution."[41] The Department's regulations provide that an institution is not financially responsible if "[a] person who exercises substantial control over the institution, or any member or members of the person's family alone or together" "[e]xercises or exercised substantial control over another institution or a third-party servicer that owes a liability for a violation of a Title IV, HEA program requirement" or "[o]wes a liability for a violation of a Title IV, HEA program requirement" that is not being repaid in accordance with an agreement with the Secretary.[42] In addition, institutions are required to report to the Secretary if someone gains the ability to "affect substantially the actions of the institution."[43] Failure to do so can result in adverse action being taken against the institution.[44]

Procedural Mechanisms to Hold Individuals Personally Liable for Losses to the United States Caused by an IHE

Implementing these existing statutory provisions could have a substantial impact in the higher education market. As David Weil, former head of the U.S. Department of Labor's Wage and Hour Division, has noted, when a regulatory agency makes full use of its financial enforcement remedies—such as civil penalties or liquidated damages—it provides "economic incentive[s] to comply with the law in the first place, creating incentive to change future behavior."[45] But this, Weil notes, is often not the case in many enforcement agencies. In the context of the Fair Labor Standards Act, Weil has specifically highlighted the need to ensure that "all parties"—irrespective of corporate formalities or relationship—are held responsible for workplace standards. Likewise, the 2015 Yates Memo emphasized how "pursuing individual actions in civil corporate matters will result in significant long-term deterrence."[46] To put in the context of Title IV, if those individuals who possess substantial control over an institution lack personal incentive to ensure repayment of liabilities after a school closes or otherwise, those debts and liabilities will likely remain unpaid. This is precisely the scenario that the Department's Inspector General sought to address when he recommended the amendments to the HEA in 1992.[47]

Nevertheless, despite the clear grants of authority to the Department to impose personal liability, or require financial guarantees, neither the HEA nor the Department's regulations include specific procedures by which the Department can demand payment from an individual or can effectuate a judgment to collect such payments. The Department does, however, have well-established precedent and process for assessing liabilities against an institution. For example, after Federal Student Aid ("FSA") conducts a Program Review of an institution, it issues a Final Program Review Determination ("FPRD") which may require an institution to pay liabilities to the Department or students.[48] Similarly, the Department may assess liabilities against an institution after reviewing its annual financial audit[49] or its "close out" audit after the institution's participation in Title IV ends.[50] The Department has also established procedures by which an IHE can appeal a liability determination to the Department's Office of Hearings and Appeals ("OHA") and then to the Secretary of Education.[51]

Shortly after the 1992 HEA Amendments took effect, the Department's Office of Student Financial Assistance, the precursor to the modern FSA, attempted to use these administrative processes to impose personal liability. In a 1994 opinion, OHA acknowledged the Department's authority to require "financial guarantees of personal liability from an owner to satisfy the institution's potential liability to the Department," which could include a demand for the owner's assumption of personal liability for the payment of liabilities to the Department.[52] Notably, the Administrative Judge also highlighted how the Department "has limited resources and is not well equipped to go behind the corporate form."[53]

Despite its commentary on the topic, the 1994 OHA opinion did not restrict or limit the Department's administrative authorities. However, the following year, OHA slammed the door shut on using OHA as an appellate body over situations in which the Department required the individual assumption of financial liabilities. The facts surrounding *In the Matter of Cosmetology College* arose after the school was sold and the original owner retained no ownership or control. Although the new owner received approval from the state authorizer and an accreditor, he did not submit or complete a change-in-ownership form from the Department. Roughly six months after the sale, the institution closed. The Department subsequently attempted to recover Title IV funds from the original owner of the institution. Reviewing the facts, OHA determined that while the school was liable to the Department for approximately $161,000, it was outside OHA's jurisdiction to "address the question of personal liability," which was to be "resolved between the respective contestants."[54]

Within a few short years, this position—that determinations of personal liability were beyond OHA's jurisdiction—had become well-established. In 1996, citing the *Cosmetology College* decision, OHA noted that: "[c]oncerning the issue of [the owner's] personal liability, I agree with counsel for [the Department] that the issue is beyond the scope of this proceeding and jurisdiction."[55] *See also, e.g., In the Matter of Excelsis Beauty College*, Dkt. No. 98-108-SA, U.S. Dep't of Educ. (October 4, 1999) ("The statements in *Cosmetology College* are unambiguous; the personal liability of a former owner is not a matter within the jurisdiction of this tribunal."); *In the Matter of Metropolitan Beauty Academy*, Dkt. No. 02-56-SA, U.S. Dep't of Educ. (Jan. 29, 2003) ("This obligation is an institutional responsibility falling on Metropolitan. If this responsibility creates personal ramifications involving the present and prior owners, those disputes remain outside the purview of this tribunal."). To our knowledge, none of these cases was reversed on appeal.[56]

The limitations by OHA on the scope of its own jurisdiction—and the apparent acceptance of that position by the Department's Office of the General Counsel[57]—does not bind the Department's exercise of its authority to require the assumption of personal liability more broadly. As an initial matter, the Department could certainly seek to use these authorities in a different case and appeal any adverse jurisdictional determination to the Secretary, *i.e.*, requesting that the Secretary reverse this position.[58] But even that approach would leave unanswered the question of how the Department would *collect* a liability, even if such a liability could be established administratively and appealed through OHA. (Importantly, as described above, the Department's authorities to collect a liability from an institution rest largely on its authority to end an institution's eligibility to participate in Title IV.)

Importantly, OHA has recognized that its jurisdictional limitation does not preclude the Department from requiring the assumption of debt or taking collection efforts against individuals.[59] In *In the Matter of Chicago Educational, Inc.*, the institution—Chicago Educational Inc. ("CEI")—went out of business and sought to dismiss, as moot, an audit that assessed liabilities against it. In that case, OHA ruled that the fact that the school had closed did not render the case moot because the Department could still seek to collect upon the liability. OHA recognized that it was "the wrong forum to consider whether CEI has any assets, or whether CEI's owner has any personal liability[.]" Those issues, according to OHA, were for other courts to consider.

Outside of the HEA and its own administrative processes, however, the Department has both the mandate and the means to hold individuals personally liable for these debts. As described in OMB Circular A-129, all federal agencies "shall have a fair but aggressive program to recover delinquent debt," which includes overpayments to contractors, grantees, employees, and beneficiaries, as well as fines, penalties and other debts that are not paid or otherwise resolved.[60] Short of simply compromising, settling, or simply writing off the debt, the Department has two primary avenues for collection: (a) judicial collection through the U.S. Department of Justice ("Justice") under the Federal Debt Collection Procedures Act ("DCPA");[61] or (b) administrative collection through the U.S. Department of Treasury ("Treasury") under the Debt Collection Improvement Act ("DCIA").[62]

A. Pursuing Owners and Executive in Court: The Federal Debt Collection Procedures Act

Although the HEA gives the Department authority to require individuals to assume an institutional debt, it does not provide cause of action for the Department or the United States to use in court to actually *collect* on that assumed debt. In such a case, the DCPA provides the "exclusive civil procedure for the United States" to either "recover a judgment on a debt" or to "obtain, before judgment on a claim for a debt, a remedy[.]"[63] Although this statute, to our knowledge, has never been used by the United States to collect on an administrative debt established by the Department,[64] it has been used by other agencies to collect from owners of entities that owe debts to the government.[65] Indeed, the Act was enacted "to create a comprehensive statutory framework for the collection of debts owed to the United States government, in order to improve the efficiency and speed in collecting those debts."[66]

To collect on an assumed debt, the Department should first establish the debt[67] by issuing a "certificate of indebtedness" to the member of the Institutional Control Group from whom it seeks to collect, informing that individual or individuals of the debt and the required assumption.[68] As a practical matter, this would take place after the institution's liability to the Department becomes final and unpaid.[69]

Under the Federal Claims Collection Standards ("FCCS"), the Department must then "promptly" refer to Justice for litigation those "debts on which aggressive collection activity has been taken" in accordance with the standards for the administrative collection of claims.[70] Nevertheless, if the Secretary has determined that administrative collection should not be used because it would be best to "exempt[]" that "class of debt"—*i.e.*, debts owed by IHEs resulting from participation in the Title IV program—from administrative collection, the Secretary may do so consistent with the FCCS.[71]

Once the debt has been referred to Justice, the United States would file a complaint against the individual in U.S. District Court under the DCPA, alleging the "(1) the existence of a debt, (2) owed by defendants, (3) that is payable to the Government, (4) that a demand for payment of the debt has been made to defendants, and that (5) payment of the debt has thus far been refused by defendants."[72] Because no "judgment" will have yet been issued under the DCPA, the United States could seek "prejudgment remedies" or to simply establish a judgment through procedures of the District Court and then seek post-judgment remedies.

Thus, in the example of Park West Barber School, discussed above, which owed more than $19.8 million to the Department after it closed in 2016, FSA would first assess the liability through a Final Program Determination Letter. The Department did exactly that in June 2017.[73] The institution would then have all rights to administratively appeal that liability through OHA. Once that liability is final and remains unpaid, the Department would issue Certificates of Indebtedness to one or more members of the Institutional Control Group, citing its authority to require the assumption of personal liability under HEA § 498(e)(1)(B), 20 U.S.C. § 1099c(e)(1)(B). Justice would then use its ordinary DCPA litigation authority to bring suit against the individuals for debts owed, and—in all likelihood—promptly file for summary judgment to establish the liability as a monetary judgment.[74] By ensuring that the existence and amount of debt (as to the IHE) is "final"[75] before the Department issues the Certificate of Indebtedness, any issues in a subsequent court proceeding under the DCPA should be limited to the issue of "substantial control" and the assumption of liability, rather than the existence of the liability itself.[76] Once a judgment is established, the DCPA sets forth the mechanism to collect upon the judgment, or enforce the judgment through payment, the execution of a lien, or other collection mechanism.[77]

B. Pursuing Owners and Executives Administratively: The Debt Collection Improvement Act

In addition to the judicial remedies under the DCPA, the federal Debt Collection Improvement Act provides extensive administrative collection powers over debts owed to the Department. Under the DCIA, the Department has the authority to collect on its debt in a variety of ways without a court order, including by reporting delinquent non-tax debt to credit agencies, offsetting the debtor's federal tax refund or federal benefit payments, or garnishing a debtor's wages.[78]

Ultimately—whether offset, wage garnishment, or adverse credit reporting—the Department would use the same mechanisms it currently uses for involuntary collections from defaulted student loan borrowers. For example, to collect on debt by offset, as is the case under the DCPA, the Department would first need to establish a final debt to the IHE and then notify the debtor of the assumption of that liability.[79] If unpaid, the Department would certify to the Bureau of the Fiscal Service ("Fiscal Service") at Treasury that the debt is valid and legally enforceable for purposes of an offset, including a certification that the debt is due, in the amount stated, with no legal bars to collection, and that the Department has met all due process requirements applicable to the debt it seeks to collect through offset.[80] The Department would also submit to Fiscal Service the identifying information for the debtor, as well as the balance due on the debt.[81] Treasury then would accept notice from ED that a debtor owes a "past-due legally enforceable debt," offset the debtor's federal tax refund or federal benefit payment, pay the amount offset to ED, and notify the debtor of the offset.[82]

To be certain, these mechanisms—offset, garnishment, or credit reporting—may be of limited utility in the case of particularly wealthy or destitute former executives, who may be unlikely to have future "wages" subject to garnishment or tax refunds to offset. And while Social Security offset is an option, a fifteen percent offset of even the maximum Social Security benefit may not provide much disincentive to change corporate behavior.

Pre-Enforcement Activities: Financial Guarantees and Providing Notice

In addition to working with Justice and Treasury to use judicial and administrative authorities to collect debts, the Department can use two pre-enforcement approaches to notify IHEs of its intentions to exercise its collection authorities. Although the clarity of existing authorities does not require the Department to notify regulated entities of an intent to hold individuals personally accountable, doing so would promote the same sort of deterrence effects that come with actually using the authority.[83] By publicizing these approaches in advance of enforcement, the Department will be transparent and put IHEs—and the public—on notice of its intent to use the extent of the authorities that Congress has provided.[84] Of course, providing notice could also have the effect that institutions insure against the risk of potential future loss, which has the advantage of requiring a third-party underwriter to assess the risk of insurance and use that assessment in its insurance pricing scheme.[85]

Such communications and notice can take a number of forms. *First*, the Department can—with evidence that doing so is "necessary to protect financial interest of the United States"—require members of the Institutional Control Group to post financial guarantees to mitigate future losses. *Second*, the Department can publicize guidance regarding how the Department intends to make discretionary referrals to Treasury or Justice to collect liabilities. *Third*, the Department can modify its gatekeeping agreements with IHEs, namely the Program Participation and Direct Loan Agreements, to both provide notice and ease any challenges related to collections.

A. Financial Guarantees by Members of the Institutional Control Group

As noted above, the HEA provides the Department authority, to the "extent necessary to protect the financial interest of the United States," to require that an institution or one or more individuals who exercise "substantial control" over the institution to provide "financial guarantees" to the Department "in an amount determined by the Secretary to satisfy the institution's potential liability to the Federal Government, student assistance recipients, and other program participants for federal funds under [Title IV]."[86] In contrast to the assumption of personal liability for a debt, discussed above, a "financial guarantee" suggests a pre-payment or escrow of funds sufficient to cover future liabilities.

To our knowledge, this authority has not been used by the Department. In final regulations adopted in 1997, the Department included a provision whereby an institution that is not financially responsible "because the persons or entities that exercise substantial control over the institution owe a liability" can nevertheless participate in the Title IV program by meeting certain standards. In such a case, the Secretary has the authority to require the institution or individuals who exercise substantial control over the institution (or both) to "submit to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs."[87] But of course, the Secretary's authority to require "financial guarantees" from "an institution participating" or "seeking to participate" is broader than the 1997 regulations and can be used by the Department to ensure that institutions do not act in a manner that is contrary to "the financial interest of the United States."

B. Notice of Intent to Collect

Additionally, the Department could issue an internal policy directive[88] or other interpretive statement informing IHEs and the public of its intent to issue Certificates of Indebtedness to those who own or exercise "substantial control" of an IHE when liabilities remain unpaid. Such a statement could explain the importance of the certificate, and the authority of the United States to use the certificate to collect upon debts owed. The Department could also set forth the criteria it will use to determine whether a referral should be made to Justice in order to initiate an action under the DCPA: relying on the size of the debt, the circumstances that gave rise to the debt, and whether the Department would consider mitigating factors (such as institutional performance on Cohort Default Rates or other metrics).

IHEs and individuals who are part of an Institutional Control Group are, quite naturally, likely to have reservations about the concept of personal liability, perhaps asserting that, particularly for non-profit institutions, individuals may be less likely to serve on a board of directors. But this too is something that the Department can consider by obtaining public comments on an internal policy to guide its use of these authorities. For instance, the Department may wish to more aggressively require the assumption of personal liability, and take more aggressive collection actions, when an individual has personally profited (either through shareholder distributions from a proprietary school, or excessive salary at a non-profit or proprietary school) from the acts and omissions of the IHE that gave rise to the liability. Such an approach could be considered consistent with the testimony of the Department's Inspector General in 1992, which was cited by Congress when adopting these provisions.[89] Likewise, the Department could confirm that its intent is not to impose a blanket requirement that members of the Institutional Control Group assume personal liability in all circumstances, but rather would assess the institution's performance meeting the core objectives of the Higher Education Act. Ultimately, however, under the Supreme Court's decision in *Heckler v. Chaney*, the decision to make such a referral is almost certainly within the Department's discretion.[90]

C. Modifying the Program Participation Agreement and Direct Loan Agreement

Finally, the Department can also use its gatekeeping agreements with institutions[91]—*i.e.*, documents that an IHE must physically sign—to periodically remind IHEs that the Department has both the authority and the mandate to recover from individuals when an entity has unpaid liabilities. Including provisions that pertain to personal liability may result in more careful administration of Title IV, HEA programs, thus preventing unnecessary school closures, eliminating or reducing the possibility of borrower defense claims, or the expenditure or other use of excess funds that would result in the discharge of loans or the return of funds to the Department.

Although the Department need not change these agreements to impose personal liability on those with "substantial control," doing so could remind key officials (including those who sign the agreements) that such liability is a potential outcome. Doing so could also ease the Department's use of federal debt collection authorities. For example, the Department could include:

- A provision requiring institution representatives who sign the DLA to acknowledge that there may be a valid claim for funds, within the meaning of the 31 U.S.C. § 3701, against those who exercise "substantial control," over the institution (*i.e.*, the "institutional control group") stemming from the failure to "perform [an institution's] functions pursuant to the [DLA]."
- A provision requiring all individuals with "substantial control" over an institution to acknowledge, in writing, that the Department can legally require them to personally assume liabilities established by the Department. Such a provision should also include an acknowledgment by the individuals that institutional liabilities to the Department that are past-due can be legally enforceable against those individuals. Such a provision can also require their consent to the use of nontax debt collection mechanisms to the extent permitted by law.[92]
- A provision requiring that the institution and individuals with "substantial control" over the institution consent to the maintenance of information regarding such "claims" in a "system of records," that identifies not only the institution but also the members of the Institutional Control Group, and place those individuals on notice that information regarding the failure to repay any such liability will be provided to consumer reporting agencies.[93]
- A provision acknowledging that the procedures afforded to the institution for a reconsideration of any liability, *i.e.*, the OHA appeal process in 34 C.F.R. Part 668 Subpart G, are sufficient "reconsideration" procedures for a liability assessment under 31 U.S.C. § 3711(e)(2). The provision could note that if such procedures are followed, and the debt remains delinquent for a "period of 180 days" after a requirement of assumption, the Department can "transfer the debt or claim to the Secretary of the Treasury" who may take "appropriate action to collect" on the claim.[94]

Endnotes

1 Dan Zibel is Chief Counsel, Vice President, and a co-founder of the National Student Legal Defense Network ("Student Defense"). He previously served as Deputy Assistant General Counsel for Postsecondary Education in the Office of General Counsel at the U.S. Department of Education. Alice Yao is Senior Counsel at Student Defense. She previously served as an attorney in the Office for Civil Rights at the Department.

2 HEA § 498(e)(1)(A), 20 U.S.C. § 1099c(e)(1)(A).

3 HEA § 454(a)(3), 20 U.S.C. § 1087d(a)(3).

4 HEA § 437(c)(1), 20 U.S.C. § 1087(c)(1).

5 *See* P.L. 102-325 § 498 (July 23, 1992) (adding HEA § 498(e)(1)(B), 20 U.S.C. § 1099c(e)(1)(B)). In that same legislation, Congress added other specific references to individual liability, including, for example, in the context of closed school loan and false certification discharges. *See* P.L. 102-325 § 428 (amending HEA § 437 to include § 437(c)(1), 20 U.S.C. § 1087(c)(1) and requiring the Secretary to discharge such loans and to "pursue any claim available to such borrower against the institution *and its affiliates and principals*") (emphasis added). Separately, the HEA provides that if an "individual" "willfully fails to pay" or "willfully attempts in any manner to evade payment of" a refund owed to the Department, such individual may be liable "as a responsible person for a penalty under section 6672(a)" of the Internal Revenue Code of 1986, with respect to the nonpayment of taxes. HEA § 498(e)(6), 20 U.S.C. § 1099c(e)(6); HEA § 437(c)(1), 20 U.S.C. § 1087(c)(1).

6 H.R. Rep. 102-447, 1992 U.S.C.C.A.N 334, 417–418 (1992).

7 *Id*.

8 *See* 34 C.F.R. § 685.214.

9 *See infra* n. 20.

10 Trustee's Motion to Compromise and Settle Certain Claims with the United States of America ¶ 24, *In re: ITT Educ. Servs., Inc.*, No. 16-07207-JMC-7A, Dkt. 3999 (Bankr. S.D. Ind. June 25, 2020) ("ITT Trustee's Motion"), *available at*: https://casedocs.omniagentsolutions.com/cmsvol2/pub_47137/828182_3999.pdf. *See also* Order Granting Trustee's Motion to Compromise and Settle Certain Claims with the United States of America, *In re: ITT Educ. Servs., Inc.*, No. 16-07207-JMC-7A, Dkt. 4014 (Bankr. S.D. Ind. July 15, 2020), *available at*: https://casedocs.omniagentsolutions.com/cmsvol2/pub_47137/833433_4014.pdf.

11 U.S. Dep't of Educ., *American Career Institute Borrowers to Receive Automatic Group Relief for Federal Student Loans: Education Department Announces Continued Progress with Borrower Defense and Closed School Loan Discharges* (Jan. 13, 2017), *available at:* https://www.ed.gov/news/press-releases/american-career-institute-borrowers-receive-automatic-group-relief-federal-student-loans.

12 According to press reports, ITT CEO Kevin Modany received total compensation of $1.4 million in 2015, $3.2 million in 2014, and $3 million in 2013. *See* James Briggs, *Top ITT executives agree to fines, ban from top corporate jobs in SEC settlement*, Indy Star (July 9, 2018), *available at:* https://www.indystar.com/story/money/2018/07/09/top-itt-executives-kevin-modany-daniel-fitzpatrick-settle-sec-charges/769582002. *See also* Adversary Complaint ¶ 11, *In re: ITT Educ. Servs., Inc.*, Case No. 16-07207-JMC-7A, Dkt. 2562 (Bankr. S.D. Ind. May 31, 2018), *available at:* https://casedocs.omniagentsolutions.com/cmsvol2/pub_47137/672851_2562.pdf. As reported by the Senate HELP Committee, in 2009, the CEO of Corinthian Colleges, Jack Massimino received $3.3 million, which was "more than eight times as much as the president of the University of California at Irvine. *See* U.S. Senate HELP Committee Report on For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, Part II, Corinthian Colleges at 384, ("HELP CCI Findings") *available at:* https://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf. According to that same Senate HELP Committee report, "[t]he chief executive officers of the large publicly traded for-profit education companies took home, on average, $7.3 million in fiscal year 2009." Senate HELP CCI Findings at 384.

13 Adversary Complaint ¶ 69, *In re: ITT Educ. Servs., Inc*.

14 Andrew Kreighbaum, *Growing Price Tag for College Shutdowns*, Inside Higher Ed (Sept. 4, 2019), *available at*: https://www.insidehighered.com/news/2019/09/04/costs-federal-government-mount-profit-college-shutdowns.

15 During 2014, the Department obtained over $94 million from ITT to hold in escrow to protect the Department from losses. *See* Adversary Complaint ¶¶ 18, 21, *In re ITT Educ. Servs., Inc.*, No. 16-07207-JMC-7A, Dkt. 2862 (Bankr. S.D. Ind. Sept. 7, 2018). Following the filing of an Adversary Complaint against the Department in the bankruptcy proceeding—in which the ITT bankruptcy trustee asserted, *inter alia*, that the Department was "unjustly enriched" by receiving those payments—the Department ultimately settled with the Trustee and returned $29 million to the ITT estate. ITT Trustee's Motion to Compromise and Settle ¶¶ 13, 31(b). As part of the settlement, the Department acknowledged that it estimated losses totaling $440 million. *See supra* n.10. The Department also agreed to cap a claim in the bankruptcy at approximately $283 million. *See* ITT Trustee's Motion ¶¶ 31(h)(2). In light of the $440 million in estimated losses, mitigated by the $65 million in escrow funds retained by the Department, the Settlement appears to concede that approximately $102 million in estimated losses will never be recovered from the institution.

16 *See generally* 2019-20 Federal Student Aid Handbook, Vol. 2, Chapter 8 (discussing the use of program reviews to assess liabilities against participating IHEs), *available at:* https://ifap.ed.gov/sites/default/files/attachments/2020-01/1920FSAHbkVol2Master.pdf.

17 *See generally* Ben Miller, *College Executives Need to Pay Up When Their Schools Close Abruptly*, Center for American Progress (March 19, 2019), *available at:* https://www.americanprogress.org/issues/education-postsecondary/news/2019/03/19/467366/college-executives-need-pay-schools-close-abruptly/; Yan Cao, *How DeVos is about to Make Life Harder for Victims of School Closures*, The Century Foundation (July 23, 2019) *available at:* https://tcf.org/content/report/devos-make-life-harder-victims-school-closures/.

18 We note that the United States has successfully obtained civil judgments against individuals in cases brought under the False Claims Act relating to an institution's participation in the Title IV programs. *See, e.g.*, Final Judgment, *United States v. FastTrain II Corp. et al.*, No. 12-Civ-21431-COOKE/TORRES, Dkt. No. 233 (S.D. Fla. Feb. 16, 2017) (awarding damages in the amount of $4,129,765, trebled, minus any restitution he pays to the government, together with pre- and post-judgment interest," plus a "civil penalty of $11,000 for each of the 924 false claims Defendants made to the Department of Education").

19 Under the Department's regulations governing "past performance," an otherwise eligible IHE is deemed not to be financially responsible if a person who exercises substantial control over an institution, or any member of that person's family alone or together "[e]xercises or exercised substantial control over another institution . . . that owes a liability for a violation of a title IV, HEA program requirement" or "[o]wes a liability for a violation of a title IV, HEA program requirement." 34 C.F.R. § 668.174(b). *But see infra* at n. 87 & accompanying text (discussing 34 C.F.R. § 668.175(g)).

20 For example, after ITT Educational Services, Inc., the parent of ITT Technical Institute, filed for bankruptcy in 2016, the Department filed a proof of claim in that proceeding to attempt to recover debts owed to the United States. *See* U.S. Department of Education, Official Form 410: Proof of Claim, *In re ITT Educ. Servs., Inc.*, No. 16-07207-JMC-7A, Dkt. 1427-1 (S.D. Ind. Mar. 17, 2017) ("ED ITT Proof of Claim"). *See also* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re ITT Educ. Servs., Inc.*, No. 16-07207-JMC-7A, Dkt. 1 (S.D. Ind. Sept. 16, 2016) ("ITT Bankruptcy Petition"). In the ED ITT Proof of Claim, the Department stated a claim of $230,518,448.19. In contrast, ITT's Summary of Assets and Liabilities, filed in October 2016, showed total assets of $389,175,935.14—of which approximately $47,000 was owed to secured creditors, $9,387,474.49 to priority unsecured claims, and more than $1 billion in unsecured claims.

21 Ltr. from Martina Fernandez-Rosario, Division Director San Francisco/Seattle School Participation Division, Federal Student Aid to Mr. Craig Jalbert re: WyoTech-Long Beach Final Program Review Determination 14 (February 22, 2019) (emphasis in original) ("WyoTech-Long Beach FPRD") *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/WyoTech_Long_Beach_CA_012873_02222019_FPRD_Redacted.pdf; *see also, e.g.*, Ltr from Chris Miller, Division Director, Federal Student Aid to Sean Harding, Anthem College re: Final Program Review Determination for Anthem College (May 5, 2015) (establishing $320,023 in liabilities but asserting that it was "not [making] a demand for payment") *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/AnthemCollege_Georgia_02263108_FPRD__05_05_2015.pdf; Ltr. from Betty Coughlin, Division Director, Federal Student Aid to Juanita Serbia Hernandez, President, Serbia's Technical College re: Final Program Review Determination (Feb. 2, 2017) (establishing $314,561 in liabilities but asserting that it was "not [making] a demand for payment"), *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Serbia_Technical_College_PR_025024_2_2_17_FPRD_Redacted.pdf.

22 Chapter 7 Voluntary Petition, *In re: Park West Barber Sch., LLC*, No. 16-90356, Dkt. 1 (Bankr. M.D.N.C. April 26, 2016).

23 Notice of Need to File Proof of Claim Due to Recovery of Assets, *In re: Park West Barber Sch., LLC*, No. 16-90356, Dkt. 9 (Bankr. M.D.N.C. June 2, 2016).

24 Ltr. from Chris Miller, Division Director, Federal Student Aid to Corey L. Bell, Jr., President, Park West Barber School re: Final Program Review Determination 2 (June 28, 2017), *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Park_West_Barber_School_NC_04149300_06282017_FPRD_Redacted.pdf.

25 Chapter 7 Trustee's Final Account and Distribution Report Certification that the Estate has been Fully Administered and Application to be Discharged, *In re: Park West Barber Sch., LLC*, No. 16-90356, Dkt. 88 (Bankr. M.D.N.C. July 17, 2017).

26 Memorandum from Deputy Attorney General Sally Yates, U.S. Dep't of Justice (Sept. 9, 2015) *available at:* https://www.justice.gov/archives/dag/file/769036/download.

27 *Id.*

28 Ltr. from Sen. Elizabeth Warren, Sen. Sherrod Brown, et al. to Hon. Jay Clayton, Chairman Securities & Exchange Comm'n (March 4, 2019) (criticizing the SEC's settlement with former Corinthian College executives), *available at:* https://www.warren.senate.gov/imo/media/doc/Letter%20to%20Jay%20Clayton%20on%20Corinthian%20SEC%20Settlement%203.4.2019.docx.pdf; Ltr. from Sen. Richard Durbin, Sen. Elizabeth Warren et al. to Hon. Jay Clayton, Chairman Securities & Exchange Comm'n (July 20, 2018) (criticizing the SEC's settlement with former ITT executives), *available at:* https://www.durbin.senate.gov/imo/media/doc/7.20.18%20ITT%20SEC%20letter%20FINAL.pdf.

29 *See* Litigation Release No. 24410, U.S. Securities & Exchange Comm'n*,* SEC Charges Former Executive Officers for Their Roles in Corinthian College's Disclosure Failures (February 25, 2019), *available at:* https://www.sec.gov/litigation/litreleases/2019/lr24410.htm; Press Release, U.S. Securities & Exchange Comm'n, Former CEO and CFO of ITT Barred and Ordered to Pay Penalties (July 6, 2018) *available at:* https://www.sec.gov/news/press-release/2018-129.

30 In the case of ITT, the ED ITT Proof of Claim asserted losses incurred for amounts based on closed school discharges, borrower defense discharges, and spending or otherwise using excess Pell Grant funds, thereby breaching fiduciary duties to, and Program Participation Agreements with, the Department. *See* ED ITT Proof of Claim at 1–4.

31 HEA § 498(e)(1)(B), 20 U.S.C. § 1099c(e)(1)(B).

32 HEA § 498(e)(1)(A), 20 U.S.C. § 1099c(e)(1)(A).

33 HEA § 498(e)(2)(A), 20 U.S.C. § 1099c(e)(2)(A). *See also* 34 C.F.R. § 668.15(f)(2). Notably, the twenty-five percent ownership figure was adopted by regulation, not by statute. The Secretary may, of course, change that figure—reinterpreting the statutory phrase "standard ownership interest"— through the standard regulatory process.

34 34 C.F.R. § 668.87.

35 *See, e.g.*, Ltr. from Brenda Yette, Federal Student Aid to Jeffrey Myher, President, Globe University re: Final Program Review Determination – Closed School Loan Discharges 4 (Aug. 5, 2019) *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Globe_University_MN_004642_080519_FPRD_Redacted.pdf (assessing closed school loan discharge liabilities through a Final Program Review Determination and highlighting how, if additional liabilities accrue, "the Department will use the program review process to recover those liabilities from Globe at that time").

36 HEA § 437(c), 20 U.S.C. § 1087(c).

37 *Id*.

38 More specifically, the HEA provides that the liability shall be "to the same extent with respect to such [unpaid] refund that such an individual would be liable as a responsible person for a penalty under § 6672(a) of [the] Internal Revenue Code." HEA § 498(e)(6)(C); 20 U.S.C. § 1099c(e)(6)(C). That section of the IRC provides for a penalty "equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." IRC § 6672(a); 26 U.S.C. § 6672(a). Nevertheless, it is not immediately obvious how the Department would actually levy a penalty directly on an individual, as opposed to requiring the individual to assume the liabilities of an institution and collect via the mechanisms set out herein.

39 Any IHE participating in the Title IV programs must enter a Program Participation Agreement ("PPA") with the Department. The PPA is a standard agreement that incorporates Title IV and its implementing regulations. HEA § 487, 20 U.S.C. § 1094; 34 C.F.R. § 668.14. Separately, institutions that wish to participate in the Direct Loan program—by far the largest of the Title IV programs—must also enter into an additional agreement (known as the Direct Loan Agreement, or "DLA") with the Secretary setting forth the terms of participation. *See generally* HEA §§ 451–454, 20 U.S.C. §§ 1087a–1087d.

40 HEA § 454(a)(3), 20 U.S.C. § 1087d(a)(3).

41 HEA § 487(c)(1)(B), 20 U.S.C. § 1094(c)(1)(B).

42 34 C.F.R. § 668.15(c)(1). *See also id.* § 668.174(b). If a member of the Institutional Control Group of Institution A becomes a member of the Institutional Control Group of Institution B, and Institution A has an outstanding liability to the Department, the inclusion of that individual as a member of Institution B's Institutional Control Group will result in the Department deeming Institution B to not be financially responsible, and thus ineligible to participate in Title IV programs. Institution A's liability does not transfer to Institution B, but the consequences of an unpaid liability will follow the members of Institution A's Institutional Control Group.

43 *Id.* § 600.21(a)(6).

44 *Id.* § 600.21(e).

45 David Weil, *Creating a strategic enforcement approach to address wage theft: One academic's journey in organizational Change*, J. Indus. Rel. at 6 (2018), *available at:* https://www.researchgate.net/publication/325287123_Creating_a_strategic_enforcement_approach_to_address_wage_theft_One_academic%27s_journey_in_organizational_change.

46 Yates Memo, *supra* n. 26.

47 *See supra* nn. 5–6 & accompanying text.

48 *See, e.g.*, Ltr. from Martina Fernandez-Rosario, Division Director San Francisco/Seattle School Participation Division, Federal Student Aid to Dr. Chang Yi Hsiang, President, World Medical Institute re: Final Program Review Determination (June 6, 2019) (assessing a $1,202,646 liability on the institution) *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/World_Medicine_Institute_HI_030725_06062019_FPRD_Redacted.pdf; WyoTech-Long Beach FPRD at 14 (assessing a $12,672,570 liability on a closed institution); *see also generally* 2019-20 Federal Student Aid Handbook 2-207.

49 *See generally* 34 C.F.R. § 668.23.

50 *Id.* § 668.26.

51 *See generally* 34 C.F.R. Part 668, Subpart H.

52 *In the Matter of Mile Hi Coll.*, Dkt. No. 93-105-ST, U.S. Dep't of Educ. (March 15, 1994), *available at:* https://oha.ed.gov/oha/files/2019/02/1993-105st.pdf.

53 *Id*.

54 *In the Matter of Cosmetology Coll.*, Dkt. No. 94-96-SP, U.S. Dep't of Educ. (Aug. 23, 1995), *available at:* https://oha.ed.gov/oha/files/2019/02/1994-96-sp.pdf. Indeed, the Department's regulations establishing the appeal procedures apply to any "institution" or "third-party servicer" that seeks to appeal a final audit determination or final program review determination. *See* 34 C.F.R. § 668.111(a). This language has not changed in any relevant respect since the addition of the HEA's personal liability provisions in 1992.

55 *In the Matter of Aero-Space Inst.*, Dkt. No. 96-59-SA, U.S. Dep't of Educ. (Aug. 26, 1996), *available at:* https://oha.ed.gov/oha/files/2019/02/1996-59-sa.pdf.

56 The OHA decisions in *Cosmetology College* and *Excelsis Beauty College* were "certified" as the Final Decisions of the Department by Secretaries Richard Riley and Rod Paige, respectfully. *See In the Matter of Cosmetology College*, Dkt. No. 94-96-SP, U.S. Dep't of Educ. (Nov. 27, 1995), *available at:* https://oha.ed.gov/oha/files/2019/03/1994-96-SP.pdf.; *In the Matter of Excelsis Beauty College*, Dkt. No. 98-109-SA (Oct. 11, 2001), *available at:* https://oha.ed.gov/oha/files/2019/03/1998-108-SA.pdf.

57 *See In the Matter of Aero-Space Institute*, Dkt. No. 96-59-SA, U.S. Dep't of Educ. (Aug. 26, 1996), *available at:* https://oha.ed.gov/oha/files/2019/02/1996-59-sa.pdf (noting the tribunal's "agree[ment] with counsel for [the Department] that the issue [of personal liability] is beyond the scope of this proceeding and jurisdiction.").

58 *See* 34 C.F.R. § 668.118–120 (describing the procedures for parties to appeal an OHA decision to the Secretary and granting the Secretary authority to "reverse the decision" of a hearing official).

59 *In the Matter of Chicago Educ., Inc.*, Dkt. No. 94-132-SA, U.S. Dep't of Educ. (Aug. 16, 1995), *available at:* https://oha.ed.gov/oha/files/2019/02/1994-132sa.pdf.

60 Executive Office of the President, Office of Management and Budget, Circular A-129: Policies for Federal Credit Programs and Non-Tax Receivables at 20 (Jan. 2013), *available at:* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A129/a-129.pdf. Separately, the federal "Claims Collection Standards" provide that "[f]ederal agencies shall aggressively collect all debts arising out of activities of . . . that agency." 31 C.F.R. § 901.1(a).

61 28 U.S.C. § 3001 *et seq.* This should not be confused with the Fair Debt Collection Practices Act, 15 U.S.C. § 1692–1692p, which is the most common use of the term "FDCPA." For sake of clarity, we refer to the Federal Debt Collection Procedures Act as the "DCPA."

62 31 U.S.C. § 3720A.

63 28 U.S.C. § 3001(a)(1)–(2). The exception to this "exclusive" procedure, in applicable here, is when "another Federal law specifies the procedures for recovering" on a claim for the debt. *Id.* § 3001(b).

64 There are, however, a handful of instances in which the DCPA is cited in cases regarding the Department's efforts to collect on individual student loans. *See, e.g.*, *United States v. George*, 144 F. Supp. 2d 161 (E.D.N.Y. 2001). In addition, the DCPA has been used to obtain prejudgment attachment in cases involving Title IV funds brought by the United States under the False Claims Act. *See generally*, *United States v. Teeven*, 862 F. Supp. 1200, 1207 (D. Del. 1992).

65 *See, e.g., U.S. Small Bus. Admin. v. Bensal*, 853 F.3d 992 (9th Cir. 2017) (affirming summary judgment in favor of the Small Business Administration to void the debtor's disclaimer of his share of an estate under the DCPA for loans guaranteed by the debtor); *see also* 28 U.S.C. 3002(15)(b) (defining "United States" to include an "agency, department, commission, board, or other entity of the United States).

66 *NLRB v. E.D.P. Med. Comput. Sys., Inc.*, 6 F.3d 951, 954 (2d Cir. 1993) (internal quotations and citations omitted).

67 The DCPA defines a "debt" to include an amount that is owing to the United States on account of a "fine, assessment, penalty, restitution, damages, . . . recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States." 28 U.S.C. § 3002(3). Federal student loans of all types would fall under the DCPA because "the Government is either the lender or . . . the guarantor of the loan." *Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 224 (5th Cir. 2007).

68 *See, e.g.,* U.S. Department of Justice, Sample Certificate of Indebtedness (last visited Aug. 20, 2020), *available at:* https://www.justice.gov/sites/default/files/jmd/legacy/2013/12/27/cert-indebedtedness.pdf. *See also U.S. v. Bedi*, 318 F. Supp. 3d 561 (N.D.N.Y. 2018) (government's complaint to recover debt owed under the DCPA was supported by a Certificate of Indebtedness); *U.S. v. Ouachita Gravel Co.*, No. 6:18-CV-06093-RTD, 2019 WL 5309118 (W.D. Ark. Oct. 21, 2019) (same).

69 *See* 34 C.F.R. § 668.13(b) (affording institutions 45 days to appeal an audit determination or final program review determination to OHA). A party has thirty days to submit an appeal of an OHA determination to the Secretary. 34 C.F.R. § 668.119(a). If the party does not appeal that decision, it becomes final. *Id.* § 668.121(b). If the party appeals to the Secretary, the decision of the Secretary is final, unless there is a remand back to OHA. *Id.* § 668.121(a).

70 31 C.F.R. § 904.1(a). Under the FCCS, debts over one million dollars, or other such amount as the Attorney General may direct, get referred to the Civil Division. Debts of a lesser amount can be revered to Justice's Nationwide Central Intake Facility. *Id.*

71 *Id.* § 901.1(e)(6).

72 *Bedi*, 318 F. Supp. 3d at 568.

73 *See supra* n. 24 & accompanying text.

74 *See, e.g., U.S. v. Ouachita Gravel Co.*, No. 6:18-CV-06093-RTD, 2019 WL 5309118 (W.D. Ark. Oct. 12, 2019) (U.S. Department of Labor's Mine Health and Safety Administration sought summary judgment based on debts owed by defendant company).

75 *See* 34 C.F.R. § 668.121(a) (absent an appeal to the Secretary, the decision of OHA is the final agency action); *id.* § 668.131(b) (in the event of an appeal of an OHA decision to the Secretary, the opinion of the Secretary is the final agency action). *Cf.* 34 C.F.R. § 668.123 (declaring that the Department "will take steps to collect the debt at issue" if the Secretary sustains a liability).

76 *Bedi*, 318 F. Supp. 3d at 566; *see also United States v. Behrens*, 656 Fed. Appx. 789, 790 (8th Cir. 2016).

77 28 U.S.C. §§ 3201–3206.

78 34 C.F.R. §§ 285.2–285.5.

79 The statutory and regulatory authorities governing the Department's notice requirements for federal tax offset are 31 U.S.C. § 3720A(b)(1), 31 C.F.R. § 285.2(d)(1)(ii)(B), and 34 C.F.R. § 30.33(b). The statutory and regulatory authorities governing the Department's notice requirements for offset of other federal benefit payments are 31 U.S.C. § 3716(a)(1) and 31 C.F.R. § 285.4(d).

80 31 U.S.C. § 3716(a); *id.* § 3720A(b); 31 C.F.R. § 285.2(d)(1)(i); *id.* § 285.5(b), (d)(3).

81 31 C.F.R. § 285.5(d)(5).

82 26 U.S.C. § 6402(d)(1). *See also* 31 U.S.C. § 3716(c)(6); *id.* § 3720A(c); 31 C.F.R. § 285.4(f); *id.* § 285.4(h). Fiscal Service has the authority to reject a certification that is not submitted in the proper form or lacks required information. *See, e.g.*, *id.* § 285.2(d)(5).

83 Weil, *supra* n. 45, at 10 (discussing the importance of communicating with regulated entities of a new enforcement strategy).

84 Similarly, as Professor Cass Sunstein, who also served as the Administrator of the Office of Information and Regulatory Affairs under President Obama, recently highlighted, post-enforcement publicity also has deterrent effect on future wrongdoing. Cass Sunstein, Bloomberg Opinion, *When It Comes to Workplace Safety, Shaming Works* (March 9, 2020) *available at:* https://www.bloomberg.com/opinion/articles/2020-03-09/osha-shaming-tactic-improved-workplace-safety-before-trump; *see also* Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 11 Am. Econ. R. 1866 (2020) (finding that "press releases revealing OSHA noncompliance lead to substantial improvements in workplace safety and health," and, more specifically, that such a release "leads to 73 percent fewer violations at 'peer' facilities in the same sector within a 5 kilometer radius").

85 The Department has previously noted the relevance of third-party insurance to its consideration of institutional financial responsibility. In the 2016 Borrower Defense Final Rule, the Department included certain reporting requirements and surety triggers, which were obviated where an institution had sufficient insurance to cover debts and liabilities that could result from the condition. *See, e.g.*, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926, 76,006 (Nov. 1, 2016) (discussing the Final Rule).

86 HEA § 498(e)(1)(A), 20 U.S.C. § 1099c(e)(1)(A).

87 34 C.F.R. § 668.175(g)(2)(ii).

88 One approach would be to issue a memorandum, akin to the so-called “Hansen Memo” on incentive compensation, or to the “Mitchell Memo,” which effectively revoked the internal guidance expressed in the Hansen Memo. *See* Memorandum from William D. Hansen, Deputy Secretary to Terri Shaw, Chief Operating Officer, Federal Student Aid re: Enforcement policy for violations of incentive compensation prohibition by institutions participating in student aid programs (Oct. 30, 2002) (“Hansen Memo”), *available at:* https://www.hmbr.com/wp-content/uploads/2015/06/Hansen-Incentive-Compensation-Memo.pdf; Memorandum from Ted Mitchell, Undersecretary of Education to James Runcie, Chief Operating Officer, Federal Student Aid re: Enforcement of the statutory prohibition on payment of incentive compensation by postsecondary institutions (June 2, 2015) (“Mitchell Memo”), *available at:* https://assets.documentcloud.org/documents/2095024/mitchell-incentive-compensation-memo.pdf.

89 *See supra* n. 6 & accompanying text.

90 470 U.S. 821, 837–38 (1985) (holding that, absent Congressional indication to the contrary, an agency’s decision to exercise its civil enforcement authorities are “committed to agency discretion by law” under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)).

91 *See* HEA § 487(a), 20 U.S.C. § 1094(a) (program participation agreement); HEA § 454(a)(6), 20 U.S.C. § 1087d(a)(6) (direct loan agreement). To modify the direct loan agreement, the Department would need to conclude that it was “necessary to protect the interest of the United States and to promote the purposes of [Title IV]” to do so.

92 31 U.S.C. §§ 3716, 3720D.

93 *Id.* § 3711(e).

94 *Id.* § 3711(g).

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