

WASHINGTON UPDATE

MARCH 2018

Bill to Award Tax Credits to Support Apprenticeships Introduced

On March 1, 2018, Congressmen Lloyd Smucker (R-PA) and Alexander Mooney (R-WV) introduced H.R. 5153, the *USA Workforce Tax Credit Act*, which would award up to \$2 billion in tax credits to individuals and corporations that make charitable donations to groups that award K-12 scholarships and institutions offering career and technical education and community-based apprenticeship programs. The bill would allow a tax credit of up to 25 percent of an individual or corporation's tax liability. According to his press release, Congressman Smucker said: "The goal of this legislation is to encourage investment in organizations and programs that are preparing individuals for the jobs of today."

A copy of the press release is found at: <https://smucker.house.gov/media/press-releases/smucker-introduces-bill-create-new-tax-credit-support-workforce-development-and>.

Senator Warren and Representative Clark Release Report Outlining Ways Secretary DeVos has Failed Students in her First Year

On March 1, 2018, Senator Elizabeth Warren (D-MA) and Representative Katherine Clark (D-MA) released a report titled, "DeVos Watch, Year One: Failing America's Students." The report found that Secretary of Education Betsy DeVos' first year in office "has been a boon for for-profit colleges, student loan companies, and advocates of school privatization at the expense of America's K-12 and college students." The report summarizes the Secretary's major actions during the first year and concluded that she has "failed as Education Secretary." Detailed findings of the review include:

- Questionable ethics and conflicts of interest by hiring personnel with clear conflicts of interest;
- Favoring for-profit colleges over students by eliminating and delaying regulations aimed at protecting students from fraud;
- Weakening public education by undermining key protections for public school students; and
- Turning back the clock on civil rights protections by leaving vulnerable populations of learners, such as transgender students, without safeguards.

A copy of the report is found at:

<https://www.warren.senate.gov/imo/media/doc/DeVos%20Report%202-26.pdf>.

A copy of Senator Warren's press release is found at:

<https://www.warren.senate.gov/oversight/reports/new-warren-clark-report-devos-tenure-has-been-a-boon-for-shady-for-profit-colleges-student-loan-companies-and-school-privatization-advocates->.

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Senator Baldwin Re-Introduces Free Community College Bill

On March 1, 2018, Senator Tammy Baldwin (D-WI) reintroduced S. 2483, the *America's College Promise Act*, which would create a new federal-state partnership to provide two years of tuition-free access to community or technical college programs that lead to a degree or industry-recognized credential. The bill would provide a federal match of \$3 for every \$1 invested by the state to waive community college tuition and fees for eligible students before other financial aid is applied. Senator Baldwin stated in the press release: "Higher education should be a path to shared prosperity, not a path into suffocating debt." According to the press release, the bill "would give students the opportunity to access quality and affordable higher education that gives them the skills and knowledge they need to succeed in the 21st century economy."

A copy of the press release is found at: <https://www.baldwin.senate.gov/press-releases/americas-college-promise>.

House and Senate Members Seek Discharge of Student Loans for Disabled Borrowers

On February 15, 2018, Senators Rob Portman (R-OH), Chris Coons (D-DE), and Angus King (I-ME) sent a letter to Secretary of Education Betsy DeVos, Secretary of Veterans Affairs David Shulkin, and Acting Commissioner of Social Security Nancy Berryhill urging the agencies to immediately discharge outstanding federal student loans for permanently disabled Americans and veterans. The letter said that the newly-enacted tax reform legislation, the *Tax Cuts and Jobs Act*, should be an impetus for forgiving the debt since discharged student loans are no longer required to be included in the gross income of disabled borrowers. "Therefore, loan forgiveness in these cases is tax-exempt." The letter urges the agencies to immediately begin discharging student loans for eligible individuals since Congress has removed the potential tax consequence associated with loan forgiveness. Others who signed the letter include Senators Susan Collins (R-Me), Tammy Duckworth (D-IL), and Corry Gardner (R-CO) as well as Congressmen Ron Kind (D-WI) and Peter Roskam (R-IL).

A copy of the Senator Portman press release, which includes the letter, is found at: <https://www.portman.senate.gov/public/index.cfm/press-releases?ID=7A5F4761-4C22-4FA0-AE92-5726D27E67CD>.

Department Issues Notice of Interpretation Preempting State Student Loan Laws

On March 12, 2018, the Department of Education published a Notice in the *Federal Register* that clarified that only the federal government, and not the States, can oversee federal student loan servicers. The Notice stated that the Department of Education issued this Notice to assert its view that the federal government has the power to regulate those companies hired by the Department to collect on Federal Direct Loans and that "State regulation of the servicing of Direct Loans impedes uniquely federal interest, and that State regulation of the servicing of the

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Federal Family Education Loan Program is preempted to the extent that it undermines uniform administration of the program.”

The Department wrote that “Congress created and expanded the Direct Loan Program with the goal of simplifying the delivery of student loans to borrowers, eliminating borrower confusion, avoiding unnecessary costs to taxpayers, and creating a more streamlined student loan program that could be managed more effectively at the federal level. Recently, several States have enacted regulatory regimes or applied existing State consumer protection statutes that undermine these goals by imposing new regulatory requirements on the Department’s Direct Loan servicers, including State licensure to service Federal student loans.” The Department concluded that subjecting Federal student loan servicers to a requirement to comply with 50 different State-level regulatory regimes would “significantly undermine the purpose of the Direct Loan Program to establish a uniform, streamlined, and simplified lending program managed at the Federal level.”

A copy of the Notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2018-03-12/pdf/2018-04924.pdf>.

On March 13, 2018, the National Governors Association (NGA) released a statement urging the Department of Education to reconsider the Notice of Interpretation. “With this declaration, the Department moves to block state policies protecting student borrowers by establishing a federal regulatory ceiling.”

A copy of the NGA statement is found at: <https://www.nga.org/cms/govs-voice-concerns-over-new-student-borrower-proposal>.

Department Expands Closed School Discharges for Former Charlotte School of Law Students

On March 9, 2018, the Department of Education announced that it was expanding the number of former Charlotte School of Law students who are eligible to have their federal loans discharged following the closure of the school last year. In a press release, Secretary of Education Betsy DeVos said that she was exercising her authority to expand the pool of former students who are eligible for closed school loan discharges. “My focus is and will continue to be on doing what’s right for individual students.”

A copy of the press release is found at: <https://www.ed.gov/news/press-releases/secretary-devos-extends-closed-school-discharge-more-charlotte-school-law-students>.

Department Distributes FY 2015 Draft Cohort Default Rates

On February 26, 2018, the Department of Education distributed its FY 2015 Draft Cohort Default Rates. The Electronic Announcement also disclosed the time period for appealing the FY 2015 Draft Cohort Default Rates, which begins on March 6, 2018 for all schools.

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A copy of the announcement is found at:

<https://ifap.ed.gov/eannouncements/022818FY2015DraftCDRDistributedFeb26.html>.

Department Seeks Comments on Student Loan Bankruptcy Standards

On February 21, 2018, the Department of Education published a Notice in the *Federal Register* requesting comments on factors to be considered in evaluating undue hardship claims asserted by student loan borrowers in bankruptcy proceedings. In 2005, the U.S. Bankruptcy Code was amended and barred most student loan borrowers from discharging their student loans in bankruptcy unless they could demonstrate “undue hardship” if forced to pay their student loans.

According to the Notice, Congress has never defined “undue hardship” in the Bankruptcy Code and has not delegated to the Department the authority to do so. Federal courts have established the legal standard for a student loan debtor to prove “undue hardship”. Current guidance is found in Dear Colleague letter GEN-15-13 and was reported to be very difficult to reach. The publication of the Notice suggests that the Department may be willing to broaden the definition of “undue hardship.” Comments are due May 22, 2018.

A copy of the Notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2018-02-21/pdf/2018-03537.pdf>.

Borrower Defense to Repayment Rules Delayed Until July 1, 2019

On February 14, 2018, the Department of Education posted a Notice in the *Federal Register* that the borrower defense to repayment regulation would be delayed until July 1, 2019. The delay of the rule came around the time that the negotiated rulemaking sessions for the borrower defense to repayment rule concluded.

A copy of the Notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2018-02-14/pdf/2018-03090.pdf>.

Net Price Calculator Template for 2016-2017 Data is Now Available

Each institution that participates in the Title IV federal student aid programs is required to post its Net Price Calculator on its Web site. The Net Price Calculator is required for all Title IV institutions that enroll full-time, first time degree- or certificate-seeking undergraduate students. The Net Price Calculator uses institutional data to provide estimated net price information to current and prospective students and their families based on a student’s individual circumstances. While there is no specific deadline for updating the Net Price Calculator, institutions are required to update their Net Price Calculator on an annual basis.

The template is available at: <https://nces.ed.gov/ipeds/netpricecalculator/>.

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Court Prevents Department of Education from Enforcing the Deadline for Third Parties to Comment on ACICS' Initial Recognition Application

On February 16, 2018, U.S. District Judge Paul Crotty ordered the U.S. Department of Education to extend the public comment period regarding whether the Department should reinstate the recognition for the Accrediting Council for Independent Colleges and Schools (ACICS). February 16, 2018 was the deadline for public comments but the Temporary Restraining Order (TRO) issued by Judge Crotty required the Department to extend the date until March 1, 2018 or until a hearing on a motion for preliminary injunction is held. The ruling was the result of a lawsuit filed by The Century Foundation, a liberal leaning group that has been critical of for-profit schools, which sought to force the Department to turn over ACICS' application for initial recognition. The Century Foundation argued that it could not comment unless it was permitted to review the ACICS application.

A copy of the decision is found at: <https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2018/02/16104012/TRO-Decision.pdf>.

Pursuant to the recent court order, a Notice appeared in the February 22, 2018 *Federal Register* extending the public comment period until March 1, 2018. The Notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2018-02-22/pdf/2018-03686.pdf>. The Department has also begun releasing records related to the ACICS application during the last week in February.

Democratic Senators and Attorneys General Express Concern About ACICS' Request for Reinstatement

In response to the Department of Education's request for written comments on ACICS' application for initial recognition, a number of groups have weighed in. Of special note was the February 15, 2018 letter from Senators Elizabeth Warren (D-MA), Patty Murray (D-WA), Dick Durbin (D-IL), Sherrod Brown (D-OH), and Richard Blumenthal (D-CT) asking that the National Advisory Committee on Institutional Quality and Integrity (NACIQI) reject ACICS' request for initial recognition. A letter of February 16, 2018 from a coalition of 20 Democratic Attorneys General (AG) requested that ACICS' application for reconsideration be blocked. The Career Education Colleges and Universities (CECU) sent a letter on February 16, 2018 to the Department urging it to undertake a "fair, transparent, and non-ideological evaluation of ACICS' application."

A copy of the Senators' letter is found at: http://c.yimcdn.com/sites/www.ncher.us/resource/resmgr/daily_briefing/ACICS_letter.pdf.

A copy of the AGs' letter is found at: <https://www.mass.gov/files/documents/2018/02/16/AG%20Multistate%20Letter%20to%20USD%20Ed%20Opposing%20ACICS%20Recognition.pdf>.

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A copy of CECU's letter is found at:

http://c.ymcdn.com/sites/www.ncher.us/resource/resmgr/daily_briefing/CECU_letter.pdf.

IG Outlines Concerns with the *PROSPER Act* and the White Paper on Higher Education Accountability

On March 5, 2018, the Department of Education's Inspector General (IG) Kathleen Tighe sent a letter to Chairman Virginia Foxx (R-NC) and Ranking Member Bobby Scott (D-VA) of the House Education and the Workforce Committee and Chairman Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA) of the Senate Health, Education, Labor and Pensions (HELP) Committee outlining concerns with H.R. 4508, the *Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (PROSPER Act)*, which passed the House Committee on Education on December 13, 2017, and with the Higher Education Accountability White Paper (White Paper) issued by Chairman Alexander on February 1, 2018. IG Tighe said that the financial aid programs are "inherently risky because of their complexity, the amount of funding involved, the number of program participants, and the characteristics of student populations." She also said that there are "persistent and emerging problems in the Federal student aid programs authorized by the HEA," and "it is imperative for Congress to address long-standing and emerging challenges, amend outdated HEA provisions to address awarding and disbursing aid in distance education and other alternative educational environments, and continue to provide for accountability, all while not stifling innovation."

Some of IG Tighe's views are as follows:

- **Cohort Default Rates and 90/10 Rule:** IG Tighe said that while her office shares the position in the *PROSPER Act* and the White Paper that cohort default rates and the 90/10 rule have not been effective in improving institutions' accountability because of their ability to be manipulated, she recommended that instead of eliminating the provisions, Congress should strengthen them. IG Tighe suggested that cohort default rates could be adjusted to account for nonperforming loans and 90/10 could be simplified and adjusted to eliminate veterans' benefits from the schools' calculation of the 10 percent revenue derived from non-Title IV funds.
- **Gainful Employment:** IG Tighe said that they continue to believe that a school receiving funding for programs designed to provide training for a specific occupation need to be held accountable for the success in securing employment for its students in that occupation.
- **Loan Repayment:** IG Tighe said that the "implementation of a programmatic loan repayment measure would require a massive data collection and reporting effort by schools and would require the Department to track millions of student borrowers enrolling in all programs at over 6,100 schools," and "could be nearly impossible to implement."

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- **Regular and Substantive Interaction:** Since the *PROSPER Act* removes the definition of “distance education” and replaces it with “correspondence education,” the “distance education” requirement of regular and substantive interaction between students and instructors would be eliminated. The definition of “correspondence education” is further amended to add: “Interaction between the institution and the student is limited and the academic instruction by the faculty is not regular and substantive.” IG Tighe said that by removing the definition of distance education and replacing “instructor” with “faculty” in correspondence education, institutions would be allowed full participation in the federal student aid programs based on e-mail contact between the student and faculty in matters unrelated to the subject matter of a program. Further, she noted that eliminating the definition of distance education may present difficulties for schools in the awarding, disbursing and refunding of Federal student aid funds.
- **Definition of Credit Hour:** IG Tighe said that eliminating the current regulatory definition of credit hour would create difficulties in awarding, disbursing, and returning student aid because schools would no longer be held to any standard for the quantity and quality of education offered to justify the debt incurred by students.
- **Multiple Disbursements:** While IG Tighe supported the proposal of multiple disbursements, she warned that the House’s intentions to allow schools to disburse unequal amounts of aid to adjust for costs would continue to allow abuse in the Federal student aid programs. Through past audits, OIG found some bad actors among distance education programs who were stealing the identity of students for the purpose of taking out Federal funds in their names and benefited from the large disbursement of Federal funds at the start of the academic year.
- **Return of Title IV:** IG Tighe supported the proposal to change the way institutions receive and return Title IV funds.
- **Financial Responsibility:** IG Tighe stated that when the Department proposed the delay of the borrower defense to repayment rules, the OIG had recommended that the Department leave in place the financial responsibility improvements that were not related to borrower defense. However, the Department delayed the entire borrower defense regulations. The OIG has recommended that the Department propose regulations to address schools that are at risk of precipitous closure.
- **Information Security:** IG Tighe suggested that specific safeguards included in the Gramm-Leach-Bliley Act be mandated to ensure that student data are adequately protected.

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- Accrediting Agencies: IG Tighe stated that the *PROSPER Act* would eliminate most standards required for accrediting agencies, which she believed would create “unnecessary and unacceptable risks to students and taxpayers.” She noted that their audits found that accrediting agencies “are not always reliable” and rather than eliminating the standards, the OIG recommends “retaining and strengthening expectations for accrediting agencies to ensure the quality of education member schools provide.”

A copy of the IG letter is found at:

<https://www2.ed.gov/about/offices/list/oig/misc/lettertocongressonoighearecommendationsmarch2018.pdf>

Century Foundation Releases Report on College Promise Programs

On March 6, 2018, The Century Foundation released a report titled, “The Future of Statewide College Promise Programs,” which examined the future of statewide College Promise programs. The report defines Promise programs as programs that provide at least free or debt-free tuition to a significant subset of students. According to the report, with the current focus on college affordability and student debt, a number of states and localities have proposed or implemented “free college” policies. The Obama Administration focused on the concept and, in 2014, the Tennessee Promise program was launched. A total of sixteen states now have at least one statewide Promise program, with two states running two different versions of a Promise program. Of those sixteen states, ten have enacted and funded a Promise program in 2017. The report found that while states often describe their programs as universal, the programs include extensive eligibility requirements intended to either ration the benefits in order to bring down the costs or direct the benefit to certain populations of students or both. The report concluded that: “[P]romise programs are becoming an increasingly common pathway for states to pursue urgently needed new – though frequently narrow – investments in higher education.”

A copy of the report is found at: <https://tcf.org/content/report/future-statewide-college-promise-programs/>.

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