

MAJORITY MEMBERS:

ROBERT C. "BOBBY" SCOTT, VIRGINIA,
Chairman

RAÚL M. GRIJALVA, ARIZONA
JOE COURTNEY, CONNECTICUT
GREGORIO KILILI CAMACHO SABLÁN,
NORTHERN MARIANA ISLANDS
FREDERICA S. WILSON, FLORIDA
SUZANNE BONAMICI, OREGON
MARK TAKANO, CALIFORNIA
ALMA S. ADAMS, NORTH CAROLINA
MARK DESAULNIER, CALIFORNIA
DONALD NORCROSS, NEW JERSEY
PRAMILA JAYAPAL, WASHINGTON
JOSEPH D. MORELLE, NEW YORK
SUSAN WILD, PENNSYLVANIA
LUCY MCBATH, GEORGIA
JAHANA HAYES, CONNECTICUT
ANDY LEVIN, MICHIGAN
ILHAN OMAR, MINNESOTA
HALEY M. STEVENS, MICHIGAN
TERESA LEGER FERNANDEZ, NEW MEXICO
MONDAIRE JONES, NEW YORK
KATHY E. MANNING, NORTH CAROLINA
FRANK J. MRVAN, INDIANA
JAMAAL BOWMAN, NEW YORK
SHEILA CHERFILUS-MCCORMICK, FLORIDA
MARK POCAN, WISCONSIN
JOAQUIN CASTRO, TEXAS
MIKIE SHERRILL, NEW JERSEY
ADRIANO ESPAILLAT, NEW YORK
KWEISI MFUME, MARYLAND



COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

VIRGINIA FOXX, NORTH CAROLINA,
Ranking Member

JOE WILSON, SOUTH CAROLINA
GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
GLENN GROTHMAN, WISCONSIN
ELISE M. STEFANIK, NEW YORK
RICK W. ALLEN, GEORGIA
JIM BANKS, INDIANA
JAMES COMER, KENTUCKY
RUSS FULCHER, IDAHO
FRED KELLER, PENNSYLVANIA
MARIANNETTE MILLER-MEEKS, IOWA
BURGESS OWENS, UTAH
BOB GOOD, VIRGINIA
LISA C. MCCLAIN, MICHIGAN
DIANA HARSHBARGER, TENNESSEE
MARY E. MILLER, ILLINOIS
VICTORIA SPARTZ, INDIANA
SCOTT FITZGERALD, WISCONSIN
MADISON CAWTHORN, NORTH CAROLINA
MICHELLE STEEL, CALIFORNIA
JULIA LETLOW, LOUISIANA
CHRIS JACOBS, NEW YORK
VACANCY

March 10, 2022

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary Cardona:

I write to share my views on the Department of Education's (Department's) current negotiated rulemaking process to improve protections for students and taxpayers defrauded by unscrupulous institutions of higher education (IHEs). I am encouraged by many of the Department's proposals, but I believe more can be done to protect students and hold bad actors accountable.

Specifically, in Issue Paper 6, "Certification Procedures," the Department proposes to increase oversight of institutions by requiring companies that "exercise control" over a proprietary or private nonprofit institution to sign a Program Participation Agreement (PPA).¹ The Department, in this proposal, defines an entity as "exercise[ing] control" if it has 1) 50 percent direct or indirect ownership by either voting rights or by the right to appoint board members to the institution, 2) the power to block significant actions, 3) 100 percent direct or indirect interest in the institution, or 4) provided or will provide the financial statements to meet any of the underlying requirements for institutional eligibility.² These changes have been proposed to help ensure that the Department can conduct "heightened oversight of institutions," including to hold corporate owners liable for "taxpayer losses that may be incurred by the institution."³

While this initial proposal includes many overdue and worthwhile policy changes, it fails in two key aspects: it allows individual owners and leaders to evade scrutiny by limiting the PPA

¹ See Issue Paper 6, "Certification Procedures," Session 1: January 18-21, 2022, at pg. 2, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/6certprocedures.pdf> (hereinafter "Jan. Issue Paper 6"); Issue Paper 6, "Certification Procedures," Session 2: February 14-18, 2022, at pg. 5, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/6certproced.pdf> (hereinafter "Feb. Issue Paper 6").

² See Feb. Issue Paper 6, *supra* 1 at pg. 5.

³ See Jan. Issue Paper 6, *supra* 1 at pgs. 1-2.

requirement to corporate owners only, and it uses standards for determining control that are out of alignment either with existing or proposed regulations.

Personal Liability

In my August 16, 2021, letter to the Department,⁴ I requested that the Department use its existing authority under the *Higher Education Act of 1965* (HEA) to hold owners, executives, and board members of defunct for-profit and converted for-profit colleges individually responsible for liabilities of the institution to the federal government when these individuals were involved in and profited from the fraud perpetrated against students and taxpayers.

Under the HEA, the Department currently has authority to recover financial losses from individuals who “exercise substantial control” over education institutions, namely board members, the chief executive officer, other executives, or major owners.⁵ In this section of the HEA, the term “exercises substantial control” can be determined by the following factors:

- 1) the individual or entity directly or indirectly controls a substantial ownership interest in the institution;
- 2) “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 substantial ownership interest in the institution”; or
- 3) “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 substantial ownership interest in the institution.”⁶

In current regulations related to institutional financial responsibility, the Department considers an individual to “exercise substantial control” if he or she 1) directly or indirectly holds, including with other members of his or her family, at least a 25 percent ownership interest in the institution; 2) represents through a voting trust, power of attorney, proxy, or similar agreements, either alone or with others, at least a 25 percent ownership interest in the institution; or 3) is a board member or other executive officer of the institution or an entity that holds a 25 percent ownership interest in the institution.⁷ This section of the regulations has been proposed to be deleted in its entirety in the Department’s proposed Issue Paper 4, “Financial Responsibility,” and not adequately addressed in Section 668.176 of Subpart L, as proposed.⁸

Fluctuating Thresholds to Determine “Control”

Separately, in Issue Paper 5, “Changes in Ownership,” in a proposed section 600.21(a)(6), the Department suggests using a 25 percent threshold for ownership when identifying individuals and entities that are able to “substantially affect the actions” of an institution. The Department

⁴ See Letter from Rep. Robert “Bobby” Scott to Dep’t of Ed., House Comm. on Ed. and Labor, Aug. 16, 2021, available at <https://edlabor.house.gov/download/scott-letter-to-ed-requesting-personal-liability>.

⁵ See HEA §498(e)(1)(B), 20 U.S.C. §1099c(e)(1)(B).

⁶ See *id.* at §1099c(e)(2)(A)-(B).

⁷ See 34 C.F.R. §668.15(f)(2).

⁸ See Issue Paper 4, “Financial Responsibility,” Session 2: February 14-18, 2022, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/4finrespfinal.pdf>.

The Honorable Miguel Cardona

March 10, 2022

Page 3

proposes to use this 25 percent threshold in requiring institutions that experience a change in ownership to update their applications to the Department.⁹

By contrast, the Department's proposal in Issue Paper 6 fails to capture many of the owners that the Department itself recognizes are in a position to "exercise substantial control" over an institution or to "substantially affect" an institution's actions. The proposal in Issue Paper 6, in addition to needlessly excluding individual owners, creates different thresholds for what the Department considers substantial ownership by adopting a significantly higher ownership interest threshold for the PPA requirement (50 percent) than is used in current and proposed regulations relating to financial responsibility and changes in ownership (25 percent).

While I commend the Department for its ongoing efforts to strengthen consumer protections and hold bad actors accountable, more can and should be done to ensure that owners and executives of predatory and unscrupulous institutions who participate in and profit from the institution's fraudulent actions are held liable for the harm they inflict on students and taxpayers. I urge the Department review Issue Paper 4 and address how the proposed deletion of 34 C.F.R. §668.15(f)(2) might impact the analysis of "exercise substantial control." Further, I strongly urge the Department to review the proposed regulations currently under consideration to ensure that the PPA requirements included in Issue Paper 6 are consistent with previous regulations and current proposals and enable the Department to use existing authority under the HEA to hold both corporate and individual owners of institutions accountable.

Thank you for your consideration.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Chairman

⁹ See Issue Paper 5, "Changes in Ownership," Session 2: February 14-18, 2022, §600.21, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/5chnginownership.pdf>.