

May 9, 2018

Dr. Arthur E. Keiser, Ph.D.
Chairman
National Advisory Committee on Institutional Quality and Integrity
U.S. Department of Education, Office of Postsecondary Education
400 Maryland Ave., S.W., Room 6W250
Washington, DC 20202

Mr. Frank H. Wu, J.D.
Vice Chairman
National Advisory Committee on Institutional Quality and Integrity
U.S. Department of Education, Office of Postsecondary Education
400 Maryland Ave., S.W., Room 6W250
Washington, DC 20202

Dear Dr. Keiser and Mr. Wu:

We write on behalf of the National Student Legal Defense Network (“NSLDN”)¹ in response to NACIQI’s invitation to comment on the oversight of for-profit institutions converting to, or attempting to convert to, non-profit entities.

I. Background

In recent years, several large institutions of higher education have engaged (or attempted to engage) in transactions that have resulted in, among other things, the elimination of a for-profit institution of higher education and the creation or expansion of a non-profit or public institution. For example, in August 2011, the U.S. Department of Education (“Department”) denied a request from the Center for Excellence in Higher Education (“CEHE”), a Utah-based chain of for-profit schools, to convert to non-profit status for purposes of federal student aid. Grand Canyon University recently announced plans to seek non-profit status for the second time, which the school unsuccessfully attempted to do in 2015-2016. In 2017, Purdue University, a public institution, announced plans to take over Kaplan University, a for-profit institution, and “Purdue University Global” officially opened for enrollment in April 2018. Also in 2017, Education Management Corporation (“EDMC”), a large for-profit education company based in Pennsylvania, completed the sale of 31 Art Institute locations, South University, and Argosy University to the non-profit Dream Center Foundation, a Los Angeles-based Pentecostal organization. And just two months ago, Ashford University (owned by Bridgepoint Education, Inc.), announced its intent to seek non-profit status amid a cloud of recent

¹ NSLDN is a non-partisan, non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.

federal and state scrutiny over misleading and abusive practices.² In each of these transactions, Department recognized accrediting agencies have had to review, or will review the transaction and change in ownership and/or change in structure. For sake of simplicity, we will refer to these transactions collectively as “conversions,” with the continuing institution being referred to as the “post-conversion” institution.

The history of failures in the for-profit education sector is substantial and need not be recounted in detail here. Many for-profit institutions have a history of poor student outcomes and have been subject to federal and state law enforcement actions and investigations, as well as private litigation, for unfair and deceptive acts and practices in connection with recruitment and marketing strategies. Students at for-profit institutions have, broadly speaking, worse outcomes than their peers at non-profit or public institutions.³

But of course, the issues that have plagued for-profit institutions do not end simply by virtue of an institution changing its tax-status and its status with the U.S. Department of Education. In fact, given that non-profit and public institutions are subject to less scrutiny by regulators, accreditor review at a transitional moment for an institution is of increased importance. Nevertheless, NSLDN is concerned that recognized accreditors have not devoted sufficient attention to how these institutions are treating their students.

II. NACIQI Should Recommend That Accreditors Require All Post-Conversion Institutions to Adhere to the Standards Currently Required of For-Profit Institutions

NACIQI is uniquely positioned to issue guidelines and best practices for Department recognized accrediting agencies to follow in order for those agencies to properly discharge their responsibilities. Such guidelines could encourage uniform standards across the accreditation community in analyzing these transactions. For this reason,

² See, e.g., California Attorney General Press Release, Attorney General Xavier Becerra Sues For-Profit Ashford University For Defrauding and Deceiving Students (Nov. 29, 2017), available at <https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-sues-profit-ashford-university-defrauding-and>; Consumer Financial Protection Bureau Press Release, “Consumer Financial Protection Bureau Takes Action Against Bridgepoint Education, Inc. for Illegal Student Lending Practices,” (Sept. 12, 2016), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-bridgepoint-education-inc-illegal-student-lending-practices/>.

³ See, e.g., Adam Looney & Constantine Yannelis, Media Summary, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults*, 2015 Brookings Papers on Economic Activity, available at <https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/> (“The so-called student loan crisis in the U.S. is largely concentrated among non-traditional borrowers attending for-profit schools and other non-selective institutions, who have relatively weak educational outcomes and difficulty finding jobs after starting to repay their loans. In contrast, most borrowers at four-year public and private non-profit institutions have relatively low rates of default, solid earnings, and steady employment rates.”).

NSLND strongly urges NACIQI to issue advisory guidelines recommending that accrediting agencies condition any approval of these conversions on the creation of robust student protections, especially conversions involving large institutions with histories of misconduct and/or poor outcomes. At a minimum, we suggest that NACIQI recommend that accreditors require all post-conversion institutions to adhere to the standards that are currently required of for-profit institutions of higher education, including the 2014 Gainful Employment regulations, those protections that have been delayed by the U.S. Department of Education that were part of the 2016 Borrower Defense Regulation,⁴ and the requirement in the Higher Education Act that at least 10% of revenue comes from non-Title IV sources. NSLND believes that post-conversion institutions should not be able to avoid student-focused regulations merely by changing corporate form. Accrediting agencies can and should, for a period of time post-conversion, require institutions to adhere to these fundamentally sound standards.

III. In Certain Circumstances, NACIQI Should Also Recommend That Accreditors Place Additional Requirements on Post-Conversion Institutions to Protect Students

In particular instances, such as when schools have long histories of misconduct or poor outcomes, the existing student protections are not enough. In such cases, NSLND recommends that NACIQI advise recognized accreditors to place the following requirements onto post-conversion institutions, each of which is discussed in detail below:

1. Requiring the post-conversion institution to set aside funds to protect students against fraudulent, misleading, or deceptive conduct, abrupt closures, or cessation of programs;
2. Requiring enhanced student debt benchmarks;
3. Appointing an unaffiliated third-party to monitor and publicly report on all marketing and recruiting for the post-conversion institution;
4. Limiting the use of lead generators that collect and use information regarding prospective students;

⁴ These protections include additional disclosure requirements in the 2016 Borrower Defense Rule, *see, e.g.*, 34 C.F.R. § 668.41(h) (originally effective July 1, 2017) (“Loan repayment warning for proprietary institutions”), as well as bans on the use of mandatory arbitration provisions and class action waivers in student enrollment agreements, *see, e.g.*, 34 C.F.R. §§ 685.300(d)-(h) (originally effective July 1, 2017). We note here that certain for-profit institutions have *voluntarily* committed to end the use of mandatory arbitration provisions and class action waivers in their enrollment agreements. *See* Danielle Douglas-Gabriel, “Two of the biggest for-profit colleges are making it easier for students to sue,” *The Washington Post* (May 23, 2016), available at https://www.washingtonpost.com/news/grade-point/wp/2016/05/23/two-of-the-biggest-for-profit-colleges-are-making-it-easier-for-students-to-sue/?utm_term=.d2048388b973.

5. Providing extensive consumer protection training for all employees and agents who direct or engage in any aspect of student recruitment or enrollment; *and*
 6. Requiring enhanced protections for student-veterans.
1. ***Post-Conversion Institutions Should Set Aside Funds to Protect Students from Fraudulent, Deceptive, or Misleading Conduct, Abrupt Closures, or Cessation of Programs***

When a pre-conversion institution has a history of liabilities, law enforcement actions and investigations, or substantial numbers of private consumer actions and complaints regarding unfair and deceptive marketing practices, accreditors should require the post-conversion institution to escrow or otherwise set aside funds in an appropriate financial vehicle in order to cover any liabilities to past, current, or future students resulting from institutional misconduct and the potential of abrupt campus closures or other instructional or programmatic cessation. The funds should be monitored by the accreditor or an appropriate entity as determined by the accreditor. Accreditors can continue to monitor the post-conversion institution in order to ensure that the amount required to be set aside is appropriate given the size of the institution and the nature of the alleged or actual misconduct. On a case-by-case analysis, accreditors can also determine the appropriate length of time, considering, at a minimum, all applicable statutes of limitation, for the post-conversion institution to maintain the set-aside funds as such.

2. ***Post-Conversion Institutions Should Adopt Strict Student Debt Benchmarks***

Accreditors should create and enforce student debt benchmarks that post-conversion institutions must meet over a period of years or face the loss of accreditation. These benchmarks should include debt-to-earnings ratios and a campus or program level cohort default rate above what is required by existing Department of Education regulations. To the extent that these measures are not otherwise calculated by the federal government or the institution, the accreditor should require an earnings survey of select programs with historically low rates.⁵

3. ***Accreditors Should, As Circumstances Require, Appoint an Independent Official to Oversee the Converting Institution's Marketing and Recruiting***

To the extent a converting institution has a history of law enforcement actions and investigations, or private litigation and complaints regarding pre-conversion recruiting tactics, accreditors can appoint, as a condition of approval, an unaffiliated party with experience in consumer protection and higher education to monitor all marketing and recruiting efforts at the post-conversion institution. Monitors have been successfully

⁵ For more information on earnings surveys, see U.S. Dep't of Educ., "Standards for Conducting the Recent Graduates Employment and Earnings Survey" (Nov. 2015), available at <https://ifap.ed.gov/GainfulEmploymentInfo/attachments/standards.pdf>.

used at a number of institutions of higher education and can be of tremendous value when required to issue periodic reports regarding the institution under monitorship.⁶

4. *Limit the Use of Lead Generators to Collect Consumer Information*

Lead generation is the process of identifying and cultivating individual consumers who are potentially interested in purchasing a product or service. In the postsecondary education sector, lead generators collect consumer contact and other information and sell it to schools as “leads.” Schools then use the leads for their own purposes, including to market their products and services. As frequently reported, lead generators often engage consumers through fraudulent or misleading representations about employment opportunities or the “best affordable colleges” when, in fact, they are gathering personal information in order to sell it to schools seeking new students at amounts ranging, in one recent case, from \$22 to \$125 for each lead.⁷

For-profit colleges have a history of working with lead generators that have been accused of deceptive marketing. For example, on January 18, 2018, the Federal Trade Commission (“FTC”) announced that it issued a final order settling charges that lead generator Victory Media violated Section 5 of the FTC Act in connection with its promotion of post-secondary schools—including for-profit institutions such as Kaplan—to military consumers.⁸ According to the FTC’s complaint, some of Victory’s materials and tools deceptively promoted schools that paid the company for those promotions, including schools that the company had not deemed “military friendly.”⁹

Given this conduct, accreditors can require post-conversion institutions to only work with lead generators that clearly and conspicuously disclose when personal information will be

⁶ See, e.g., <https://www.ed.gov/news/press-releases/us-education-department-accepts-selection-new-independent-monitor-zenith-education-group>.

⁷ See *FTC v. Expand, Inc.*, No. 16-cv-00714 (M.D. Fla. Apr. 28, 2016) (alleging that Expand, Inc. and its CEO misrepresented to consumers that they were applying for job openings when, in fact, defendants were selling consumers’ personal information – for up to \$125 per lead – to schools and career training programs), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3124/expand-inc-gigats>; see also FTC Press Release, FTC Charges Education Lead Generator with Tricking Job Seekers by Claiming to Represent Hiring Employers (Apr. 28, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/04/ftc-charges-education-lead-generator-tricking-job-seekers>.

⁸ FTC Press Release, FTC Approves Final Consent Order in Victory Media Advertising Case (Jan. 12, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/01/ftc-approves-final-consent-order-victory-media-advertising-case>; see also Student Veterans of America Comment to the FTC re: Docket Number FTC-2017-0085 (Nov. 20, 2017) (“Victory Media’s publications similarly promoted Kaplan College, but the materials excluded the fact that 23 percent of Kaplan’s programs fail the proposed gainful employment regulations.”), available at <https://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5a137fbd41920209440dcd71/1511227328342/SVA+Comment+on+Victory+Media.pdf>.

⁹ *Id.*

sold to a third party *and* that receive consumers’ express, informed consent for the sale, transfer, or disclosure of such information.¹⁰ Accreditors should also review the contracts of all third-party lead generators, third-party servicers, bundled servicers, and other outside/online marketing vendors used by the converting institution and confirm with the FTC, CFPB, Better Business Bureau, Online Lenders Alliance, and relevant state prosecutors that these entities have not received complaints or been under recent investigation. In addition, consistent with Online Lenders Alliance Best Practices,¹¹ accreditors should require converting institutions to obtain representations and warranties from all lead generators that they will comply with all applicable laws, regulations, and best practice guidelines for lead generators.

5. *Enhanced Consumer-Focused Training for all Employees or Agents of the Post-Conversion Institution Who Direct or Engage in any Aspect of Student Recruitment or Enrollment*

Similar to the training program required by the FTC in its recent settlement with DeVry, accreditors can require that post-conversion institutions establish and implement strong consumer protection trainings for all officers, employees, and agents who direct or are involved in any aspect of the student recruitment process.¹²

6. *Enhanced Protections for Student Veterans*

Under federal law, for-profit colleges cannot receive more than ninety percent of their revenue from Department of Education Title IV federal student aid. The so-called 90/10 rule does not, however, apply to non-Department government funding—such as the GI Bill—which counts on the ten percent side of the 90/10 calculation. As has been well documented, this loophole in the 90/10 rule has incentivized for-profit colleges to aggressively recruit student veterans.¹³

¹⁰ See, e.g., *FTC v. Blue Global, LLC*, No. 17-cv-2117, at 6 (D. Ariz. July 5, 2017) (proposed stipulated order for permanent injunction and monetary judgment) (requiring the defendant lead generator to clearly disclose the sale of personal information to a third party and to “have the consumer’s express, informed consent for the sale, transfer, or disclosure”), available at https://www.ftc.gov/system/files/documents/cases/ftc_v_blue_global_de04_1.pdf.

¹¹ See Online Lenders Alliance, “Best Practices” (May 2017), available at <http://onlendersalliance.org/wp-content/uploads/2015/01/Best-Practices-2017.pdf>.

¹² See, e.g., *FTC v. DeVry Educ. Group, Inc.*, No. 16-cv-00579, at 7-8 (C.D. Cal. Dec. 15, 2016) (stipulation as to entry of order for permanent injunction and monetary judgment) (requiring a twenty-year training program for all DeVry officials who “direct or engage in the promotion or sale of any educational product or service”), available at https://www.ftc.gov/system/files/documents/cases/161215_devry_stipulationrefinalorder.pdf.

¹³ See, e.g., Alia Wong, “‘Dollar Signs in Uniform:’ Why For-Profit Colleges Target Veterans,” *The Atlantic* (June 24, 2015), available at <https://www.theatlantic.com/education/archive/2015/06/for-profit-college-veterans-loophole/396731/>; Remarks by Hollister K. Petraeus, Assistant Director for Servicemember Affairs Consumer Financial Protection Bureau, Higher Ed Day, DoD Worldwide

NSLND believes that all post-conversion institutions should be required to comply with the existing 90/10 rule. Nevertheless, there may be instances in which more should be required of institutions with particularly pernicious histories. Notably, DeVry Education Group (now Adtalem Global Education, Inc.) announced in September 2016 that it was voluntarily limiting the amount of federal revenue that each of its six Title IV institutions derive from federal funding to eighty-five percent, *including* Department of Veterans Affairs and military tuition assistance benefits.¹⁴ DeVry committed to meeting this 85/15 pledge by the end of fiscal year 2017.

If post-conversion institutions are unwilling to voluntarily commit to following DeVry/Adtalem’s lead, accreditors should impose an 85/15 rule wherein Veterans Affairs and Department of Defense education benefits are included in the eighty-five percent limit on how much the institution can receive from federal student aid programs. In addition, post-conversion institutions should also be required to count foreign revenue from subsidiaries or other sources as part of the non-federal funds. Accreditors should also require converting institutions to post disclosures on any military and education-related websites to make clear that it is not government or military-affiliated and that, where accurate, the institution pays to appear in military listings.

* * * * *

Accrediting agencies serve as the “gatekeepers” of institutional eligibility for federal student aid programs.¹⁵ Their core function—to serve the common good by advancing the quality of higher education—will be undermined if they approve deals that fail to protect students and taxpayers. We therefore strongly urge NACIQI to issue new, robust guidelines advising accrediting agencies to consider the above student protections as

Education Symposium 2012 (July 25, 2012), *available at* <https://www.consumerfinance.gov/about-us/newsroom/remarks-by-hollister-k-petraeus-at-the-department-of-defense-worldwide-education-symposium/>. In November 2017, thirty-two Senators reintroduced the Military and Veterans Education Protection Act, which would “close the 90/10 loophole by counting VA and DOD funds as federal dollars.” Press Release, Senator Tom Carper (Nov. 9, 2017), *available at* <https://www.carper.senate.gov/public/index.cfm/2017/11/senators-reintroduce-military-and-veterans-education-protection-act-with-groundbreaking-support-from-veterans-service-organizations>.

¹⁴ Ashley Smith, “DeVry Adopts Reform Favored by For-Profit Critics,” *Inside Higher Ed* (Sept. 20, 2016), *available at* <https://www.insidehighered.com/news/2016/09/20/devry-university-plans-adopt-financial-reform-favored-profit-critics>.

¹⁵ See Press Release, U.S. Dep’t of Educ., Education Department Establishes Enhanced Federal Aid Participation Requirements for ACICS-accredited Colleges (Dec. 12, 2016), *available at*: <https://www.ed.gov/news/press-releases/education-department-establishes-enhanced-federal-aid-participation-requirements-acics-accredited-colleges>.

Dr. Arthur Keiser & Mr. Frank Wu

May 9, 2018

Page 8 of 8

conditions for the approval of for-profit conversions, especially conversions involving institutions with histories of misconduct and/or poor outcomes.

Sincerely,



Aaron Ament, President

Daniel A. Zibel, Vice President & Chief Counsel

Alexander Elson, Senior Counsel

National Student Legal Defense Network

1015 15th St. NW, Suite 600

Washington, DC 20005

aaron@nsldn.org

dan@nsldn.org

alex@nsldn.org

(202) 734-7495