

# FORECLOSURES AND FINANCIAL AID: MIND OVER MORTGAGES IN CLOSING THE PLUS LOAN GAP

**KAMILLE WOLFF DEAN\***

*Renewed discussion has recently emerged to help strengthen the middle class by increasing access to college. President Barack Obama is at the forefront of the discussion to make college more affordable by prompting universities to become more efficient. Using education as a gateway to success, the Obama Administration proposed a number of initiatives to deter college spending and promote financial aid accountability. This Article analyzes the nuances in financial aid that stem from the Higher Education Act of 1965 (“HEA”), which is set for reauthorization in 2014. The Article addresses an array of inherent problems in the current student loan industry, particularly as the student aid system relates to the federal Parent Loan for Undergraduate Students (“PLUS”) loan program. Specifically, the discussion defines the scope of consumer financial reform pertaining to student loans, and proposes adequate revision to the student loan provisions of the HEA to soundly provide college funding to financially distressed students and their families. The discussion also proposes a number of recommendations and best practices for relieving the heavy burden of student loan debt carried by Americans that now amounts to over 1 trillion dollars. The movement towards eroding wealth inequality through the attainment of higher education emerges as a viable opportunity for promoting innovative reform in the student loan industry. Such action is plausible considering the reauthorization of the HEA that is presently under consideration. This Article analyzes the new programs related to the agenda of lowering student debt while expanding affordable credit to attend college. Emerging student loan products are evaluated and refined to offer suggestions for the equitable implementation and enforcement of revised student loan terms.*

**I. INTRODUCTION ..... 130**

**II. FOUNDATIONAL PERSPECTIVES ON HIGHER EDUCATION AND FINANCIAL AID ..... 138**

**A. The Need for Student Loan Reform Through the Higher Education Act ..... 140**

**B. An Overview of the Student Loan Industry ..... 144**

**C. The Federal PLUS Loan Program ..... 146**

---

\* Thanks to William Anthony Dean, Joseph Christian Dean, and the dedicated staff of the Columbia Journal of Race and Law.

D.	<b>The Housing Crisis and Ensuing Credit Crunch for PLUS Loans</b> .....	148
III.	<b>CONTEMPORARY ISSUES IN THE FEDERAL PLUS LOAN PROGRAM</b> .....	151
A.	<b>The Creditworthiness Requirement for PLUS Loans</b> .....	151
IV.	<b>FINANCIAL AID BEST PRACTICES</b> .....	158
A.	<b>PLUS Loan Reform</b> .....	160
B.	<b>Financial Aid Eligibility</b> .....	165
C.	<b>Bankruptcy Protection</b> .....	167
V.	<b>CONCLUSION</b> .....	172
I.	<b>INTRODUCTION</b>	

*It's a simple fact: the more education you have, the more likely you are to have a job and work your way into the middle class. But today, skyrocketing costs price way too many young people out of a higher education, or saddle them with unsustainable debt.<sup>1</sup>*

The Great Recession of 2008 resulted in a new economy that proportionately depleted more personal and commercial wealth than the Great Depression.<sup>2</sup> Consequently, public and private entities adopted stringent spending strategies to help balance budgets and ultimately save the U.S. economy.<sup>3</sup> Widespread governmental oversight and supervision of financial products and services ensued with the legislation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”).<sup>4</sup> The Dodd-Frank Act included legislation concerning the regulation of student loans.<sup>5</sup> The house of cards built primarily by subprime mortgage lenders collapsed, thereby causing a severe

---

<sup>1</sup> President Barack H. Obama, Address Before a Joint Session of the Congress of the State of the Union (Feb. 12, 2013).

<sup>2</sup> See Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 J. BUS. & TECH L. 223, 225-27 (2013); see also MARK LABONTE, CONG. RESEARCH SERV., R40198, THE 2007–2009 RECESSION: SIMILARITIES TO AND DIFFERENCES FROM THE PAST (2010) (“One unique characteristic of the recent recession was the severe disruption to financial markets.”); see generally IVAYLO PETEV, ET AL., CONSUMPTION AND THE GREAT RECESSION: AN ANALYSIS OF TRENDS, PERCEPTIONS, AND DISTRIBUTIONAL EFFECTS (2011).

<sup>3</sup> *Id.*

<sup>4</sup> See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, H.R. 4173, 111th Cong. (2010); See also Kamille Wolff Dean, *Student Loans, Politics, and the Occupy Movement: Financial Aid Rebellion and Reform*, 46 J. MARSHALL L. REV. 105 (2012); see also Peter Coy, “The Great Recession: An ‘Affair’ to Remember,” BLOOMBERG BUSINESSWEEK, Oct. 11, 2012; see generally DAVID B. GRUSKY, ET AL., THE GREAT RECESSION 3-5 (2011) (“The ‘Great Recession’ spanned . . . to 2009, although the nation is still experiencing the aftershocks of this deep, multi-layered financial crisis”); SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION 1-2 (2004).

<sup>5</sup> *Id.*

economic downturn experienced worldwide.<sup>6</sup> The toppling of the financial market also set forth a credit crunch despite the government-funded bank bailout through the Troubled Asset Relief Program (TARP) subsidized by taxpayers.<sup>7</sup> The domino effect of the credit crunch reached the financial aid industry in unprecedented ways, including restrictions in the eligibility and issuance of student loans under the Graduate and Parent Loan for Undergraduate Students (“PLUS”) Program.<sup>8</sup>

Higher education is now closely tied to the financial market.<sup>9</sup> Credit scores play a crucial role in student loan underwriting decisions to the overall detriment of the middle class.<sup>10</sup> Low and moderate-income students also face a tightening of financial aid standards that may ultimately preclude them from attending college.<sup>11</sup> The rising costs of college, along with the decrease in federal, state, and institutional student aid, may push many deserving students to the periphery of higher education.<sup>12</sup> Without the promise of supplemental financial aid from the federal PLUS loan program, many lower and even upper middle class families may be priced out of attaining the American Dream through higher education.<sup>13</sup>

---

<sup>6</sup> See generally Meg Handley, “Bernanke: Tight Credit Impeding Housing, Economic Recovery,” U.S. NEWS AND WORLD REPORT, Feb. 10, 2012.

<sup>7</sup> See U.S. DEPT. OF TREASURY, TARP PROGRAMS, <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/Pages/default.aspx#> (last visited June 12, 2014) (“Treasury established several programs under TARP to help stabilize the U.S. financial system, restart economic growth, and prevent avoidable foreclosures. Although Congress initially authorized \$700 billion for TARP in October 2008, that authority was reduced to \$475 billion by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) . . . . The authority to make new financial commitments under TARP ended on October 3, 2010. As of March 31, 2014, cumulative collections under TARP, together with Treasury’s additional proceeds from the sale of non-TARP shares of AIG, exceed total disbursements by more than \$13 billion. Treasury is now winding down its remaining TARP investments and is also continuing to implement TARP initiatives to help struggling homeowners avoid foreclosure.”); see generally Ben S. Bernanke, Cara S. Lown & Benjamin M. Friedman, “The Credit Crunch,” 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 205, 207 (1991) (“We define a bank credit crunch as a significant leftward shift in the supply curve for bank loans, holding constant both the safe real interest rate and the quality of potential borrowers.”) (citation omitted).

<sup>8</sup> See PLUS Loans, U.S. DEPT OF EDUC., <http://studentaid.ed.gov/types/loans/plus> (last visited May 15, 2014) (“PLUS loans are federal loans that graduate or professional degree students and parents of dependent undergraduate students can use to help pay education expenses.”); see also Libby A. Nelson, *Cracking Down on PLUS Loans*, INSIDE HIGHER EDUCATION, Oct. 12, 2012, <http://www.insidehighered.com/print/news/2012/10/12/standards-tightening-federal-plus-loans?width=775&height=500&iframe=true> (reporting estimate that nearly half of potential PLUS Loan borrowers may be denied this academic year alone); Mark Kantrowitz, *Solving the Student Loan Credit Crunch*, Apr. 30, 2008, <http://www.finaid.org/educators/studentaidpolicy.phtml>.

<sup>9</sup> See National Association of College and University Business Officers, *The Financial Downturn and Its Impact on Higher Education Institutions*, <http://www.nacubo.org/documents/Impact%20of%20the%20Economy%20on%20Higher%20Education.pdf> (last visited May 15, 2014); see generally Miquel Pellicer-Gallardo, *Education and Financial Market Participation 2* (Padova University Working Paper 51, 2005).

<sup>10</sup> See generally U.S. Gov’t Accountability Office, *Student Loans: Federal Web-Based Tool on Private Loans Would Pose Implementation Challenges and May be Unnecessary* (2010), <http://www.gao.gov/assets/320/310215.pdf>; Carol Jensen & Cynthia Marrs, *A Primer on Student Loans*, ENROLLMENT MANAGEMENT JOURNAL, Winter 2009, at 45, 56 (“Good credit for students will be important . . . and will allow students to continue their educations.”); Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1965 (2012), <http://lawdigitalcommons.bc.edu/bclr/vol53/iss5/3>; see Kantrowitz, *supra* note 8, at 2, 16 (stating that private student loan lenders may have increased their credit score thresholds without formal announcement).

<sup>11</sup> See PATRICIA GANDARA, ET AL., EXPANDING OPPORTUNITY IN HIGHER EDUCATION 60-62 (SUNY Press 2006).

<sup>12</sup> See generally LAWRENCE E. GLADIEUX & ARTHUR M. HAUPTMAN, THE COLLEGE AID QUANDARY: ACCESS, QUALITY, AND THE FEDERAL ROLE 1-5 (Brookings Institution 1995).

<sup>13</sup> See generally Jacob P.K. Gross, et al., *What Matters in Student Loan Default: A Review of the Research Literature*, 39 J. OF STUDENT FIN. AID, no. 1, 2009 at 19; College Board, *Trends in Student Aid 21* (2012), <http://trends.collegeboard>.

The tightening financial aid market may also affect efforts to recruit and retain first-generation college students and other vulnerable populations, such as recent immigrants.<sup>14</sup> PLUS loans fill the gap between financial need and college expenses,<sup>15</sup> but that gap-filling function has been greatly reduced due to stringent credit checks and unforgiving underwriting standards that are exacerbated by the recent rise in student loan defaults.<sup>16</sup> Accordingly, eligible PLUS loan applicants now undergo heightened financial scrutiny to secure financial aid pursuant to the new underwriting standards implemented during the 2012–2013 academic year.<sup>17</sup> The “adverse credit” non-eligibility factor outlined in the HEA<sup>18</sup> for PLUS loans was recently revised to exclude applicants who have experienced bankruptcy, loan modifications, and foreclosures.<sup>19</sup> This subtle move in PLUS Loan eligibility negatively impacted and realigned the financial aid packages of deserving, yet economically-disadvantaged college students nationwide.<sup>20</sup>

---

org/sites/default/files/student-aid-2012-full-report.pdf (finding that 3.4% of undergraduate parents obtained a PLUS Loan or an average amount of \$12, 575 per loan in 2011-12).

<sup>14</sup> See generally JOHN H. SHUH, ET AL., STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION 20 (2007); STEPHEN BURD, UNDERMINING PELL: HOW COLLEGES COMPETE FOR WEALTHY STUDENTS AND LEAVE THE LOW-INCOME BEHIND 2 (May 2013), [http://newamerica.net/sites/newamerica.net/files/policydocs/Merit\\_Aid%20Final.pdf](http://newamerica.net/sites/newamerica.net/files/policydocs/Merit_Aid%20Final.pdf) (“Federal action is needed to ensure that colleges continue to provide a gateway to opportunity, rather than perpetuating inequality by limiting college access to only those who are rich enough to be able to afford it.”); Lee Gardner, *Dreamers’ Could Receive Federal Student Loans Under Immigration Bill*, THE CHRONICLE OF HIGHER EDUCATION (May 21, 2013), <http://chronicle.com/article/Dreamers-Could-Receive/139425/>.

<sup>15</sup> See generally Marian Wang, et al., *The Parent Loan Trap*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 4, 2012), <http://chronicle.com/article/The-Parent-Plus-Trap/134844>; Susana Garcia, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 GOLDEN GATE U. L. REV. 2 (2006) (discussing that the Development, Relief, and Education for Alien Minors (DREAM) Act that would permit eligible undocumented individuals to enroll in U.S. colleges is cost effective and will benefit American society); Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 289, 623 (2011); ANDORRA BRUNO, CONG. RESEARCH SERV., UNAUTHORIZED ALIEN STUDENTS: ISSUES AND “DREAM ACT” LEGISLATION 3 (2010) (“Even if they are able to gain admission, however, unauthorized alien students often find it difficult, if not impossible, to pay for higher education. Under the Higher Education Act (HEA) of 1965, as amended, they are ineligible for federal financial aid. In most instances, unauthorized alien students are likewise ineligible for state financial aid. Furthermore, . . . they also may be ineligible for in-state tuition.”).

<sup>16</sup> See generally Nelson, *supra* note 8.

<sup>17</sup> United Student Aid Funds, *Parent PLUS Loan Denial Issues* (2012), <http://www.usafunds.org/schools/WebcastMaterials/PLUSLoanDenialIssues.pdf> (noting that the U.S. Department of Education changed its credit underwriting procedure in October 2011, thereby resulting in increased PLUS loan denials); see generally Mark Kantrowitz, *Congress Passes Legislation Ending the Federally-Guaranteed Student Loan Program*, FASTWEB, (Sept. 22, 2009), <http://www.fastweb.com/financial-aid/articles/1589-congress-passes-legislation-ending-the-federally-guaranteed-student-loan-program> (reporting on the Student Aid and Fiscal Responsibility Act of 2009 that replaced the Federal Family Education Loan Program (FFELP) with Direct Loans).

<sup>18</sup> Higher Education Act of 1965, tit. IX, Pub. L. No. 89-329, 79 Stat. 1219, amended by Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681-88 (2012)); see generally Texas Guaranteed Student Loan Corporation, *Higher Education Act*, <http://www.tgslc.org/policy/hea.cfm> (last visited Feb. 22, 2014) (“The Higher Education Act (HEA) is the federal law that governs the administration of federal student aid programs. The HEA was originally passed in 1965 and signed into law by President Lyndon B. Johnson. To encourage growth and change, it must be re-approved, or ‘reauthorized,’ by Congress approximately every five years. In addition to major reauthorization bills, Congress also considers many bills that may directly or indirectly impact the HEA.”).

<sup>19</sup> See Nelson, *supra* note 8 (“According to Education Department standards, prospective borrowers can’t have any current accounts more than 90 days delinquent, or any foreclosures, bankruptcies, tax liens, wage garnishments or defaults within the past five years.”); Wang, *supra* note 15.

<sup>20</sup> See Nelson, *supra* note 8 (“A little-noticed Education Department change in October 2011 added new underwriting standards for the PLUS loan, the federal lending program for parents and graduate students. The changes made requirements more stringent and appear to have caused a spike in denials, including some to parents who had been

The HEA, passed in 1965 and most recently reauthorized in 2008, provides for federal financial aid spending.<sup>21</sup> Subsequent renewal of the HEA stands to modernize the PLUS loan lending system and may result in more equitable student aid borrowing and distribution.<sup>22</sup> Federal PLUS loans were once praised as a viable option for families to cope with skyrocketing college costs.<sup>23</sup> The contrast between the PLUS loans of today and former PLUS loans closely follows a trend of loan approvals and denials along based on consumer creditworthiness and strict underwriting guidelines.<sup>24</sup> PLUS loan eligibility now largely depends on the applicant's personal or family credit, as opposed to simple standards of admission and enrollment in an approved and accredited college program.<sup>25</sup> Parallels between PLUS loans issued before and after 2011 warrants a review, or even repeal of the abrupt changes to the student loan credit standard.<sup>26</sup> The need for innovation and improvement in the administration of the PLUS loan program is particularly acute at Historically Black Colleges and Universities (HBCUs),<sup>27</sup> and institutions that serve low-income individuals with limited resources.<sup>28</sup>

---

able to take out the loans in previous years.”); Wang, *supra* note 15 (“The change may result in significantly more Parent PLUS loan denials . . . and some financial-aid officers’ recent observations seem to bear that out. But new denials may actually involve the wrong people. After all, the tightened underwriting still examines aspects of credit history, not ability to repay.”).

<sup>21</sup> See *What You Need to Know About Reauthorization*, THE CHRONICLE OF HIGHER EDUCATION (Sept. 19, 2013), <http://chronicle.com/article/What-You-Need-to-Know-About/141697/>; Kelly Field, *5 Years On, Renewed Higher-Ed Act Has Lost Its Luster*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 12, 2013), <https://chronicle.com/article/5-Years-On-Renewed-Higher-Ed/141043/>.

<sup>22</sup> See Andy Thomason, *Reauthorization of Higher Education Act to Begin Next Week*, THE CHRONICLE OF HIGHER EDUCATION (Sept. 13, 2013), <http://chronicle.com/article/Reauthorization-of-Higher/141641/>; *But see generally* Alyson Klein, *Renewals of Education Laws Languish in Congress*, EDUCATION WEEK, Jan. 15, 2014 (“As the 113th Congress returns for its second year, nearly every major education law remains overdue for reauthorization, leaving issues from early childhood to workforce development caught in a vortex of partisan rancor. . . . The slow pace of legislative progress has put the Obama administration largely in the driver's seat on education policy. . . .”).

<sup>23</sup> See Jeffrey Steele, *PLUS Loans Get an A from Many Borrowers*, CHICAGO TRIBUNE, Dec. 9, 2003, [http://articles.chicagotribune.com/2003-12-09/business/0312090096\\_1\\_parent-loan-loan-program-financial-aid](http://articles.chicagotribune.com/2003-12-09/business/0312090096_1_parent-loan-loan-program-financial-aid) (noting that there was no scoring of income or analysis of cash-flow analysis in the former credit review for PLUS loan eligibility).

<sup>24</sup> See Thurgood Marshall College Fund, *Parent PLUS Loans*, <http://www.thurgoodmarshallfund.net/images/stories/site/PPL/PPL.pdf> (“As a result of the change in eligibility criteria, tens of thousands of students across the nation are in jeopardy of being unable to continue their college studies because their parents are unable to obtain loans to cover tuition and fees. In many instances, families who successfully obtained PPL in prior years were denied under the new eligibility criteria for the 2012-2013 and 2013-2014 academic years.”)

<sup>25</sup> See *generally* U.S. DEPT. OF ED., *FEDERAL STUDENT AID: THINGS TO CONSIDER*, <https://studentaid.ed.gov/prepare-for-college/choosing-schools/consider>.

<sup>26</sup> See Elvina Nawaguna, *Black Colleges Push U.S. Congress to Revoke Student Aid Changes*, CHICAGO TRIBUNE, Oct. 7, 2013, [http://articles.chicagotribune.com/2013-10-07/news/sns-rt-us-usa-studentloans-hbcus-20131007\\_1\\_plus-loans-student-aid-black-colleges](http://articles.chicagotribune.com/2013-10-07/news/sns-rt-us-usa-studentloans-hbcus-20131007_1_plus-loans-student-aid-black-colleges) (“Advocates for minority and low-income students are now focusing on Congress, hoping they can sway lawmakers to reverse the changes to PLUS loans and other disadvantageous reforms. They are pinning their hopes to the Higher Education Act, a half-century old law that lays out guidelines for distributing federal student aid and is due for reauthorization next year . . . . Further, they want lawmakers to reduce the interest rates and origination fees on PLUS loans. A new law that ties student loan interest rates to the 10-year Treasury note set their interest rate 6.41 percent for this academic year, but could spike to their cap of 10.5 percent as the economy improves. The interest rate was previously fixed at 7.9 percent.”); *see also* Steele, *supra* note 23 (noting the former ease of application for the PLUS loan program with “a gentle credit check” for delinquencies up to 30 days, no collateral, flexibility in repayment, and an interest rate cap) (quoting, in part, David Charlow).

<sup>27</sup> See Kelly Field, *In Victory for HBCUs, Department to Reconsider a Policy Change on Parent PLUS Loans*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 15, 2013), <http://chronicle.com/article/In-Victory-for-HBCUs/141133/> (addressing reconsideration of the “adverse credit” definition during rule-making sessions scheduled for the spring of

Personal finances for many Americans drastically changed as a result of the Great Recession.<sup>29</sup> Changes in consumer finances and personal accountability must be taken into account when considering the root cause of the student loan bubble that continues to expand.<sup>30</sup> A chain reaction occurred when financial institutions and consumers undertook risky investments.<sup>31</sup> A vast number of Americans were directly affected by toxic financial investments, particularly those acquired by minority participants in the housing and higher education markets, thereby resulting in financial hardship that oftentimes could not be easily mitigated.<sup>32</sup> Consequently, less consumer spending and more cautious financial lending placed

---

2014 while easing eligibility requirements for parents with minor credit history issues); Jamal Watson, *Education Secretary Issues Apology to HBCU Leaders*, DIVERSE ISSUES IN HIGHER EDUCATION, Sept. 26, 2013, <http://diverseeducation.com/article/56269/>; Justin Doubledy, *With Parents Denied Loans, Students Scramble at HBCUs*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 7, 2013), <http://chronicle.com/article/Without-Federal-PLUS-Loans/142147/> (“A tightening of the [PLUS] loan program's eligibility criteria two years ago has hit historically black colleges . . . especially hard, as they serve many students who rely on the loan, and a considerable share whose families no longer qualify. Seeing enrollment declines, some colleges have formed a coalition to protest the change. Students, meanwhile, have had to drop out or scramble to find other forms of financing. . . . Until 2011, applicants were approved for a PLUS loan as long as they were not more than 90 days delinquent on any debt, and did not have any foreclosures, bankruptcies, tax liens, wage garnishments, or student-loan defaults in the past five years. Under the new standards, unpaid debts in collection and student loans written off as unpayable in the previous five years also count against applicants.”); Hansi Lo Wang, *Student Loan Changes Squeeze Historically Black Colleges*, CODE SWITCH (Sept. 26, 2013, 4:40 PM), <http://www.npr.org/blogs/code-switch/2013/09/26/226552999/student-loan-changes-squeeze-historically-black-colleges>; see also Mark Kantrowitz, *Parent PLUS Loan Denial Rates in the FFEL and Direct Loan Programs* (Aug. 31, 2009), <http://www.finaid.org/educators/20090831parentplusdenial.pdf>; Kevin Carey, *The Federal Parent Rip-Off Loan*, THE CHRONICLE OF HIGHER EDUCATION (June 3, 2013), <http://chronicle.com/article/The-Federal-Parent-Rip-Off/139575/> (“More broadly, the Parent PLUS debate is symptomatic of a larger crisis among underresourced colleges that serve large numbers of low-income students. This is, again, not a problem specific to HBCUs. Whole sectors of higher education, particularly private colleges that depend heavily on tuition revenue, have been swept along by a 30-year wave of price increases.”).

<sup>28</sup> See Carey, *supra* note 27 (“The proportion of Parent PLUS applications denied because of bad credit increased from 28 percent to 38 percent in a single year. Over all, some 400,000 applications were denied. And while most of them were not parents with children attending historically black colleges and universities, those HBCUs were disproportionately hit. Without Parent PLUS loans, enrollment dropped, and revenues quickly followed.”); AM. COUNCIL ON EDUC., RECOMMENDATIONS FROM 39 HIGHER EDUCATION ASSOCIATIONS FOR THE REAUTHORIZATION OF THE HIGHER EDUCATION ACT, 6, 13 (Aug. 2, 2013), <http://www.acenet.edu/news-room/Documents/HEA-Reauthorization-Recs-080213.pdf>; see generally THE EDUC. TRUST, PRICED OUT: HOW THE WRONG FINANCIAL-AID POLICIES HURT LOW-INCOME STUDENTS (2011), [http://www.edtrust.org/sites/edtrust.org/files/publications/files/PricedOutFINAL2.0\\_0.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/PricedOutFINAL2.0_0.pdf); Marian Wang, *Public Colleges' Quest for Revenue and Prestige Squeezes Needy Students*, THE CHRONICLE OF HIGHER EDUCATION (Sept. 11, 2013), <https://chronicle.com/article/Public-Colleges-Quest-for/141541/>.

<sup>29</sup> See generally PAUL TAYLOR, ET AL., A BALANCE SHEET AT 30 MONTHS: HOW THE GREAT RECESSION HAS CHANGED LIFE IN AMERICA, Pew Research Center (June 30, 2010).

<sup>30</sup> See generally Dan Kadlec, *Scared to Prepared: How the Great Recession Changed Our Spending Habits*, TIME MAGAZINE, Apr. 3, 2013.

<sup>31</sup> See Barbara O’Niel & Jing Jian Xiao, *Financial Responsibility Before, During, and After the Great Recession: Results of an Online Study*, J. CONSUMER EDUC. 28, 34-43 (2011); Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 629 (Oct. 2010).

<sup>32</sup> See generally Barbara O’Niel & Jing Jian Xiao, *Financial Responsibility Before, During, and After the Great Recession: Results of an Online Study*, J. CONSUMER EDUC. 28, 34-43 (2011); Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 629 (Oct. 2010); Consumer Financial Protection Bureau, CFPB Ruels Establish Strong Protections for Homeowners Facing Foreclosure (Jan. 17, 2013), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-rules-establish-strong-protections-for-homeowners-facing-foreclosure/>; Experian Team, *Impact on Credit Scores of Missed Payments, Mortgage Modification*, EXPERIAN ADVICE BLOG (Mar. 28, 2012), <http://www.experian.com/blogs/ask-experian/2012/03/28/impact-on-scores-of-missed-payments-mortgage-modification/> (“Missing even one mortgage payment will affect your credit scores substantially. Multiple missed mortgage payments will seriously damage your credit history, which likely will be reflected in much lower credit scores. As a result, you may have difficulty obtaining new credit for a long period of time.”).

fiscal pressure on the federal government in several areas including the financing of higher education.<sup>33</sup> The link between consumer choice in higher education and government spending on financial aid is somewhat tied to the distressed housing market.<sup>34</sup> The evolving views on home ownership as a liability as opposed to an asset impacts the pursuit of higher education for many Americans, especially those who depended on Home Equity Lines of Credit (HELOC) loans to help pay for college.<sup>35</sup> The increased credit underwriting standard used for federal student loans effectively penalizes unassuming college students and their families who invested in the over-inflated real estate market without adequate protection from predatory lenders.<sup>36</sup> The housing bubble and ensuing recession were created in part by unscrupulous lenders and investors, as well as uninformed consumers.<sup>37</sup> Many consumers were unaware of the complexity and toxicity of their home mortgages that were backed by private and public investors.<sup>38</sup> When these investments soured, lower and middle class borrowers whose homes were their greatest assets were disproportionately targeted for foreclosure.<sup>39</sup> Minorities were particularly encouraged to take advantage of home ownership incentives from lenders and the federal government as a means of becoming upwardly mobile.<sup>40</sup> Unfortunately, the collapsed housing market actually had the reverse

<sup>33</sup> See generally IVAYLO PETEV, ET AL., CONSUMPTION AND THE GREAT RECESSION: AN ANALYSIS OF TRENDS, PERCEPTIONS, AND DISTRIBUTIONAL EFFECTS 6-7 (2011), [http://www.stanford.edu/~isaporta/cons\\_recess\\_August\\_2011.pdf](http://www.stanford.edu/~isaporta/cons_recess_August_2011.pdf) (“In stark contrast to the 2001 recession, the Great Recession, which began with the burst of the housing bubble and the global financial crisis that ensued, is characterized by a decline in real terms in all consumption components.”).

<sup>34</sup> See generally Paul O’Donnell, *How the Student Loan Crisis Drags Down Home Prices*, CNBC (March 4, 2013), <http://www.cnbc.com/id/100513344>.

<sup>35</sup> See generally Rohit Chopra, *Should I Use a Home Equity Loan to Refinance My Student Loans?*, CFPB BLOG (June 7, 2013), <http://www.consumerfinance.gov/blog/should-i-use-a-home-equity-loan-to-refinance-my-student-loans/>; FINAID, USING YOUR HOME EQUITY, <http://www.finaid.org/savings/homeequity.phtml> (last visited June 12, 2014); Brian O’Connell, *Should You Pay for College with an HELOC?*, NASDAQ, <http://www.nasdaq.com/personal-finance/should-you-pay-for-college-with-an-heloc.aspx>.

<sup>36</sup> See generally Mechele Dickerson, *The Myth of Homeownership and Why Home Ownership is Not Always a Good Thing*, 84 INDIANA L.J. 189, 189-237 (2009).

<sup>37</sup> See David Luttrell, et al., *Assessing the Costs and Consequences of the 2007–09 Financial Crisis and Its Aftermath*, 8 ECONOMIC LETTER (Sept. 2013), <http://dallasfed.org/assets/documents/research/eclt/2013/el1307.pdf>; see also Christopher Matthews, *Viewpoint: Stop Calling Student Loans a “Bubble”!*, TIME MAGAZINE, Mar. 7, 2013, <http://business.time.com/2013/03/07/viewpoint-stop-calling-student-loans-a-bubble/>; Sandy Baum, *Student Loans: Crisis, Bubble, or Manageable Policy Issue?*, STUDENT AID PERSPECTIVES, (Sept. 24, 2013), [http://www.nasfaa.org/advocacy/perspectives/articles/Student\\_Loans\\_Crisis\\_Bubble\\_or\\_Manageable\\_Policy\\_Issue.aspx](http://www.nasfaa.org/advocacy/perspectives/articles/Student_Loans_Crisis_Bubble_or_Manageable_Policy_Issue.aspx) (“To simplify a complex issue, the housing loan crisis occurred when people bought houses with mortgages they could not afford expecting the prices of the houses to rise. They thought they would be able to sell those homes at a profit, but interest rates on many of these mortgages rose and prices collapsed. Many homeowners ended up owing the bank more than the equity they had in their homes and many were unable to make the required payments. Selling wasn’t viable and those who lost their jobs or were victimized by predatory lenders often couldn’t make the payments.”).

<sup>38</sup> See Luttrell, *supra* note 37 (“A confluence of factors produced the December 2007–June 2009 Great Recession—bad bank loans, improper credit ratings, lax regulatory policies and misguided government incentives that encouraged reckless borrowing and lending.”); see also Joseph E. Stiglitz, *Student Debt and the Crushing of the American Dream*, THE GREAT DIVIDE, (May 12, 2013, 9:09 PM), [http://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream/?_r=0).

<sup>39</sup> See Taylor, *supra* note 29; Karyn Lacy, *All’s Fair? The Foreclosure Crisis and Middle-Class Black (In)Stability*, 56 AM BEHAVIORAL SCI. 1565, 1565-79 (Nov. 2012); Ben Henry, et al., *Wasted Wealth: How the Wall Street Crash Continues to Stall Economic Recovery and Deepen Racial Inequality in America* 7, ALLIANCE FOR A JUST SOCIETY (May 2013), [http://allianceforajustsociety.org/wp-content/uploads/2013/05/Wasted.Wealth\\_NATIONAL.pdf](http://allianceforajustsociety.org/wp-content/uploads/2013/05/Wasted.Wealth_NATIONAL.pdf) (“Families of color hold significantly higher percentages of wealth in home equity, with 52% of total assets for Latino families and 49% for Black families, compared to just 28% for White families.”) (citation omitted).

<sup>40</sup> See Stiglitz, *supra* note 38; Emily Badger, *Were Big Banks Guilty of Racial Discrimination in the Housing Crisis?*, THE ATLANTIC CITIES PLACE MATTERS (Oct. 16, 2012), <http://www.theatlanticcities.com/housing/2012/10/did-big-banks-subprime-mortgage-crisis-violate-civil-rights-law/3598/>.

effect: it contributed to a sizeable depreciation of household wealth, especially for at-risk minority families who invested in the real estate market.<sup>41</sup> As a result of the relation between home ownership and financial health, vulnerable populations are specifically at greater risk of developing adverse credit histories when they invest in home mortgages.<sup>42</sup>

Evidence suggests that there is a causal connection between foreclosure rates and the denial of student aid, especially among African Americans and Latinos.<sup>43</sup> Specifically, the housing crisis negatively impacted college enrollment for people of color in the United States, resulting in mortgage defaults that labeled borrowers as having an “adverse credit history,” thereby precluding their eligibility for the enhanced PLUS loan program.<sup>44</sup> The bursting of the housing bubble, and the subsequent financial fallout, disproportionately affected underrepresented minorities who were more likely than their white counterparts to be offered subprime mortgages.<sup>45</sup> Predatory lending and financial literacy shortfalls contributed to the deleterious effect of the housing crisis on vulnerable populations that drastically depleted household wealth and decimated the personal finances of those affected.<sup>46</sup> Consequently, those who were most affected by the housing crisis may be precluded from full participation in the federal financial aid market due to blemishes on their credit reports.<sup>47</sup> Potential student and parent PLUS loan borrowers are now subject to rejection in record numbers as a result adverse credit concerns.<sup>48</sup>

The cyclical relation of the housing and student aid industries warrants greater attention from federal financial regulators.<sup>49</sup> This Article provides a basis for governmental supervision and oversight of the federal financial aid program in light of the changing personal circumstances exacerbated by the persistent housing crisis.<sup>50</sup> The shifting need of borrowers stemming from the erratic financial market is reviewed herein as an analysis to enhance the stability of the higher education system.<sup>51</sup> The fluctuating political climate regarding student loans further contributes to the uncertainty that college students and their families experience as they deplete their personal savings to finance their degrees.<sup>52</sup> The

---

<sup>41</sup> See Luttrell, *supra* note 37 (reporting that the average American family lost \$50,000 to \$120,000 in potential earnings with a collective decline in household wealth of \$16 trillion during the period of the Great Recession); U.S. CONGRESS, JOINT ECON. COMM., ASSESSING THE IMPACT OF THE GREAT RECESSION ACROSS THE STATES (2010), available at <http://journalistsresource.org/wp-content/uploads/2011/09/ASSESSING.pdf>.

<sup>42</sup> See, Taylor *supra* note 29; see also Stiglitz, *supra* note 38; see generally Jackson Toby, *The Looming Student Loan Crisis*, THE AMERICAN (May 14, 2013), <http://www.american.com/archive/2013/may/the-looming-student-loan-crisis>; Henry, *supra* note 39.

<sup>43</sup> See LaTanya Brown & Daren A. Conrad, *The Foreclosure Crisis, Parent PLUS Loan Approvals, and Minority College Enrollment: Is There a Link?*, 3 AM INT’L J. OF CONTEMP. RES. (Jan. 2013), available at [http://www.aijcrnet.com/journals/Vol\\_3\\_No\\_1\\_January\\_2013/9.pdf](http://www.aijcrnet.com/journals/Vol_3_No_1_January_2013/9.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Stiglitz, *supra* note 38.

<sup>50</sup> See generally CONSUMER FINANCIAL PROTECTION BUREAU, ANN. REP. OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 16, 2013); Ilyce R. Glink & Samuel J. Tamkin, *Real Estate Matters: Is the Housing Crisis Over? Maybe Not for Minorities.*, WASHINGTON POST (June 11, 2013, 5:30 AM), <http://www.washingtonpost.com/blogs/where-we-live/wp/2013/06/11/real-estate-matters-is-the-housing-crisis-over-maybe-not-for-minorities/>; see Henry, *supra* note 39.

<sup>51</sup> See CONSUMER FINANCIAL PROTECTION BUREAU, *supra* note 50.

<sup>52</sup> See Bipartisan Student Loan Certainty Act of 2013, Pub. L. No. 113-28, 127 Stat. 506 (to be codified as amended at 20 U.S.C. 1087e(b)); see also Jenna Johnson, *Congress Approves Student Loan Plan*, WASHINGTON POST (Aug. 9, 2013), [http://www.washingtonpost.com/politics/obama-signs-student-loan-interest-rate-legislation-into-law/2013/08/09/98fb0426-00f2-11e3-9711-3708310f6f4d\\_story.html](http://www.washingtonpost.com/politics/obama-signs-student-loan-interest-rate-legislation-into-law/2013/08/09/98fb0426-00f2-11e3-9711-3708310f6f4d_story.html). (“The rate for PLUS loans, which are taken out by parents of students and graduate students, is 6.41 percent. These rates will lock in for the lifetime of the loan. All are lower than the



forthcoming reauthorization of the HEA provides a prime opportunity for legislative and administrative interests to converge for the benefit of college students of modest means that the federal financial aid program was established to serve.<sup>53</sup>

The evolving use of the creditworthiness factor in determining financial aid has drastic consequences for students in financial need, especially for students of color.<sup>54</sup> This Article examines the historical context of the PLUS loan program to determine the past, present, and future of federal financial aid in light of the current financial crisis. It also examines public policy arguments and proposes financially sound tactics for balancing the competing interests of risk adverse creditors and well-deserving college students. Further, this Article analyzes the applicable financial aid policies that stem from the HEA subject to periodic reauthorization.<sup>55</sup> Part II of this Article describes the higher education financial aid landscape, and assesses the public policy of reauthorizing the HEA in terms of enhancing PLUS Loan availability. Part III analyzes the problems inherent in the current student loan industry, and addresses the relevant issues in any subsequent evaluation of the revised federal PLUS Loan program, particularly as it pertains to minority communities and the institutions that serve them. Part IV proposes a number of recommendations and best practices for relieving the heavy burden of student loan debt

---

original rates of 6.8 for undergraduates and graduates and 7.9 percent for PLUS loans. The U.S. Department of Education will now change the interest rates and retroactively apply the new rates to loans taken out since July 1 [of 2013].”).

<sup>53</sup> Letter from Tom Harkin, Chairman, U.S. Senate Committee on Health, Education, Labor, and Pensions, to Higher Education Stakeholder (Sept. 16, 2013), <http://www.help.senate.gov/imo/media/doc/HEA%20Stakeholder%20Letter%2009.17.13.pdf>; *Keeping College Within Reach: The Role of Federal Student Aid Programs: Hearing Before the Subcomm. on Higher Educ. And Workforce Training of the Comm. On Educ. And the Workforce*, 113 Cong. 2 (2013) (statement of Hon. Virginia Foxx, Chairwoman, Subcomm. on Higher education and Workforce Training) (“In the coming months, we will work together to reauthorize the Higher Education Act. Established in 1965, this law is intended to help low-and middle-income students earn a degree. . . . However, more work must be done. College costs continue to skyrocket, and too many students struggle to navigate our financial aid system. Families face uncertainty about repayment options and confusion about the differences between various aid programs.”); What You Need to Know, *supra* note 21 (“It’s true that major changes in student-aid policy are now being made outside of the reauthorization process, in spending bills and federal rules. That shift has made the act’s renewal less momentous than it used to be. Still, reauthorization remains a major legislative event, with consequences for all of higher education.”); *see generally* Henry, *supra* note 39, at 2 (“Without proactive policy interventions, Americans stand to lose hundreds of billions more in wealth, and the racial wealth gap will only continue to widen.”); Stiglitz, *supra* note 38.

<sup>54</sup> *See generally* DEREK V. PRICE, BORROWING INEQUALITY: RACE, CLASS, AND STUDENT LOANS 3 (2004) (“Individuals from disadvantaged locations within the social hierarchies of race, class, and gender are more likely to borrow for college and are at increased risk for excessive educational debt burden after graduation.”).

<sup>55</sup> Nat’l Alliance for Partnerships in Equity, *Higher Education Act*, <http://www.napequity.org/public-policy/current-laws-and-bills/higher-education-act/> (last visited Mar. 7, 2014) (“The 2008 reauthorization changed HEA’s regulations regarding students with disabilities, financial aid, and cost transparency in educational institutions. This most recent HEA legislation is set to expire in 2013, which requires Congress to either reauthorize or extend it by the end of the year. However, if Congress fails to pass an on-time reauthorization bill in 2013, then an automatic 1-year extension will take effect. After that, Congress must pass additional legislation to extend HEA if it is not fully reauthorized.”); *see also* Am. Educ. Research Ass’n, *Senate Kicks Off HEA Reauthorization* (Oct. 2013) (explaining that the U.S. Senate will hold 12 hearings regarding the renewal of the HEA to set forth a bill in 2014); U.S. Senate Comm. on Health Educ. Labor & Pensions, *Most Recent Hearings on Education*, <http://www.help.senate.gov/issues/issue/?id=20c1298a-5186-4859-8488-a6731cf07a9e> (last visited Mar. 7, 2014) (reference for updates of senate hearings on education that may occur after submission of this publication); *see, e.g., Federal Update*, CHEA.ORG (Sept. 26, 2013), [http://www.chea.org/government/FedUpdate/CHEA\\_FU37.html](http://www.chea.org/government/FedUpdate/CHEA_FU37.html) (provided updates on congressional hearings pending the reauthorization of the HEA from the Senate Committee on Health, Education, Labor and Pensions and the House of Representatives Committee on Education and the Workforce and the Subcommittee on Higher Education and Workforce Training).

owed by an estimated 37 million Americans to support the effective restructuring of the PLUS loan program.<sup>56</sup>

## II. FOUNDATIONAL PERSPECTIVES ON HIGHER EDUCATION AND FINANCIAL AID

The principles of federal financial aid are based in the HEA as landmark legislation on college access and affordability.<sup>57</sup> The HEA serves as a benchmark for federal programs and initiatives on student aid.<sup>58</sup> The federal financial aid system evolved under authorization by the HEA to include the PLUS Loan program. The reauthorization of the HEA involves the review of an array of issues pertaining to higher education including the enactment of revised standards for federal financial aid.<sup>59</sup> The allocation of resources and program assessment are subject to adaptation in light of the current economic climate.<sup>60</sup>

Reauthorization of the HEA takes place periodically, and is estimated to occur approximately every five years.<sup>61</sup> The most recent reauthorization of the HEA took place in 2008 with the enactment of

<sup>56</sup> See Meta Brown, et al., *Grading Student Loans*, FED. RESERVE BANK OF N.Y. (Mar. 5, 2012), <http://libertystreeteconomics.newyorkfed.org/2012/03/grading-student-loans.html>.

<sup>57</sup> See *NASFAA Reauthorization Task Force to Focus Recommendations on Access and Accountability*, NASFAA, <http://www.nasfaa.org/Login.aspx?redirectURL=WorkArea%2finkit.aspx%3fLinkIdentifier%3dID%26ItemID%3d9348> (last visited Mar. 7, 2014); Letter from Molly Corbett Broad, Am. Council on Educ., to John Kline, Chairman, Comm. on Educ. and the Workforce (Aug. 2, 2013), <http://www.acenet.edu/news-room/Documents/HEA-Reauthorization-Recs-080213.pdf>.

<sup>58</sup> See Letter from Molly, *supra* note 57.

<sup>59</sup> See generally Press Release, U.S. Congress, Preparing for Higher Education Act Reauthorization, Subcommittee Explores the Role of Federal Student Aid (April 16, 2013), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=329232>; *Keeping College Within Reach*, *supra* note 53; Memorandum, National Association for College Admission Counseling, Higher Education Act Reauthorization: 2014 Recommendations, <http://www.nacacnet.org/issues-action/LegislativeNews/Documents/HEA%20Reauthorization%202014%20Recommendations.pdf>; Memorandum, Council of Graduate Schools, Higher Education Reauthorization (Jan. 25, 2014), [http://www.cgsnet.org/sites/default/files/Higher\\_Education\\_Act\\_Jan\\_25\\_2014.pdf](http://www.cgsnet.org/sites/default/files/Higher_Education_Act_Jan_25_2014.pdf); Memorandum, American Association of State Colleges and Universities, Top 10 Higher Education State Policy Issues for 2014 (Jan. 2014), <http://www.aascu.org/policy/publications/policy-matters/Top10StatePolicyIssues2014.pdf> (“Despite the fact that the HEA’s most recent authorization expired in 2013, it is unlikely to be reauthorized this year. Nevertheless, state legislators will pay attention to the policy and funding priorities of HEA reauthorization emanating from initial congressional deliberations, as well as the impact of any proposed federal mandates.”); Mitchell D. Weiss, *10 Ways to Fix Student Loans in 2014*, CREDIT.COM, (Jan. 14, 2014), <http://blog.credit.com/2014/01/student-loans-in-2014-73657/> (“The HEA has helped America to become a better educated country. Unfortunately, it also made it possible for many schools and financial institutions to help themselves at taxpayer expense. Perhaps the act doesn’t need to change as much as the manner in which it’s administered.”).

<sup>60</sup> See generally Troy Onink, *The Future of College Financial Aid, According to the Man Who Influences Billions of It*, FORBES (June 5, 2014, 3:04PM), <http://www.forbes.com/sites/troyonink/2014/06/05/the-future-of-college-financial-aid-an-interview-with-justin-draeger/> (interview with Justin Draeger, President, NASFAA) (“The elimination of the option for students to use Pell Grants year round and the loss of subsidies on graduate student loans are just two examples of benefit losses for students. Other changes—like new limitations on financial aid eligibility criteria—are much less transparent to the public.”); Newsweek Staff, *How the Economy Has Changed Financial Aid*, NEWSWEEK (Aug. 11, 2009, updated Mar. 13, 2010), <http://www.newsweek.com/how-economy-has-changed-financial-aid-78681>.

<sup>61</sup> *The Early History of the Higher Education Act of 1965*, NAT’L TRIO CLEARINGHOUSE, [http://www.pellinstitute.org/downloads/trio\\_clearinghouse-The%20Early%20History%20of%20the%20Higher%20Education%20Act%20of%201965.pdf](http://www.pellinstitute.org/downloads/trio_clearinghouse-The%20Early%20History%20of%20the%20Higher%20Education%20Act%20of%201965.pdf) (last visited Mar. 7, 2014); *Higher Education Act*, ASS’N FOR CAREER & TECHNICAL EDUC., <https://www.actonline.org/HEA/#Uxpf-UJdVLP> (last visited Mar. 7, 2014).

the Higher Education Opportunity Act (HEOA).<sup>62</sup> Subsequently, changes to the federal financial aid program have emerged through the implementation of various rules and regulations undertaken by a number of federal agencies.<sup>63</sup> The U.S. Department of Education instituted the current changes to the credit worthiness factor of the PLUS loan program.<sup>64</sup> The Department of Education also set forth the federal policies regarding financial aid under the HEA.<sup>65</sup>

The functionality and focus of the PLUS loan program is under scrutiny by lawmakers, university stakeholders, and public policy advocates.<sup>66</sup> The upcoming reauthorization of the HEA serves as an opportunity to revise the PLUS loan program to adjust the dramatic shift in eligibility that has resulted, in part, from the impact of the Great Recession on the access to credit and capital.<sup>67</sup> The Dodd-Frank Act, through the Consumer Financial Protection Bureau (CFPB), addresses the private student loan market to a degree; however, the federal student loan system is still in need of reform.<sup>68</sup> The reauthorization of the HEA may include oversight of the Department of Education in altering the “adverse credit history” factor for PLUS Loan eligibility.<sup>69</sup> Reauthorization of the HEA also provides an opportunity for public commentary, and gives ample notification of pending changes to critical financial aid products such as the PLUS Loan for parents and graduate students.<sup>70</sup>

---

<sup>62</sup> Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008) (codified as amended in scattered sections of 5, 12, 15, 20, 25, and 42 U.S.C.).

<sup>63</sup> See generally Kamille Wolff Dean, *Student Loans, Politics, and the Occupy Movement: Financial Aid Rebellion and Reform*, 46 J. MARSHALL L. REV. 105 (2012).

<sup>64</sup> See Dianne Hayes, *Obama Administration Plans Changes to Parent PLUS Loans*, DIVERSE ISSUES IN HIGHER EDUC. (Aug. 15, 2013), <http://diverseeducation.com/article/55297/>.

<sup>65</sup> See *The Early History*, *supra* note 61.

<sup>66</sup> See Hayes, *supra* note 64.

<sup>67</sup> See Rachel Fishman, *The Parent Trap: Parent PLUS Loans and Intergenerational Borrowing*, NEW AM., (Jan. 2014), <http://education.newamerica.net/sites/newamerica.net/files/policydocs/20140108-ParentTrap-FinalRelease-SinglePages.pdf>; see generally American Council on Education, *Recommendations from 39 Higher Education Associations for the Reauthorization of the Higher Education Act* (Aug. 2, 2013), <http://www.acenet.edu/news-room/Documents/HEA-Reauthorization-Recs-080213.pdf> (“While many factors will contribute to HEA policy formulation, the current economic and social climate is likely to play an outsized role in shaping the kinds of policies that will be adopted . . . . But in the long history of the HEA and its successive renewals, there may never have been such a tumultuous environment for making consequential policy decisions.”).

<sup>68</sup> See *Report on private education loan and private educational lenders*, CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/dodd-frank/section-1077/> (last visited Mar. 7, 2014); *Wall Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, <http://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> (last visited Mar. 7, 2014); see generally PLUS Loan Accessibility Act, H.R. 2966, 113th Cong. (2013).

<sup>69</sup> See PLUS Loan Accessibility Act, *supra* note 68 (“To amend the Higher Education Act of 1965 to suspend, for a certain period, the use of adverse credit history in determining eligibility for Federal Direct PLUS Loans.”); See generally Letter from Molly, *supra* note 57, at 3 (“Since the previous reauthorization bill was passed five years ago, other legislation has been enacted amending some elements of the student financial aid programs and many of these changes have had far-reaching consequences for the programs and the students who rely on them or have created a certain budget brinksmanship that has the potential to destabilize the programs. However necessary or well-intentioned, legislation enacted outside of the parameters of reauthorization is never able to fully account for the interactive effects that changes to one program may have on the net effect or the potential of Title IV to live up to its promise of meeting national access and success mandates.”).

<sup>70</sup> See 20 U.S.C. § 1078-2 (2012); Letter from John Kline, Chairman, Comm. on Educ. and the Workforce, to Higher Education Stakeholder (Apr. 25, 2013), <http://edworkforce.house.gov/uploadedfiles/04-25-2013.pdf>; Letter from Vincent Sampson, Deputy Assistant Secretary for Policy, Planning, and Innovation, U.S. Dep’t of Educ., to the Office of Postsecondary Education, U.S. Dep’t of Educ. (Dec. 2008), <http://www.ifap.ed.gov/dpccletters/attachments/GEN0812FP0810.pdf> (“As required by the HEA, the Department will issue regulations for some of the programs affected by the HEOA through the negotiated rulemaking process. For other programs, the necessary regulatory

### A. The Need for Student Loan Reform Through the Higher Education Act

“Let’s write a new law—repeal the old law and have new regulations written with our oversight, not as an ideological exercise but simply in the way that someone would weed a garden before planting a new crop. Because we all know what happens – during the previous eight authorizations, we have new well-intentioned ideas, we just pile them on top of the existing well-intentioned ideas.”<sup>71</sup>

The HEA<sup>72</sup> established the core federal financial aid programs, including the Educational Opportunity Grant Program, a predecessor of the Pell Grant,<sup>73</sup> and the Guaranteed Student Loan Program that later developed into the Stafford Loan Program.<sup>74</sup> The HEA has been amended several times since its enactment and is subject to occasional reauthorization.<sup>75</sup> While the HEA is set for reauthorization, financial aid reform is likely to be a main issue.<sup>76</sup> Today, federal financial aid is under the auspices of the United States Department of Education that issues an estimated \$150 billion in loans and work-study funds annually to pay for college related expenses.<sup>77</sup>

The federal PLUS loan program was established under the 1980 reauthorization of the HEA to provide aid to legal guardians of dependent college students.<sup>78</sup> PLUS loans were initially available to

changes will be made either through notice and comment rulemaking or, where the new regulations will merely reflect the changes to the HEA and not expand upon those changes, without notice and comment.”); *see generally* PLUS Loan Accessibility Act, *supra* note 67.

<sup>71</sup> Liz Wolgemuth, *Alexander: Senate Should “Start From Scratch” on Higher Education Act*, U.S. COMM. ON HEALTH EDUC. LABOR & PENSIONS (Sept. 19, 2013), <http://www.help.senate.gov/newsroom/press/release/?id=c581a00a-e137-4c26-8a5e-d9419ac83048> (quoting Senator Lamar Alexander).

<sup>72</sup> *See generally* Patricia Somers & James Cofer, *Singing the Student Loan Blues: Multiple Voices, Multiple Approaches?*, STUDENT LOAN DEBT: PROBS. & PROSPECTS 125 (1997), <http://www.ihep.org/%5Cassets%5Cfiles%5C/publications/S-Z/StudentLoanDebt.pdf> (“[T]he original purpose of HEA, which was to provide access to all students, regardless of their socioeconomic status, has been obscured through these actions. By attempting to serve two goals, access and choice, low-income students cannot afford even a moderately priced public institution without borrowing, and middle-income students cannot attend a private institution without excessive borrowing.”)

<sup>73</sup> *See* Gandara, *supra* note 11, at 54 (noting that the Federal Pell Grant Program was created pursuant to an amendment to the HEA in 1972 to assist low and moderate income students with grants to pay for college); Shuh, *supra* note 14, at 16 (chronicling the movement towards social justice in education with federal student aid programs including the Basic Educational Opportunity Grants (BEOG) that became Pell Grants, and Supplementary Educational Opportunity Grants (SEOG), making college more affordable for low-income students).

<sup>74</sup> *See* Michael Mumper & Pamela Vander Ark, *Evaluating the Stafford Student Loan Program: Current Problems and Prospects for Reform*, 62 J.L. OF HIGHER EDUC. 62 (Jan.-Feb. 1991).

<sup>75</sup> *See History of Student Financial Aid*, FINAID.ORG, <http://www.finaid.org/educators/history.phtml> (last visited Mar. 7, 2014) (The HEA was amended in 1968, 1992, 1998. The HEA was reauthorized in 1976, 1980, 1986, and 2008); The Early History, *supra* note 61 (“The Higher Education Act of 1965 was reauthorized in 1968, 1972, 1976, 1980, 1986, 1992 and 1998 [and 2008].”).

<sup>76</sup> *See generally* Libby A. Nelson, *Four More Years*, INSIDE HIGHER EDUC., Nov. 7, 2012; Libby A. Nelson, *Tangling Over Accountability*, INSIDE HIGHER EDUC., Feb. 5, 2013; David Moltz, *Looking Ahead to 2013*, INSIDE HIGHER EDUC., Dec. 3, 2010; *Ace on Government Regulation*, AM. COUNCIL ON EDUC., <http://www.acenet.edu/advocacy-news/Pages/Government-Regulation.aspx> (last visited Mar. 7, 2014) (“Current reauthorization for the HEOA expires at the end of 2013 though it is unclear when the next reauthorization process will begin.”).

<sup>77</sup> *See Aid and Other Resources from the Federal Gov’t*, FED. STUDENT AID, <http://studentaid.ed.gov/types> (last visited Mar. 7, 2014); Kim Clark, *The Minuses of Student PLUS Loans*, MARKETPLACE (Oct. 14, 2010, 20:03), <http://www.marketplace.org/topics/life/minuses-student-plus-loans>.

<sup>78</sup> *See* Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (codified as amended in scattered sections of 20 U.S.C.); *Parents*, FEDERAL STUDENT AID, <http://www.direct.ed.gov/parent.html> (last visited Mar. 7, 2014)

parent borrowers for their children as beneficiaries pursuant to the HEA.<sup>79</sup> Restrictions were originally placed on the applicant amount available for PLUS loans, but the 1992 HEA amendments effectively eliminated the previous PLUS loan limits.<sup>80</sup> The federal legislature opened the PLUS loan program to graduate and professional student borrowers with the enactment of the Higher Education Reconciliation Act (HERA) of 2005.<sup>81</sup>

Three years later, the Higher Education Opportunity Act of 2008 (“HEOA”) reauthorized the HEA.<sup>82</sup> Pursuant to the HEOA, PLUS Loan applicants are subject to a credit review for adverse credit history.<sup>83</sup> The HEOA also served to eliminate the deferred repayment start date option for Parent PLUS loans from up to six months after the dependent student leaves school to require the first payment of principal within the sixty days from the disbursement date of the final allocation of the loan proceeds.<sup>84</sup>

The HEA is currently scheduled for congressional reauthorization, although regulatory action may ensue in the meantime towards relieving student debt.<sup>85</sup> The impending HEA reauthorization

(Parent PLUS loans are only available to biological, adoptive, and stepparents of eligible dependent students enrolled at least half time in college); USA FUNDS UNIV., STAFFORD/PLUS LOANS: THE BASICS 11 (2013), <http://www.usafunds.org/USAFunds%20ResourceLibrary/StaffordPLUSBasicsManual.pdf>; Gross, *supra* note 13, at 19; *see generally* TG RESEARCH AND ANALYTICAL SERVICES, HIGHER EDUCATION ACT: FORTY YEARS OF OPPORTUNITY 37-38 (2005), [http://www.tgslc.org/pdf/hea\\_history.pdf](http://www.tgslc.org/pdf/hea_history.pdf); *History of Student Financial Aid*, FINAID, <http://www.finaid.org/educators/history.phtml> (last visited Mar. 7, 2014).

<sup>79</sup> *See* Gross, *supra* note 13, at 19; *see also* 34 CFR 685.200(c) (Parent PLUS Loan eligibility). *But see* 34 CFR 685.200(b) (PLUS Loan availability for graduate and professional students).

<sup>80</sup> Parents, *supra* note 78 (While there is no limit in the amount that a borrower may obtain from a PLUS loan, the amount disbursed is restricted to an amount determined by the institution the student attends and may not exceed college costs); *Graduate and Professional Student PLUS Loans*, FINAID, <http://www.finaid.org/loans/gradplus.phtml> (last visited Mar. 7, 2014) (The PLUS loan is effectively limited by the cost of college attendance minus any financial aid obtained); *Historical Loan Limits*, FINAID, <http://www.finaid.org/loans/historicallimits.phtml> (last visited Mar. 7, 2014); *see also* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (codified as amended in scattered sections of 20 U.S.C.); 34 C.F.R. § 685.203(f)-(g) (2013); Susan B. Hannah, *The Higher Education Act of 1992: Skills, Constraints, and the Politics of Higher Education*, 67 J. OF HIGHER EDUC., Sept.-Oct. 1996, at 498 (“[T]he politics of HEA ’92 are important because they resulted in a significant shift in federal policy from an historic commitment to promote access to postsecondary education through grants based on need to a broader strategy of insured loans regardless of family income.”).

<sup>81</sup> *See* Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, 120 Stat. 155 (codified in scattered sections of 20 U.S.C.).

<sup>82</sup> *See* Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008) (codified as amended in scattered sections of 5, 12, 15, 20, 25, and 42 U.S.C.).

<sup>83</sup> *See* Higher Education Opportunity Act, § 424(a)(1).

<sup>84</sup> *See* Higher Education Opportunity Act, § 424(a)(2); *see also* Ensuring Continued Access to Student Loans Act (ECASLA), Pub. Law 110-227 (2008) (the PLUS loan borrower had the option under the ECASLA to pay the accrued interest either monthly or quarterly, or have the interest capitalized periodically); *see generally* Direct Loans Bulletin DLB-08-24 (Oct. 2008), *available at* [https://my.flagler.edu/ICS/icsfs/Deferment\\_Options\\_for\\_Parent\\_PLUS\\_Loan\\_Borrowers.pdf?target=43913515-be59-4b5b-9821-1b6e0ccbc09c](https://my.flagler.edu/ICS/icsfs/Deferment_Options_for_Parent_PLUS_Loan_Borrowers.pdf?target=43913515-be59-4b5b-9821-1b6e0ccbc09c) (“Subsequent to publication of DLB-08-17 and before we were able to issue additional operational guidance on the delayed repayment option for parent Direct PLUS Loan borrowers, the Higher Education Opportunity Act (the HEOA) was enacted. This legislation established deferment provisions for PLUS loan borrowers that superseded the changes made by the ECASLA.”).

<sup>85</sup> Press Release, Educ. & the Workforce Comm., Committee Leaders Call for Feedback on Higher Education Act Reauthorization (Apr. 25, 2013), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=331585>; Letter from Kline, *supra* note 70; *Negotiated Rulemaking Committee; Public Hearings*, FEDERAL REGISTER (Apr. 16, 2013), <https://www.federalregister.gov/articles/2013/04/16/2013-08891/negotiated-rulemaking-committee-public-hearings>; *see generally* Sara Lipka, *Quest for Good Graduation Data Will Be Key to Next Higher Education Act*, CHRONICLE OF HIGHER EDUCATION (Nov. 15, 2012), <http://chronicle.com/article/Quest-for-Good-Graduation-Data/135816/>; Libby A.

subjects the federal student aid program to a number of substantive changes, including the revision of PLUS loan policies.<sup>86</sup>

The upcoming reauthorization of the *Higher Education Act* will be an opportunity to focus on runaway college costs and promote a system of shared responsibility among all stakeholders: the federal government, states, institutions, and students and families.<sup>87</sup>

Legislation regarding the federal PLUS loans falls under Title IV of the HEA, and the corresponding regulations are under Title 34 of the Code of Federal Regulations.<sup>88</sup> Sections 428B and 451 of the HEA should be considered for revision in regards to the problems created by the credit eligibility standards of the PLUS loan program.<sup>89</sup> In addition, sections 685.102, 685.200, and 685.201 of Title 34 of the Code of Federal Regulations should be reviewed to revise the implementation and administration of the PLUS loan program.<sup>90</sup> Disbursement costs and origination fees could also be revised to reenact the former interest rebate under the now expired provision of the Budget Control Act of 2011.<sup>91</sup>

Section 685.200 of Title 34 of the Code of Federal Regulations addresses borrower eligibility for the PLUS loan program, including the “adverse credit” requirement.<sup>92</sup> The interpretation of the “adverse credit” term is pertinent, and the meaning of the term for PLUS loans is stated in section 685.200(c) to include consideration of any debt.<sup>93</sup> Moreover, defaults, bankruptcies, foreclosures, repossessions, tax

Nelson, *Trying Again on ‘Gainful’*, INSIDE HIGHER EDUCATION, Apr. 16, 2013; *see generally* Doug Lederman, *HEA: A Huge, Exacting Accountability Bill*, INSIDE HIGHER ED (Aug. 1, 2008), <http://www.insidehighered.com/news/2008/08/01/hea#sthash.xa3z8dNF.dpbs> (“Given that the bill by its nature has such a sweeping agenda, and that it becomes a magnet for proposals from the increasing numbers of federal lawmakers who are interested in education policy and have their own ideas for what to do, it may be almost inevitable that the Higher Education Act renewal ends up being disjointed rather than full of vision.”).

<sup>86</sup> *See generally* Libby A. Nelson, *And So It Begins*, INSIDE HIGHER EDUCATION, Apr. 17, 2013; Libby A. Nelson, *Higher Ed in the Next Congress*, INSIDE HIGHER EDUCATION, Oct. 10, 2012 (recent issues before Congress include Pell Grant shortfalls and subsidized student loan interest rate hikes); NASFAA, *supra* note 57; Matt Aschenbrenner, *Reauthorization of the Higher Education Act: Implications for Student Affairs Administrators*, NASPA (Dec. 6, 2013), <http://www.naspa.org/rpi/posts/reauthorization-of-the-higher-education-act-implications-for-student-affair> (“Some have suggested this reauthorization may overhaul and streamline the financial aid system, providing a single grant program, a single loan program, and a work-study opportunity to students with financial need.”); Memorandum from National Association of Student Financial Aid Administrators, *Preliminary Report of the NASFAA Reauthorization Task Force to the Membership* (July 2013), <http://www.nasfaa.org/reauth/>.

<sup>87</sup> Press Release, U.S. Senate Comm. on Health Educ. Labor & Pensions, Harkin Statement on the President’s Higher Education Speech (Aug. 22, 2013), <http://www.help.senate.gov/newsroom/press/release/?id=34820ea1-ae68-486e-baee-efe8edb4980a> (quoting Senator Tom Harkin).

<sup>88</sup> *See* Higher Education Act of 1965, Pub. L. No. 89 – 329, 79 Stat. 1219, *amended by* Bipartisan Student Loan Certainty Act of 2013, Pub. L. No. 113 – 28, 127 Stat. 506; 34 C.F.R. § 685 (2014).

<sup>89</sup> *See* 20 U.S.C. § 1078 – 2 (2012); 20 U.S.C. § 1087a (2012); *see generally* USA Funds, *supra* note 78.

<sup>90</sup> *See generally* USA Funds, *supra* note 78.

<sup>91</sup> Budget Control Act of 2011, Pub. L. No. 112 – 25, 125 Stat. 240; Higher Education Act of 1965, 20 U.S.C. 1078 – 2(d)(3); *see also* USA Funds, *supra* note 78 at 12-13 (stating that PLUS loans are ineligible for federal interest subsidies) (“In the past, the DL program offered an up-front interest rebate calculated on the gross loan amount (before fees) and added to the disbursement. Borrowers whose loans originally qualified for the rebate must make the first 12 monthly payments on time to retain the rebate benefit. The Budget Control Act of 2011 eliminated the up-front interest rebate for federal Direct Stafford and PLUS loans first disbursed on or after July 1, 2012.”); *See generally* NAT’L ASS’N OF STUDENT FINANCIAL AID ADM’RS, *PRELIMINARY REPORT OF THE NASFAA REAUTHORIZATION TASK FORCE TO THE MEMBERSHIP*, NASFAA 19-20 (2013).

<sup>92</sup> *See* 34 C.F.R. § 685.200(b)-(c) (2014).

<sup>93</sup> *See* 34 C.F.R. § 685.200(c)(1) (2014); *see also* 34 C.F.R. § 685.200(b)(5) (2014).

liens, wage garnishments, and debt write-offs constitute an adverse credit history that may serve as the basis for denial of PLUS loan applicants.<sup>94</sup> A definition of the “adverse credit” term should be included as part of Title 34 to exclude consideration of primary residential real property indebtedness.<sup>95</sup> Currently, a deed in lieu of foreclosure or even a defaulted real property lease may preclude a student from obtaining a PLUS loan.<sup>96</sup> The standard should be amended further than circumscribed under the discretionary “extenuating circumstances” evaluation to include mortgage loan delinquencies greater than 180 days,<sup>97</sup> especially considering the housing crisis that Americans are still emerging from.<sup>98</sup> Rehabilitated debtors would also be subject to PLUS loan denial under the present “adverse credit” standard.<sup>99</sup> Such penalty on borrowers who could improve their economic outlook and advance the probability of debt repayment by obtaining a college degree or pursuing job retraining defeats the purpose of federal financial aid.<sup>100</sup>

The situation of borrower indebtedness and the moral hazard argument with student loans<sup>101</sup> may be addressed by enacting proactive debt counseling and relevant financial literacy education for at-risk debtors.<sup>102</sup> In addition, the meaning of the “adverse credit” term could be revised by shortening the

<sup>94</sup> 34 C.F.R. § 685.200(c)(1) (2014).

<sup>95</sup> See generally 34 C.F.R. § 77.1 (2014); 34 C.F.R. § 682.200 (2014); 20 U.S.C. §§ 1001 – 1003 (2012).

<sup>96</sup> See 34 C.F.R. § 685.200(c)(1); see also Mark Kantrowitz, *How Does a Pending Foreclosure or Short Sale Affect Financial Aid?*, FASTWEB (Jan. 28, 2013), <http://www.fastweb.com/financial-aid/articles/3849-how-does-a-pending-foreclosure-or-short-sale-affect-financial-aid> (“A deed in lieu of foreclosure is treated the same as a foreclosure, unless it was provided as part of a short sale.”).

<sup>97</sup> See 20 U.S.C. § 1078 – 2(a)(3)(B) (2012) (permits but does not require discretion for mortgage loan delinquency up to 180 days).

<sup>98</sup> See generally NAT’L ASS’N OF STUDENT FINANCIAL AID ADM’RS, *supra* note 91 at 21-22.

<sup>99</sup> *Id.*

<sup>100</sup> See generally 20 U.S.C. § 1070 (2012); NAT’L DIRECT STUDENT LOAN COAL., REAUTHORIZATION OF THE HIGHER EDUCATION ACT PROPOSALS FOR LEGISLATIVE CHANGE (2013), available at [http://www.directstudentloancoalition.org/media/pdfs\\_autogen/Reauth-Comp\\_9-2013.pdf](http://www.directstudentloancoalition.org/media/pdfs_autogen/Reauth-Comp_9-2013.pdf); NAT’L CONSUMER LAW CTR. STUDENT LOAN BORROWER ASSISTANCE, HIGHER EDUCATION ACT (HEA) REAUTHORIZATION RECOMMENDATIONS (2013), available at <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/promoting-higher-ed-access-2013.pdf>; Bridget Terry Long & Erin Riley, *Financial Aid: A Broken Bridge to College Access?*, HARVARD EDUC. REV., Spring 2007, at 39.

<sup>101</sup> See ROBERT B. ARCHIBALD, REDESIGNING THE FINANCIAL AID SYSTEM: WHY COLLEGES AND UNIVERSITIES SHOULD SWITCH ROLES WITH THE FEDERAL GOVERNMENT 126 (2002) (“The moral hazard in guaranteed student loans, however, cannot be reduced quite so easily. Limiting the availability of loan guarantees to officially accredited providers and eliminating institutions, with poor default records, combined with threatening nonpaying students in various ways, does affect the loan repayment rate, but the fundamental problem remains.”); BETH AKERS & MATTHEW M. CHINGOS, STUDENT LOAN SAFETY NETS: ESTIMATING THE COSTS AND BENEFITS OF INCOME-BASED REPAYMENT 18 (2014), available at [http://www.brookings.edu/~media/research/files/papers/2014/04/14%20student%20safety%20nets/ibr\\_online.pdf](http://www.brookings.edu/~media/research/files/papers/2014/04/14%20student%20safety%20nets/ibr_online.pdf) (“A common worry about any insurance-like program is moral hazard, where the insured engage in more risky behavior because they don’t have to bear the full cost of their actions.”); see, e.g., Josh Mitchell, *Student Loans Entice Borrowers More for Cash than a Degree*, WALL STREET JOURNAL (Mar. 2, 2014), <http://online.wsj.com/news/articles/SB10001424052702304585004579415022664472930>; Shaila Dewan, *Moral Hazard: A Tempest-Tossed Idea*, N.Y. TIMES (Feb. 25, 2012), <http://www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html?pagewanted=all&r=0> (“MORAL hazard has long been used to explain why social safety nets like welfare, unemployment insurance and workers’ compensation should be less generous. It is almost always applied to the recipients, rather than the providers, of such benefits.”).

<sup>102</sup> See generally NAT’L ASS’N FOR COLLEGE ADMISSION COUNSELING, HIGHER EDUCATION REAUTHORIZATION: 2013 RECOMMENDATIONS (2013), available at <http://www.nacacnet.org/issues-action/Legislative-News/Documents/HEAReauthorizationRecommendations.pdf>; see, e.g., USA Funds, *supra* note 78, at 19 (“Some schools consider entrance counseling to be a continual process and provide information to students throughout their

period of review to a time frame less than five years.<sup>103</sup> Further, the “satisfactory repayment arrangement” provided for FFEL student loans could perhaps be extended to non-FFEL PLUS loans.<sup>104</sup> Revision of the PLUS loan eligibility criteria as it pertains to the “adverse credit” consideration would more closely align student loan debt with other types of consumer debt.<sup>105</sup> Special consideration for students classified as first generation college students or low-income individuals, as provided by the HEA, could be extrapolated to apply to the administration of PLUS loans in terms of creditor eligibility.<sup>106</sup>

## B. An Overview of the Student Loan Industry

The federal student aid program partially consists of loans in three broad categories: Direct Loans, Perkins Loans, and Stafford Loans.<sup>107</sup> The William D. Ford Federal Direct Loan Program issues Parent PLUS loans to undergraduate families, and Grad PLUS loans to students pursuing graduate or professional degrees.<sup>108</sup> The PLUS loan program does not have a direct cap on the amount that may be borrowed, but the approved amount is based upon the cost of attendance at each particular institution,

enrollment. Ongoing communication about their loans enables students to make informed borrowing decisions and remain aware of their overall loan debt and the implications of that debt upon repayment.”).

<sup>103</sup> See ASS’N OF PUBLIC AND LAND-GRANT UNIVERSITIES, APLU COMMENTS ON HEA REAUTHORIZATION FOR THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE 6 (Aug. 2, 2013), *available at*, <https://www.aplu.org/document.doc?id=4696> (“The recent increase in denials of parent PLUS loans by the Department of Education came after a stricter interpretation of existing rules was applied to PLUS loan applicants, moving from a 90 day credit history to a consideration of a five year credit history of applicants. We hope the Department consults with the broader community of institutions and parents before enacting such consequential changes in the future. The change had a substantial negative impact on the parents of lower-income students. We urge Congress, working with affected stakeholders, to reexamine the existing evaluation criteria and seek a better methodology to judge applicants based on their current capacity for repayment.”); Kantrowitz, *supra* note 96 (“PLUS loan borrowers must not have an adverse credit history, which is defined as a current delinquency of 90 or more days on any debt or a five-year look-back for certain derogatory events in the credit history. The derogatory events include bankruptcy, foreclosure, repossession, tax lien, wage garnishment or default determination . . . . A chapter 13 bankruptcy does not affect PLUS loan eligibility.”); *see generally* 20 U.S.C. § 1078–2(a)(3)(B)(i)–(ii) (2012) (including home mortgage arrearage as consideration of “extenuating circumstances”).

<sup>104</sup> *See generally* 34 C.F.R. § 682.200 (2014) (denotes the voluntary and timely full payment for six consecutive months on a defaulted loan) (“The required full monthly payment amount may not be more than is reasonable and affordable based on the borrower’s total financial circumstances.”).

<sup>105</sup> *See* Senate Bill introduced by Senator Elizabeth Warren and endorsed by President Barack Obama in June 2014 to amend the HEA to permit student loan refinancing for lower interest rates, <http://www.warren.senate.gov/files/documents/BankOnStudentsRefinancingBillText.pdf>; *see also* *Parent Plus Loans: Frequently Asked Questions*, U.S. NEWS & WORLD REPORT (Aug. 17, 2010), <http://www.usnews.com/education/best-colleges/paying-for-college/student-loan/articles/2010/08/17/parent-plus-loans-frequently-asked-questions> (“Unlike credit card debt and mortgages, which can be canceled if you file for bankruptcy, education loans of all types must be paid. Most bankruptcy courts will not cancel them unless your situation is extremely dire.”); *see generally* Am. Council on Educ., *supra* note 28 at 13–14; Kantrowitz, *supra* note 8.

<sup>106</sup> *See generally* 20 U.S.C. § 1070a–11(h)(3)–(4) (2012); Nat’l Ass’n of Student Financial Aid Adm’rs, *supra* note 91 (“As more credit restrictions are imposed, more grant support needs to be created for schools serving underrepresented and disadvantaged populations and their students.”).

<sup>107</sup> *See* U.S. Dept. of Educ., *Overview of Federal Student Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans> (last visited Feb. 22, 2014); *Student Loan and Private Loan FAQs*, SIMPLE TUITION, [http://www.simpletuition.com/faq\\_full?type=It&subject=federal\\_student\\_loans\\_government-backed](http://www.simpletuition.com/faq_full?type=It&subject=federal_student_loans_government-backed) (last visited May 1, 2013) (provides a legislative update that subsidized Stafford Loans are no longer be available to graduate students as of July 1, 2012).

<sup>108</sup> *See* U.S. Dept. of Educ., *PLUS Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans/plus> (last visited Feb. 22, 2014).



minus any other financial aid.<sup>109</sup> Perkins and Stafford Loans are limited to specific amounts based on the level of educational attainment.<sup>110</sup> Ultimately, there is a cumulative limit on the amount of federal Perkins and Stafford student loans that a borrower may obtain, but there is no monetary limit on the lifetime amount of PLUS loans that a recipient may receive.<sup>111</sup>

A college financial aid package may include federal and private student loans.<sup>112</sup> There are a number of differences between private and federal student loans.<sup>113</sup> One main distinction is that the United States Department of Education is the lender for federal student loans, whereas a bank or financial institution is usually the lender for private student loans.<sup>114</sup> Also, federal student loans have fixed interest rates over the life of the loans while private student loans have variable interest rates that are typically higher than those offered by the federal student aid program.<sup>115</sup> Finally, federal student loans are generally subject to more favorable repayment options than private student loans, including deferment, forbearance, income-based repayment and income-sensitive repayment.<sup>116</sup>

---

<sup>109</sup> See U.S. Dept. of Educ., *supra* note 107 (“Federal student aid covers such expenses as tuition and fees, room and board, books and supplies, and transportation. Aid also can help pay for other related expenses, such as a computer and dependent care.”); Kim Clark, *Graduate PLUS Loan FAQs*, U.S. NEWS & WORLD REPORT (Mar. 16, 2011), <http://www.usnews.com/education/best-graduate-schools/paying/articles/2011/03/16/graduate-plus-loan-faqs> (“Each year, you can borrow the full net, or out-of-pocket, cost of your graduate study. To calculate the maximum PLUS eligibility, take your program’s annual cost of attendance—which includes tuition, fees, books, and living costs—and subtract out any financial aid such as tuition waivers, grants, or Stafford loans.”).

<sup>110</sup> See Simple Tuition, *supra* note 107 (The borrowing limits for the 2012–13 academic year are as follows: \$5,500 for undergraduate Perkins Loans, \$8,000 for graduate Perkins Loans, up to \$7,500 for dependent undergraduate Stafford loan students, up to \$12,500 for independent undergraduate Stafford loan students, and \$20,500 for graduate dependent or independent Stafford loan students).

<sup>111</sup> See *id.* (The federal financial aid undergraduate cumulative limit is as follows: Stafford Dependent Undergraduate Students - \$31,000; Stafford Independent Undergraduate Students - \$57,500; Perkins Undergraduate Students - \$27,500; the cumulative limit for undergraduate and graduate federal loans is as follows: Stafford Dependent and Independent Graduate Students Cumulative Limit (Undergraduate and Graduate combined) - \$65,500; Perkins Loans - \$60,000; Parent PLUS and Grad PLUS: - “Up to the total cost of attendance, less aid received”).

<sup>112</sup> See U.S. DEPT. OF TREASURY & DEPT. OF EDUC., THE ECONOMICS OF EDUCATION 26 (Dec. 2012) *available at* [http://www.treasury.gov/connect/blog/Documents/20121212\\_Economics%20of%20Higher%20Ed\\_vFINAL.pdf](http://www.treasury.gov/connect/blog/Documents/20121212_Economics%20of%20Higher%20Ed_vFINAL.pdf). (“Loans are the largest share of financial aid, followed by grants. . . .”)

<sup>113</sup> See generally Consumer Fin. Prot. Bureau, *What Are the Main Differences between Federal Student Loans and Private Student Loans*, CONSUMER FINANCE, <http://www.consumerfinance.gov/askcfpb/545/what-are-main-differences-between-federal-student-loans-and-private-student-loans.html> (last updated July 26, 2013).

<sup>114</sup> See generally *Loan Tradeoffs – Public vs. Private*, FINAID <http://www.finaid.org/loans/loantradeoffs.phtml> (last visited Feb. 22, 2014).

<sup>115</sup> See generally William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL’Y 485, 505 (2011) (explaining that federal student loans are offered at lower interest rates because they are backed by the full faith and credit of the United States).

<sup>116</sup> See Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Report Finds Private Student Loan Borrowers Face Roadblocks to Repayment*, CONSUMER FINANCE (Oct. 16, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-report-finds-private-student-loan-borrowers-face-roadblocks-to-repayment/>; see generally Eryk J. Wachnik, *The Student Debt Crisis: The Impact of the Obama Administration’s “Pay as You Earn” Plan on Millions of Current & Former Students*, 24 LOY. CONSUMER L. REV. 442 (2011–12). See generally META BROWN, ET AL., MEASURING STUDENT DEBT AND ITS PERFORMANCE 3 (2014), *available at* [http://www.newyorkfed.org/research/staff\\_reports/sr668.pdf](http://www.newyorkfed.org/research/staff_reports/sr668.pdf) (“Unfortunately, while the vast majority of student loan servicers report to credit bureaus, these data do not distinguish between private and federal loans.”). *But see* Jonathan M. Layman, *Forgiven but not Forgotten: Taxation of Forgiven Student Loans Under the Income-Based-Repayment Plan*, 39 CAP. U. L. REV. 131 (2011); U.S. Dept. of Educ., *Recent Changes to the Student Aid Programs*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/about/announcements/recent-changes> (last visited Feb. 23, 2014) (Direct Loan borrowers are no longer able to offer repayment incentives other than for automatic bank debit payments). *But see* Borrower Services, Federal Direct

College and vocational school students should be encouraged to exhaust all possible federal student loan options before turning to private student loans.<sup>117</sup> A more reasonable alternative to federal student loans may be obtaining private student loans from a non-profit private student loan lender.<sup>118</sup> However, students and their families are increasingly steered towards federal PLUS loans to help finance their higher education.<sup>119</sup> Accordingly, financial aid packages have increasingly included federal PLUS loans to cover the cost of college attendance in recent years.<sup>120</sup>

### C. The Federal PLUS Loan Program

Federal PLUS loans are comprised of two forms: Parent PLUS loans and Grad PLUS loans.<sup>121</sup> The federal PLUS loan program was historically limited to parents who funded undergraduate college expenses for dependents.<sup>122</sup> As of July 1, 2006, the federal PLUS loan program was expanded to include graduate students pursuing advanced degrees under the Grad PLUS loan program.<sup>123</sup> The federal PLUS

---

Consolidation Loans Online Calculator, <https://loanconsolidation.ed.gov/loancalc/calculator/jsp/help.jsp> (“As an incentive to use the EDA [Electronic Debit Account] repayment method, the Direct Loan Program offers a quarter point (.25%) reduction in your interest rate for repayment periods. Your interest rate reduction occurs automatically once your account is placed on EDA This discount will not apply during an in-School status, grace, deferment, or forbearance period. The U.S. Department of Education may discontinue this discount at anytime without notice.”).

<sup>117</sup> See U.S. Dept. of Educ., *supra* note 107; FED. TRADE COMM’N & U.S. DEPT. OF EDUC., *Student Loans: Avoiding Deceptive Offers* (2012), <http://www.consumer.ftc.gov/articles/pdf-0048-student-loans.pdf>; Michelle Singletary, *Students Wisely Turn from Private Loans*, WASHINGTON POST (Oct. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/AR2009102304322.html>.

<sup>118</sup> See CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS 4 (Aug. 29, 2012), [http://files.consumerfinance.gov/f/201207\\_cfpb\\_Reports\\_Private-Student-Loans.pdf](http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf) (reporting on alternative non-profit and state-affiliated private student loan lenders).

<sup>119</sup> See Wang, *supra* note 15; Marian Wang, *Families Shoulder Heftier Burdens as College Debt Swells*, PROPUBLICA (Jan. 3, 2013), <http://www.propublica.org/article/families-shoulder-heftier-burdens-as-college-debt-swells>; Kantrowitz, *supra* note 8 at 10-11; Equal Justice Works, *Borrowing for College Costs Can Burden Parents*, U.S. NEWS & WORLD REPORT (Dec. 26, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/12/26/borrowing-for-college-costs-can-burden-parents>.

<sup>120</sup> See Marian Wang, *How Financial Aid Letters Often Leave Students Confused and Misinformed*, PROPUBLICA (Oct. 16, 2012), <http://www.propublica.org/article/how-financial-aid-letters-often-leave-students-confused-and-misinformed>; Nelson, *supra* note 8.

<sup>121</sup> See U.S. Dept. of Educ., *supra* note 107.

<sup>122</sup> See *Id.*; see generally Lance Lochner & Alexander Monge-Naranjo, *Education and Default Incentives with Government Student Loan Programs* 5 (Nat’l Bureau of Econ. Research, Working Paper, 2004).

<sup>123</sup> See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (amending the HEA, section 428B, to open the PLUS Loan program to graduate and professional students); see generally EdFinancial Services, *Federal GradPLUS Loans*, EDFINANCIAL SERVICES <http://www.edfinancial.com/topics/financialaid> (last visited Feb. 24, 2014); see, e.g., Memorandum from Columbus School of Law, CATHOLIC UNIVERSITY OF AMERICA, <http://www.law.edu/finaid/loanPlus.cfm> (“Congress passed legislation in 2006 with changes regarding financial aid. The two major changes which effect Graduate/Law students are (1) a fixed interest rate for the Federal Stafford Loan and (2) a new fixed interest rate loan called the *Grad PLUS* loan.”); Memorandum from LEWIS & CLARK, *Financial Aid: Federal Direct PLUS Loan for Grad & Law Students*, [https://www.lclark.edu/offices/financial\\_aid/loans/direct\\_plus\\_grad](https://www.lclark.edu/offices/financial_aid/loans/direct_plus_grad) (“Beginning on July 1st, 2006 graduate and law students may borrow under the Federal Direct PLUS Loan program. Lewis & Clark graduate and law students may choose either a Federal Direct PLUS Loan or a private loan to cover educational costs after they have exhausted their Federal Direct Loan eligibility.”); see generally U.S. Dept. of Ed., *Questions and Answers About Direct PLUS Loans for Graduate and Professional Students*, <http://www.law.edu/res/docs/Grad-PLUS-Loan-Q-A.pdf>.

loan program was formerly administered by two separate agencies: the Direct Loan Program and the Federal Family Education Loan (“FFEL”) Program.<sup>124</sup>

Previously, the Direct PLUS program was serviced by the U.S. Department of Education, and the FFEL PLUS program was serviced by private entities.<sup>125</sup> As of July 1, 2010, the Obama administration consolidated the FFEL PLUS loan program,<sup>126</sup> and all new PLUS loans are disbursed under the Direct PLUS loan program.<sup>127</sup> However, previously disbursed FFEL PLUS loans will continue to be serviced under the FFEL PLUS loan program.<sup>128</sup>

Consequently, the Direct PLUS program offered more favorable terms and lower rates than the FFEL PLUS program.<sup>129</sup> Under the previous financial aid structure, eligible PLUS loan students and their families could not choose between the Direct PLUS or FFEL PLUS programs.<sup>130</sup> Rather, the

---

<sup>124</sup> See U.S. Dept. of Educ., *supra* note 107; Barack Obama, *Remarks By the President on Higher Education*, WHITEHOUSE (Apr. 24, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-Higher-Education/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Higher-Education/); see generally Health Care and Education Reconciliation Act of 2010 (Title II), Pub. L. No. 111–152, 124 Stat. 1029 (2010); Lochner, *supra* note 122 at 5.

<sup>125</sup> See Health Care and Education Reconciliation Act of 2010 (Title II), Pub. L. No. 111 – 152; see generally Kim Clark, *Big Changes Coming to Student Loans*, U.S. NEWS & WORLD REPORT (Mar. 24, 2010), <http://www.usnews.com/education/articles/2010/03/24/big-changes-coming-to-student-loans>; Nick Anderson, *What Would Change If Student Lending Legislation Passes*, WASHINGTON POST (Mar. 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032503578.html>; Lochner, *supra* note 122.

<sup>126</sup> See Health Care and Education Reconciliation Act of 2010 §§ 2201–05; Student Aid and Fiscal Responsibility Act of 2009, H.R. 3221, 111<sup>th</sup> Cong. (2009); Tamar Lewin, *House Passes Bill to Expand College Aid*, N.Y. TIMES (Sept. 17, 2009), <http://www.nytimes.com/2009/09/18/education/18educ.html>.

<sup>127</sup> See Health Care and Education Reconciliation Act of 2010 §§ 2201 – 05 (ending the FFEL program for new PLUS loans as of July 1, 2010, while maintaining FFEL PLUS loan terms including an increased interest rate on existing loans).

<sup>128</sup> See Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 340 (2013) (“Loans are now made directly to students through the U.S. Department of Education, ending the FFELP program. For loans made before 2010, lenders receive the higher of the special allowance rate or the student interest rate set by the government for new student loans. If the student rate is lower than the special allowance rate, the government makes up the difference. In the event that the student rate is higher, the lender pays the difference to the government.”) (citations omitted).

<sup>129</sup> See Cong. Budget Office, *Letter to the Honorable Judd Gregg*, CONG. BUDGET OFFICE (Mar. 15, 2010), [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11343/03-15-student\\_loan\\_letter.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11343/03-15-student_loan_letter.pdf) (estimating a savings of \$68.7 billion over ten years by eliminating the FFEL program); see generally New America Foundation, *Federal Student Loan Programs—History*, NEW AMERICA FOUNDATION (Mar. 28, 2012), <http://febp.newamerica.net/background-analysis/federal-student-loan-programs-history>; Chuck Marr & Gillian Brunet, *Student Loan Reform In Health Bill Would Save More than \$60 Billion and Invest In Access to College*, CTR ON BUDGET AND POLICY PRIORITIES (Mar. 19, 2010), <http://www.cbpp.org/files/3-19-10health2.pdf>. But see FinAid, *Direct Loans vs. FFEL Program*, FINAID, <http://www.finaid.org/loans/dl-vs-ffel.phtml>, (last visited May 1, 2013)

(“[A]bout two-thirds of the FFEL program loan volume in 2008-09 was funded through the Ensuring Continued Access to Student Loans Act of 2008 and has been or will be sold to the US Department of Education. This is in contrast with the Direct Loan program, where federal education loans are held by the US Department of Education for the life of the loan and are not sold. . . . [I]n the College Cost Reduction and Access Act of 2007, when combined with the savings from the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA), caused the FFEL program to cost less than the Direct Loan program in FY 2008 on a per-dollar-lent basis. . . .”).

<sup>130</sup> See generally Jennifer Liberto, *Trying to Flunk Banks Out of College*, CNN (Mar. 12, 2010), [http://money.cnn.com/2010/03/11/news/economy/student\\_loans/](http://money.cnn.com/2010/03/11/news/economy/student_loans/); Dave Roos, *How PLUS Loans Work*, HOW STUFF WORKS (Mar. 31, 2010), <http://money.howstuffworks.com/personal-finance/college-planning/financial-aid/plus->

eligible educational institution determined which PLUS program it would enroll in, thereby precluding students from negotiating better terms and rates for their federal PLUS loans.<sup>131</sup> Such a practice adversely affected student loan prospects.<sup>132</sup>

#### D. The Housing Crisis and Ensuing Credit Crunch for PLUS Loans

The Great Recession prompted an economic downturn that officially spanned from 2007 to 2009, and left household wealth to spiral several years thereafter.<sup>133</sup> The resulting financial instability was caused in part by a downturn in the housing market spurred by the default of mortgage-backed securities.<sup>134</sup> During the turbulent years of the Great Recession, the home mortgage crisis permeated the financial market to cripple some of the largest financial institutions in our nation, including Lehman Brothers, Bear Sterns, and AIG.<sup>135</sup> Large financial institutions with a concentration in real estate assets contributed to an unprecedented number of bank failures and closures.<sup>136</sup>

---

loans3.htm; Abigail Field, *How the Banks' Student Loan Gravy Train Finally Got Halted*, DAILY FINANCE (Mar. 30, 2010), <http://www.dailyfinance.com/2010/03/30/how-the-banks-student-loan-gravy-train-finally-got-halted/>.

<sup>131</sup> See generally Liberto, *supra* note 130; Roos, *supra* note 130; Field, *supra* note 130.

<sup>132</sup> See generally William D. Ford *Federal Direct Loan Program*, COLLEGES.COM, [http://www.colleges.com/financial-aid/direct\\_stafford\\_programs.html](http://www.colleges.com/financial-aid/direct_stafford_programs.html) (last visited Feb. 24, 2014) (noting that schools could not participate in both the Direct Loan and Family Education Loan Program, but rather could only participate in one or the other); Field, *supra* note 130; Equal Justice Works, *Learn What Obama's Student Loan Plan Means for You*, U.S. NEWS AND WORLD REPORT (Nov. 9, 2011), <http://www.usnews.com/education/blogs/student-loan-ranger/2011/11/09/learn-what-obamas-student-loan-plan-means-for-you>.

<sup>133</sup> See, *From Free-Fall to Stagnation: Five Years After the Start of the Great Recession, Extraordinary Policy Measures Are Still Needed, but Are Not Forthcoming* (Economic Policy Institute, Briefing Paper # 355, Feb. 14, 2013) at 6 (“Essentially, the burst of the housing bubble erased trillions of dollars of wealth from household balance sheets . . . . The pullback in consumer spending (households spent less because they were much less wealthy) . . . then cascaded throughout the rest of the economy.”); see also Jeffrey A. Frieden, *Foreseeable and Preventable*, N.Y. TIMES, Jan. 30, 2011, <http://www.nytimes.com/roomfordebate/2011/01/30/was-the-financial-crisis-avoidable/the-financial-crisis-was-foreseeable-and-preventable> (“Many things contributed to the Great Recession of 2007-2010. Massive foreign borrowing, excessively loose monetary policy, reckless lending practices, lax regulation, and other factors all fed into the crisis.”); Center on Budget and Policy Priorities, *Chart Book: The Legacy of the Great Recession*, <http://www.cbpp.org/cms/index.cfm?fa=view&id=3252> (“Although employers began to add jobs in 2010, the economy has recovered just over 7.8 million of the 8.7 million jobs lost between the start of the recession in December 2007 and early 2010.”).

<sup>134</sup> See generally LEE E. OHANIAN, ACCOUNTING FOR THE GREAT RECESSION: WHY AND HOW DID THE 2007–09 U.S. RECESSION DIFFER FROM ALL OTHERS? (2011); Dale Arthur Oesterle, *The Collapse of Fannie Mae and Freddie Mac: Victims or Villains*, 5 ENTREPRENEURIAL BUS. L. J. 733, 734 (2010) (“Fannie and Freddie had heavy involvement with the creation and funding of residential mortgages and one of the primary mortgage derivatives, the mortgage-backed security (MBS). So Fannie and Freddie are deeply in play in the various theories on the cause of the current Recession.”); Kantowitz, *supra* note 8 at 5-10 (noting that the collapse of the securitized subprime mortgage market decreased investor confidence in student loan securitizations that funded a significant portion of the student loan industry resulting in lower profits and higher interest rates); see also Anne Johnson & Tobin Van Ostern, *It's Our Interest: The Need to Reduce Student Loan Interest Rates*, CTR FOR AMERICAN PROGRESS (Feb. 13, 2013), <http://www.americanprogress.org/issues/higher-education/report/2013/02/13/53061/its-our-interest-the-need-to-reduce-student-loan-interest-rates/> (“In November 2008 the Federal Reserve announced the creation of the Term Asset-Backed Securities Loan Facility under the Federal Reserve Act. The program was intended to improve economic and market conditions by purchasing asset-backed securities. Originally, there were four categories of asset-backed securities that qualified, one being student loans. The program was closed on March 31, 2010, and all loans that the program extended will expire no later than March 30, 2015.”) (citations omitted).

<sup>135</sup> See generally Grusky, *supra* note 4 at 5.

<sup>136</sup> See, e.g., *Countrywide Financial Corporation*, N.Y. TIMES, [http://topics.nytimes.com/top/news/business/companies/countrywide\\_financial\\_corporation/index.html](http://topics.nytimes.com/top/news/business/companies/countrywide_financial_corporation/index.html) (last updated Jan. 31, 2014); see also Boston Bus. Journal, *Bank of America's Acquisition of Countrywide Financial the Worst Deal Ever*, MASSLIVE (Jan. 14, 2013), <http://www.masslive>.

As financial institutions began to fold, the American public bore the brunt of the financial collapse.<sup>137</sup> With falling home prices, many homes were “underwater,” meaning homeowners owed more on their mortgages than what their homes were actually worth.<sup>138</sup> The decrease in home equity equaled a drastic decrease in wealth for millions of Americans, particularly for minorities, whose homes were often their greatest asset.<sup>139</sup> The dramatic decrease in household wealth translated to a decrease in confidence in the U.S. economy, domestically and abroad, triggering a global economic crisis.<sup>140</sup> Bank bailouts and a credit crunch ensued as the economy stabilized with the help of low interest rates and caps on inflation.<sup>141</sup>

The contraction of the United States economy had a ripple effect that increased the unemployment rate.<sup>142</sup> Increased unemployment contributed to less spending for the average family that

---

com/business-news/index.ssf/2013/01/editorial\_bank\_of\_america\_and\_the\_worst.html (reporting on the recent \$11.6 billion settlement with Fannie Mae for mortgages made pursuant to the housing crisis to in part buy back toxic loans); Jeff Blumenthal, *Bank Failures Easing, but Still More Frequent than before Crisis*, PHILADELPHIA BUS. JOURNAL, (Jan. 2, 2013), <http://www.bizjournals.com/philadelphia/news/2013/01/02/bank-failures-easing-but-still-more.html?page=all> (“According to data from the Federal Deposit Insurance Corp., there were 50 bank failures nationwide in 2012, down from 92 in 2011, 157 in 2010 and 140 in 2009. There were only 52 total failures combined in the eight years prior, with 25 of those coming as the recession began in earnest in late 2008.”); Associated Press, *Ga. Bank Failure Brings 2012 Total to 50*, ASSOCIATED PRESS (Nov. 16, 2012), <http://www.bigstory.ap.org/article/ga-bank-failure-brings-2012-total-50> (reporting that bank failures peaked in 2010 with the highest number of closures since the savings and loans crisis approximately 20 years ago).

<sup>137</sup> See generally JULIA C. OTT, *WHEN WALL STREET MET MAIN STREET* (2011) (documenting Wall Street’s connection to the economic health of the country and its citizens); Rodney Ramcharan, et al., *From Wall Street to Main Street: The Impact of the Financial Crisis on Consumer Credit Supply* (Fed. Reserve Bd., Working Paper No. 2013-10, 2012); Anthony Reyes, *Reforming Wall Street, Protecting Main Street: An Update on Wall Street Reform*, U.S. DEPT. OF TREASURY (July 18, 2012), [http://www.treasury.gov/connect/blog/Documents/20120719\\_DFA\\_FINAL5.pdf](http://www.treasury.gov/connect/blog/Documents/20120719_DFA_FINAL5.pdf).

<sup>138</sup> See Alejandro Lazo, *Fewer Americans Are Stuck in Underwater Mortgages*, L.A. TIMES (Feb. 22, 2013), <http://articles.latimes.com/2013/feb/22/business/la-fi-mo-underwater-loans-20130222> (underwater home mortgages, or mortgages owing more than what the property is worth, totaled more than \$1 trillion in 2012); Les Christie, *Half of Mortgage Borrowers Under 40 Are Underwater*, CNN (Aug. 23, 2012), [http://money.cnn.com/2012/08/23/real\\_estate/underwater-mortgage-borrowers/index.html](http://money.cnn.com/2012/08/23/real_estate/underwater-mortgage-borrowers/index.html).

<sup>139</sup> See Paul Taylor, et al., *Wealth Gaps Rise to Record Highs between Whites, Blacks and Hispanics*, PEW RESEARCH CENTER (July 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/> (“[A]nalysis finds that, in percentage terms, the bursting of the housing market bubble in 2006 and the recession that followed from late 2007 to mid-2009 took a far greater toll on the wealth of minorities than whites.”); Tami Luhby, *Worsening Wealth Inequality by Race*, CNN (June 21, 2012), <http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/index.htm>; Jeff Kearns, *Fed Says U.S. Wealth Fell 38.8% in 2007–2010 on Housing*, BLOOMBERG (June 12, 2012), <http://www.bloomberg.com/news/2012-06-11/fed-says-family-wealth-plunged-38-8-in-2007-2010-on-home-values.html>; Eric Pianin, *How the Housing Crisis Shafted the Next Generation*, THE FISCAL TIMES (May 22, 2012), <http://www.thefiscaltimes.com/Articles/2012/05/22/How-the-Housing-Crisis-Shafted-the-Next-Generation.aspx#page1>; see generally Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 J.L. & POL’Y 53, 65 (2006) (stating that homeownership is a large asset for American families in building wealth).

<sup>140</sup> See generally Stijn Claessens, et al., *What Happens During Recession, Crunches, and Busts?*, 60 ECON. POL’Y 653 (2009); Susan Fenton, *U.S. Consumer Confidence Now Lower than at Height of Global Recession*, HUFFINGTON POST (July 17, 2011), [http://www.huffingtonpost.com/2011/07/17/consumer-confidence-global-recession\\_n\\_901015.html](http://www.huffingtonpost.com/2011/07/17/consumer-confidence-global-recession_n_901015.html).

<sup>141</sup> See generally Phil Izzo, *Secondary Sources: Bailout Concerns, Credit Crunch, Inflation Targeting*, WALL STREET JOURNAL (Sept. 24, 2008), <http://blogs.wsj.com/economics/2008/09/24/secondary-sources-bailout-concerns-credit-crunch-inflation-targeting/>.

<sup>142</sup> See generally EconPort, *Types of Unemployment*, EconPort, <http://www.econport.org/content/handbook/Unemployment/Types.html> (last visited Feb. 24, 2014); Ronald Kimmons, *How Business Cycles Affect Unemployment*, HOUSTON CHRONICLE, <http://smallbusiness.chron.com/business-cycles-affect-unemployment-21368.html> (last visited Feb. 24, 2014).

further contracted the job market.<sup>143</sup> The decline in wages and job layoffs prompted Americans to either enroll in college or vocational school to acquire additional skills to keep pace with the changing job market.<sup>144</sup>

The resulting recession forced prospective students to engage in a cost benefit analysis of whether to attend college.<sup>145</sup> Public colleges and universities experienced an increase in enrollment as employment prospects dwindled.<sup>146</sup> However, private colleges, universities, and professional schools with higher tuition experienced a sharp decline in enrollment.<sup>147</sup> The bleak economic outlook triggered the growing concern that the cost of a college education effectively outpaced the rate of inflation.<sup>148</sup> The average financial aid award today does not adequately cover college expenses.<sup>149</sup> Accordingly, there must be an integrated approach to provide sufficient funding for higher education and to lower the cost of college attendance.<sup>150</sup> Such movement may alleviate the tension between the need for an educated workforce and the difficulty of paying for it.<sup>151</sup>

The housing crisis affected how families with college students finance higher education.<sup>152</sup> Home equity loans and lines of credit have decreased in use as alternatives to student loan financing.<sup>153</sup> Further, the housing market fallout resulted in a number of foreclosures, short sales, and deeds in lieu of foreclosure that established an adverse credit history for federal PLUS Loan program applicants.<sup>154</sup> The

---

<sup>143</sup> See John W. Schoen, *Lack of Job Growth Holds Economy in Cycle of Weakness*, NBC NEWS (Aug. 4, 2012), [http://economywatch.nbcnews.com/\\_news/2012/08/04/13107880-lack-of-job-growth-holds-economy-in-cycle-of-weakness?lite](http://economywatch.nbcnews.com/_news/2012/08/04/13107880-lack-of-job-growth-holds-economy-in-cycle-of-weakness?lite).

<sup>144</sup> See PAUL TAYLOR, ET AL., COLLEGE ENROLLMENT HITS ALL-TIME HIGH FUELED BY COMMUNITY COLLEGE SURGE1 (2009); See generally Howard, *supra* note 115 at 488.

<sup>145</sup> See generally Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67 (2010).

<sup>146</sup> See Lisa Barrow & Jonathan Davis, *The Upside of Down: Postsecondary Enrollment in the Great Recession*, 36 ECON. PERSPS. 117 (2012); see generally Eric Hoover, *Recession Reshaped College Enrollment, But the Sky Didn't Fall*, CHRONICLE OF HIGHER EDUCATION (July 14, 2011), <https://chronicle.com/article/Recession-Reshaped-College/128223/>; Beckie Supiano, *The Economy and College Admissions*, CHRONICLE OF HIGHER EDUCATION (Oct. 20, 2010, 5:01 PM), <http://chronicle.com/blogs/headcount/the-changing-state-of-college-admissions/27569>.

<sup>147</sup> See generally Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333 (1999); INSTITUTE FOR HIGHER EDUCATION POLICY, ET AL., STUDENT LOAN DEBT: PROBLEMS & PROSPECTS at xiv-xv (finding that students who attend professional schools such as law school are accumulating high student loan debt).

<sup>148</sup> See generally Howard, *supra* note 115 at 496–497; INSTITUTE FOR HIGHER EDUCATION POLICY, ET AL., *supra* note 147 at, xiv (stating that low-income students, especially single parents, experience difficulty in paying for college as the cost of attendance exceeds the amount of available grants, thereby requiring larger student loan debt to enroll).

<sup>149</sup> See generally INSTITUTE FOR HIGHER EDUCATION POLICY, ET AL., *supra* note 147 at xiv, 106–108 (noting that students are increasingly relying on credit cards to pay for college in supplementing insufficient student loans).

<sup>150</sup> See MARK HUELSMAN & ALISA F. CUNNINGHAM, MAKING SENSE OF THE SYSTEM: FINANCIAL AID REFORM FOR THE 21<sup>ST</sup> CENTURY STUDENT 8 (2013).

<sup>151</sup> See White House, *Fact Sheet: President Obama's Blueprint for Keeping College Affordable and Within Reach for All Americans* (Jan. 27, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/27/fact-sheet-president-obama-s-blueprint-keeping-college-affordable-and-wi>; see generally D. BRUCE JOHNSTONE, HIGHER EDUCATION ACCESSIBILITY AND FINANCIAL VIABILITY: THE ROLE OF STUDENT LOANS (2005).

<sup>152</sup> See Bob Tedeschi, *College Tuition Not on the House*, N.Y. TIMES (Apr. 3, 2009), [http://www.nytimes.com/2009/04/05/realestate/05mort.html?\\_r=0](http://www.nytimes.com/2009/04/05/realestate/05mort.html?_r=0).

<sup>153</sup> See Marian Wang, et al., *supra* note 15; Michael F. Lovenheim, *The Effect of Liquid Housing Wealth on College Enrollment*, 29 J. LAB. ECONS. 741 (2011); Tedeschi, *supra* note 152.

<sup>154</sup> See Kantrowitz, *supra* note 8 at 1-2; Kantrowitz, *supra* note 96; Leigh Thompson, *Does Foreclosure Affect My Financial Aid?*, SFGATE, <http://homeguides.sfgate.com/foreclosure-affect-financial-aid-49801.html> (last visited Feb. 24, 2014).

financial crisis also led to an increase in bankruptcies that prevented applicants from obtaining private student loans or precluded parents and graduate students from obtaining federal PLUS loans.<sup>155</sup> With the financial fallout and the resulting student loan defaults,<sup>156</sup> PLUS loans are now more narrowly tailored and reserved for those with exemplary credit.<sup>157</sup> Financial aid packages that once included PLUS loans now tend to exclude them if borrowers do not meet rigid credit standards.<sup>158</sup> Consequently, a number of educational borrowers must pursue other means to make ends meet in paying for college.<sup>159</sup> After exhausting federal financial aid, private loans may constitute the only option for college financing.<sup>160</sup> The PLUS loan program technically offers a federal alternative to private student loans.<sup>161</sup> However, the high bar for those seeking to obtain a federal PLUS loan essentially undermines the increased college access offered by the federal government through the student aid program.<sup>162</sup>

### III. CONTEMPORARY ISSUES IN THE FEDERAL PLUS LOAN PROGRAM

#### A. The Creditworthiness Requirement for PLUS Loans

The PLUS loan program requires a credit check to determine whether the borrower has an adverse credit history.<sup>163</sup> The federal Perkins and Stafford loan programs do not require a credit check,

---

<sup>155</sup>See generally Ylan Q. Mui, *Study: College Graduates Driving Increase In Bankruptcy Filings*, WASHINGTON POST (Sept. 12, 2011), [http://www.washingtonpost.com/business/economy/study-college-graduates-driving-increase-in-bankruptcy-filings/2011/09/12/gIQAmentNK\\_story.html](http://www.washingtonpost.com/business/economy/study-college-graduates-driving-increase-in-bankruptcy-filings/2011/09/12/gIQAmentNK_story.html) (“According to government data, bankruptcies spiked in the years following the financial crisis, peaking at 1.5 million in 2010.”); Mark Kantrowitz, *Borrowers with a Recent Bankruptcy are Ineligible for the Federal PLUS Loan*, FASTWEB (Feb. 16, 2012), <http://www.fastweb.com/financial-aid/articles/3451-borrowers-with-a-recent-bankruptcy-are-ineligible-for-the-federal-plus-loan> (A bankruptcy within the last five years will preclude a PLUS loan applicant from obtaining the loan without an endorser due to an adverse credit history); Kyle Olson, *How the Recession Impacts Education in America*, TOTAL BANKRUPTCY, <http://www.totalbankruptcy.com/news/articles/miscellaneous/recession-bankruptcy-college.aspx> (last visited Feb. 24, 2014).

<sup>156</sup> See Press Release, U.S. Dept. of Ed., *Default Rates Continue to Rise for Federal Student Loans* (Sept. 30, 2013), available at <http://www.ed.gov/news/press-releases/default-rates-continue-rise-federal-student-loans>; Liz Weston, *Confusing Data Flummoxes Fixing of Student-Loan Arrears*, REUTERS, June 2, 2014, available at <http://www.reuters.com/article/2014/06/02/us-column-weston-idUSKBN0ED1GW20140602> (“A languid economy, soaring education debt and ignorance about available repayment options lead many borrowers to fall behind on their student loan payments, financial aid experts say.”); see generally Federal Education Budget Project, *Federal Student Loan Default Rates*, NEW AMERICA FOUNDATION (May 1, 2014, 10:17 PM), <http://feb.newamerica.net/background-analysis/federal-student-loan-default-rates> (“In fiscal year 2014, students borrowed approximately \$100 billion through federal loan programs . . . . By law, the U.S. Department of Education considers a borrower to be in default when he fails to make on-time repayment of his loans for nine consecutive months.”).

<sup>157</sup> See Nelson, *supra* note 8; see generally ALISA F. CUNNINGHAM & GREGORY S. KIENZL, *DELINQUENCY: THE UNTOLD STORY OF STUDENT LOAN BORROWING* (2011).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> See generally Katy Hopkins, *Consider When to Use Private Student Loans*, U.S. NEWS AND WORLD REPORT (Oct. 1, 2012), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2012/10/01/consider-when-to-use-private-student-loans>.

<sup>161</sup> See FinAid, *Direct Loans vs. the FFEL Program*, FINAID, <http://www.finaid.org/loans/dl-vs-ffel.phtml> (last visited Feb. 24, 2014).

<sup>162</sup> See Nelson, *supra* note 8; U.S. Dept. of Treasury & Dept. of Educ., *The Economics of Higher Education* (Dec. 2012), [http://www.treasury.gov/connect/blog/Documents/20121212\\_Economics%20of%20Higher%20Ed\\_vFINAL.pdf](http://www.treasury.gov/connect/blog/Documents/20121212_Economics%20of%20Higher%20Ed_vFINAL.pdf).

<sup>163</sup> See Higher Education Act of 1965 § 428B(a)(1)(A), 20 U.S.C. § 1078-2 (2012); 34 C.F.R. §§ 682.201(c)(2)(ii), 685.200(c)(1)(vii)(B) (2013).

but they do require a finding of demonstrated financial need.<sup>164</sup> Dependent students have their financial need assessed by the financial history of the family as reported on the Free Application for Federal Student Aid (“FAFSA”).<sup>165</sup> Previously, Parent PLUS loan applicants were not required to file the FAFSA because the aid was not based on family financial need.<sup>166</sup> However, the FAFSA is now required of all PLUS Loan applicants.<sup>167</sup> A PLUS loan denial relegates students to pursue additional aid from the unsubsidized Stafford loan program.<sup>168</sup> The federal PLUS loan program conducts a credit check to determine whether any factors exist to constitute an adverse credit history.<sup>169</sup> Examples of the factors used to determine whether a PLUS loan applicant has an adverse credit history include: charged off accounts, accounts in collection, delinquent accounts that are 90 to 180 days late, wage garnishments, repossessions, voluntary surrenders of property, defaulted loans, foreclosures, deeds in lieu of foreclosure, bankruptcies, and tax liens.<sup>170</sup>

---

<sup>164</sup> See U.S. DEPT. OF EDUC., YOUR FEDERAL STUDENT LOANS: LEARN THE BASICS AND MANAGE YOUR DEBT 9 (Dec. 2010); FinAid, *Student Loans*, FINAID, <http://www.finaid.org/loans/studentloan.phtml> (last visited Feb. 24, 2014); FinAid, *Credit Scores*, FINAID, <http://www.finaid.org/loans/creditscores.phtml> (last visited Feb. 24, 2014).

<sup>165</sup> See U.S. DEPT. OF EDUC., AM I DEPENDENT OR INDEPENDENT? (2013); U.S. Dept. of Educ., *Applying for Federal Direct Loans*, FEDERAL STUDENT AID, <http://www.direct.ed.gov/applying.html> (last updated Jan. 3, 2014).

<sup>166</sup> See FinAid, *Parent Loans*, FINAID, <http://www.finaid.org/loans/parentloan.phtml> (last visited Feb. 25, 2014) (“Parents who are applying for a Parent PLUS loan are, strictly speaking, not required to have the student file a FAFSA. However, it is generally advisable to do so in order to avoid missing out on other federal student aid. But if they wish to apply for a Parent PLUS loan without submitting a FAFSA, they will need to submit a loan application and sign a master promissory note. Starting in 2011-2012, the FAFSA will be required for the Parent PLUS loan.”); *PLUS Loan Frequently Asked Questions*, PARENT PLUS LOAN, <http://www.parentplusloan.com/plus-loans/frequently-asked-questions-about-the-plus-loan.php> (last visited Feb. 25, 2014) (“[T]he FAFSA is not required at all schools, but it is strongly recommended. The PLUS Loan is a federal student loan and therefore must be ‘certified’ (approved) by the college’s or university’s financial aid office. If your college or university requires the FAFSA for all students, they will not certify a PLUS Loan without a FAFSA Application on file. Check with your school’s financial aid office on their policy.”); *In Order to Get a Stafford Loan or a Parent PLUS Loan, Do I Need to Fill Out a FAFSA?*, FAFSA ONLINE, <http://www.fafsaonline.com/fafsa-questions/do-i-need-to-fill-out-a-fafsa.php> (last visited Feb. 25, 2014).

<sup>167</sup> See U.S. Dept. of Educ., *supra* note 108 (“In order to receive a Direct PLUS loan, you (or your child, in the case of parent borrowers) must complete the *Free Application for Federal Student Aid* (FAFSA). The school’s *financial aid office* will provide instructions about their process for requesting a Direct PLUS Loan.”); *see generally PLUS Loan Frequently Asked Questions*, STUDENT LOAN NETWORK, <http://www.studentloannetwork.com/federal-student-loans/plus-loan-faq.php> (last visited Feb. 25, 2014).

<sup>168</sup> See 34 C.F.R. §§ 682.201(a)(3), 685.203(c)(1) (2013); U.S. DEPT. OF EDUC., GUIDANCE ON PARTICIPATION IN THE WILLIAM D. FORD FEDERAL DIRECT LOAN (DIRECT LOAN) PROGRAM (2011), *available at* <http://www.ifap.ed.gov/dpccletters/GEN1107.html>; *see generally* U.S. Dept. of Ed., *supra* note 108 (“If a parent borrower is unable to secure a PLUS loan, the undergraduate *dependent student* may be eligible for additional unsubsidized loans to help pay for his or her education. The dependent student should contact the school’s financial aid office for more information”); FinAid, *Additional Unsubsidized Stafford Loan*, FINAID, <http://www.finaid.org/educators/pj/additional-stafford.phtml> (last visited Feb 25 2014).

<sup>169</sup> *See generally* Marian Wang, et. al, *supra* note 15 (“Of course, Parent PLUS [loans] can be an important financial lifeline—especially for those who can’t qualify for loans in the private market. An iffy credit score, high debt-to-income ratio, or lack of a credit history won’t necessarily disqualify anyone for a Plus loan.”).

<sup>170</sup> See 34 CFR 685.200(c)(1)(vii)(B); U.S. Dept. of Ed., *Questions and Answers About Direct PLUS Loans for Graduate and Professional Students*, <http://www.ifap.ed.gov/dlbulletins/attachments/DLB0703Attach.pdf>; Mark Kantrowitz, *How to Qualify for a PLUS Loan Despite an Adverse Credit History*, April 15, 2013, <http://www.fastweb.com/financial-aid/articles/3926-how-to-qualify-for-a-plus-loan-despite-an-adverse-credit-history> (“Per the regulations at 34 C.F.R. §668.32(g)(1), a student who is in default on a federal student loan — such as a Federal Perkins, Federal Stafford or Federal PLUS loan — is ineligible for any federal student aid. (A Federal Parent PLUS loan borrower must likewise not be in default on a federal education loan.) . . . [an adverse credit history] also includes the write-off of federal education loan debt.”); Marian Wang, *Parent Plus Loan: How the Government Is Saddling Parents with Loans They Can’t Afford*, CHRONICLE OF HIGHER EDUCATION, 2012 (PLUS loan applicants are now also being denied if



If a PLUS loan is denied for adverse credit reasons, then the applicant may appeal to the federal government or add a creditworthy endorser for reconsideration.<sup>171</sup> The Obama Administration, through the Department of Education, recently revised the PLUS loan appeals process as a result of public outcry regarding credit eligibility changes.<sup>172</sup> Accordingly, reconsideration of a PLUS loan denial may be undertaken under the revised evaluation process.<sup>173</sup> However, concerns regarding the availability of federal financial aid and its impact on student enrollment continue.<sup>174</sup> Issues concerning the credit check requirement for PLUS loans may be resolved by the renewal of the HEA.<sup>175</sup> The federal PLUS loan program does not deny loans on the basis of a credit score, although credit is taken into consideration.<sup>176</sup> Denied federal PLUS loan applicants may demonstrate extenuating circumstances to bypass the adverse credit history prohibition to receive the loan.<sup>177</sup> Extenuating circumstances must be documented in detail, and PLUS loan applicants will only qualify for approval if they provide proof that they have repaired their credit or rehabilitated their financial situation.<sup>178</sup> The extenuating circumstances exception is not available to endorsers or co-signers of PLUS loans.<sup>179</sup> The loss of a job, or harsh economic situations, with the exception of major medical issues, will not qualify as extenuating circumstances for federal PLUS loan purposes.<sup>180</sup>

Furthermore, there are limits on who can serve as a cosigner for federal PLUS loans, and the loans are only available to graduate students pursuing select advanced degrees, or to the natural or adoptive parents of undergraduate students.<sup>181</sup> Stepparents may apply for a federal PLUS loan for their

---

they have unsatisfied debts that were referred to a collection agency or were charged off as bad debt over the previous five years possibly resulting in a sizeable increase of denials); U.S. Dept. of Ed., *Documenting Extenuating Circumstances*, <https://studentloans.gov/myDirectLoan/whatYouNeed.action?page=credit>

<sup>171</sup> See U.S. Dept. of Ed., *Federal Student Aid – Parents*, <http://www.direct.ed.gov/parent.html>; see generally Mark Kantrowitz, *Part 1: Answers to Your Questions on Scholarships and Student Loans*, N.Y. Times, Nov. 14, 2011; FinAid, Credit Scores, <http://www.finaid.org/loans/creditscores.phtml>.

<sup>172</sup> See Dianne Hayes, *Obama Administration Plans Changes to Parent PLUS Loans*, DIVERSE ISSUES IN EDUCATION (Aug. 15, 2013), <http://diverseeducation.com/article/55297/> (“In response to outcries from congressional leaders, organizations, parents and students, the U.S. Department of Education plans to make changes to the PLUS loan programs to address the growing crisis in higher education that has blocked as many as 400,000 students nationwide from enrolling in college . . . . Under pressure from groups such as the Congressional Black Caucus, NAFEO, UNCF, the Thurgood Marshall College Fund (TMCFF), and frustrated parents and students, the U.S. Department of Education now says families that have recent but small-scale debt may now become eligible for PLUS loans through appeals.”).

<sup>173</sup> *Id.* (“Under the newly announced change, parents whose loan applications are denied may ask for reconsideration under the new policy. The Education Department said students whose parents are denied PLUS loans automatically become eligible for an extra \$4,000 in loans that are more flexible and carry lower interest rates.”).

<sup>174</sup> *Id.* (“[Public interest organizations] have been working on a set of recommendations to send to Congress to improve financial aid, including the Parent PLUS loan and Pell Grants. The higher education organizations are also requesting a guidance document from U.S. Secretary of Education Arne Duncan.”); see Deanne Loonin, *The Problem with Parent PLUS Loans*, STUDENT LOAN BORROWER ASSISTANCE (Sept. 19, 2013), <http://www.studentloanborrowerassistance.org/problem-parent-plus-loans/>.

<sup>175</sup> See generally *Id.*

<sup>176</sup> See generally Wang, *supra* note 15.

<sup>177</sup> See U.S. Dept. of Educ., *Federal Student Aid – Parents*, FEDERAL STUDENT AID, <http://www.direct.ed.gov/parent.html>; U.S. Dept. of Ed., *Documenting Extenuating Circumstances*, FEDERAL STUDENT AID, <https://studentloans.gov/myDirectLoan/whatYouNeed.action?page=credit>.

<sup>178</sup> U.S. Dept. of Ed., *Documenting Extenuating Circumstances*, *supra* note 177.

<sup>179</sup> See *Id.*

<sup>180</sup> See *Id.*

<sup>181</sup> See U.S. Dept. of Educ., *Federal Student Aid – Parents*, FEDERAL STUDENT AID, <http://www.direct.ed.gov/parent.html>; see generally U.S. Dept. of Educ., *Federal Direct PLUS Loan Endorser Agreement*, FEDERAL STUDENT AID, <https://studentloans.gov/myDirectLoan/whatToExpect.action?page=endorser>; U.S. Dept. of Educ., *Parent Loans*, FEDERAL STUDENT AID, <http://www.finaid.org/loans/parentloan.phtml> (“If the student's parents are divorced, both

stepchildren under limited circumstances.<sup>182</sup> Legal guardians and relatives may not obtain a federal PLUS loan for the benefit of a student, even if the guardians or extended relatives care and provide for the student.<sup>183</sup> Accordingly, financial support in the form of a federal PLUS loan may only come from a student's nuclear family without regard to extended family or other creditworthy adults who may be a part of a student's support system.<sup>184</sup> Also, only natural parents who are United States citizens or certain classes of legal noncitizens are directly eligible for federal PLUS loans.<sup>185</sup> These restrictions generally do not take into account the values and traditions of the non-traditional family that may include extended family members and immigrants.<sup>186</sup>

Unlike the Perkins and subsidized Stafford loans, the PLUS loan does not require a showing of financial need.<sup>187</sup> Rather, all that is generally required to obtain a federal PLUS loan is an application for approval and the execution of a master promissory note.<sup>188</sup> As long as the funds will be used either directly or indirectly to cover the cost of college attendance, which may even include transportation and child care costs, the PLUS loan is available to college students and their families.<sup>189</sup>

the custodial parent and the noncustodial parent are eligible to borrow from the PLUS loan program, provided that the combined amounts borrowed do not exceed the cost-of-attendance minus aid received cap.”).

<sup>182</sup> See 34 C.F.R. § 682.201(c)(3) (2013); see also U.S. Dept. of Educ., *Federal Student Aid – Parents*, FEDERAL STUDENT AID, <http://www.direct.ed.gov/parent.html> (“You must be the student's biological or adoptive parent or the student's stepparent, if the biological or adoptive parent has remarried at the time of application.”); U.S. Dept. of Educ., *Parent Loans*, FEDERAL STUDENT AID, <http://www.finaid.org/loans/parentloan.phtml> (“A stepparent who has not adopted the student can only borrow from the PLUS loan program for as long as he or she is married to the custodial parent (i.e., the stepparent's income and assets would be considered when calculating the dependent student's expected family contribution). A stepparent who is married to the dependent student's non-custodial parent is not eligible to borrow from the PLUS loan program.”).

<sup>183</sup> See 34 C.F.R. § 682.201(c)(3); 34 C.F.R. § 668.2; U.S. Dept. of Educ., *Parent Loans*, FEDERAL STUDENT AID, <http://www.finaid.org/loans/parentloan.phtml> (“Legal guardians are not eligible to borrow from the PLUS loan program, nor are aunts, uncles and grandparents.”); College Loan Consultant, *Parent College Loans...Private School or Community College?*, <http://www.collegeloanconsultant.com/parent-college-loans.html>.

<sup>184</sup> See generally 34 C.F.R. § 668.2 (2013).

<sup>185</sup> See U.S. Dept. of Educ., *PLUS Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans/plus#am-i-eligible-for>; U.S. Dept. of Educ., *Who Gets Aid*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/eligibility> (“Generally, if you have a ‘green card’ (in other words, if you are a permanent resident alien), you will be considered an ‘eligible noncitizen’ and will be able to get federal student aid if you meet the other basic eligibility criteria.”); U.S. Dept. of Educ., *Non-U.S. Citizens*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/eligibility/non-us-citizens>.

<sup>186</sup> See generally U.S. Dept. of Educ., *Who Gets Aid*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/eligibility>; Mark Kantrowitz, *Part 2: Answers to Readers' Questions on Financial Aid*, N.Y. TIMES, Jan. 12, 2011, <http://thechoice.blogs.nytimes.com/2011/01/12/fafsaq-and-a-part-2/>; Mark Kantrowitz, *Part 5: Answers on the Fafsa, the Free Application for Federal Student Aid*, N.Y. TIMES, Jan. 13, 2012, <http://thechoice.blogs.nytimes.com/2012/01/13/kantrowitz-answers-part-5/>; Paul Taylor, *The Return of the Multi-Generational Family Household*, PEW RESEARCH CENTER, March 18, 2010.

<sup>187</sup> See U.S. Dept. of Educ., *Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans>; see generally U.S. Dept. of Educ., *Recent Changes to the Student Aid Programs*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/about/announcements/recent-changes> (“Note: If you receive a Direct Subsidized Loan that is first disbursed between July 1, 2012, and July 1, 2014, you will be responsible for paying any interest that accrues during your grace period. If you choose not to pay the interest that accrues during your grace period, the interest will be added to your *principal* balance”; also stating that subsidized Direct Loans are no longer eligible for a six-month grace period for interest after a student falls below at least half-time enrollment; graduate and professional students are no longer eligible for subsidized loans effective July 1, 2012).

<sup>188</sup> See generally U.S. Dept. of Educ., *PLUS Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans/plus#am-i-eligible-for>; U.S. Dept. of Educ., *Parents*, FEDERAL STUDENT AID, <http://www.direct.ed.gov/parent.html>.

<sup>189</sup> See generally U.S. Dept. of Educ., *Federal Student Aid Handbook 2013 - 2014*, vol. 1: Student Eligibility; Texas Guaranteed Student Loan Corporation, *Federal Direct Loan Program (FDLP) – PLUS Loans*, <http://www.tgscl.org/>

Critics of the PLUS loan program purport that parents may be misinformed about the terms of these loans.<sup>190</sup> For example, parent borrowers may be unable to handle the additional debt burden of these loans, which enter into repayment upon disbursement of the loan funds, even while their children are still enrolled in college.<sup>191</sup> While an in-school deferment for PLUS loans is available, interest still accrues and capitalizes on the loans if not incrementally paid.<sup>192</sup>

Student and parent advocates also argue that PLUS loans present a danger to financial stability.<sup>193</sup> Particularly, student loan borrowers may take out far more debt than they can afford or need with minimal asset, income, or employment verification.<sup>194</sup> The federal PLUS loan program is also subject to criticism in approving and possibly disbursing inflated loan amounts without regard to other outstanding financial debt such as mortgages and auto loans.<sup>195</sup> Such policy may result in a PLUS loan repayment schedule that exceeds the borrower's monthly discretionary income and expenses.<sup>196</sup>

An increasing number of families in the current economy are denied PLUS loans due to an emphasis on the adverse credit history underwriting factor.<sup>197</sup> Subsequent to the credit crunch and ensuing economic conditions, the federal government may be the lender of last resort for families stressed by financial hardship.<sup>198</sup> If applicants are denied federal PLUS loans, they may also fail to qualify for private student loans.<sup>199</sup> Further, PLUS loan denials may negatively impact college enrollment by leaving some families and students unable to pay for college.<sup>200</sup>

borrowers/loans/federal/fdhp/plus.cfm.

<sup>190</sup> See Marian Wang, et. al, *Parent Plus Loan: How the Government Is Saddling Parents with Loans They Can't Afford*, CHRONICLE OF HIGHER EDUCATION, 2012.

<sup>191</sup> See *Id.*; see generally David P. Smole, CONG. RESEARCH SERV., RL34452, PROPOSALS TO ENSURE THE AVAILABILITY OF FEDERAL STUDENT LOANS DURING AN ECONOMIC DOWNTURN: A BRIEF OVERVIEW OF H.R. 5715 AND S. 2815 (2008) ("Under current law [as of 2008], the repayment of PLUS Loans to parents, graduate students, and professional students commences not later 60 days after the last disbursement of the loan is made. This is in contrast to the repayment of Stafford Loans, for which repayment does not commence until the day after six months following the borrower ceasing to be enrolled in school on at least a half-time basis.").

<sup>192</sup> See U.S. Dept. of Educ., Deferment and Forbearance, FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans/deferment-forbearance> (noting that the federal government will not pay the interest on any unsubsidized loans, including PLUS loans).

<sup>193</sup> See Wang, *supra* note 190.

<sup>194</sup> See Tim Grant, *Parents Should Beware of Borrowing Too Much for Children's College Education*, PITTSBURG POST-GAZETTE, April 23, 2013, <http://www.post-gazette.com/stories/business/news/parents-should-beware-of-borrowing-too-much-to-pay-for-their-childrens-college-education-684630/>.

<sup>195</sup> See Lynn O'Shaughnessy, *Why Parent College Loans Can Be Hazardous*, CBS NEWS, Nov. 29, 2012, [http://www.cbsnews.com/8301-500395\\_162-57556031/why-parent-college-loans-can-be-hazardous/](http://www.cbsnews.com/8301-500395_162-57556031/why-parent-college-loans-can-be-hazardous/).

<sup>196</sup> See, e.g., Liz Weston, *Parent PLUS Loans Pose Hazard*, MSN MONEY, Nov. 15, 2012, <http://money.msn.com/baby-boomers/parent-plus-loans-pose-hazards>.

<sup>197</sup> See Wang, *supra* note 190; Libby A. Nelson, *Cracking Down on PLUS Loans*, INSIDE HIGHER EDUCATION, Oct. 12, 2012, <http://www.insidehighered.com/news/2012/10/12/standards-tightening-federal-plus-loans>.

<sup>198</sup> See Mark Kantrowitz, *Solving the Student Loan Credit Crunch* (2008), at 3, <http://www.finaid.org/educators/studentaidpolicy.phtml> (listing the lender-of-last resort program as a possible, but untested solution, to the loss of potential student loan lenders).

<sup>199</sup> See generally 34 C.F.R. § 682.204(d) (2013) ("A parent's refusal to borrow a PLUS loan does not constitute an exceptional circumstance.").

<sup>200</sup> See, e.g., Reginald Stuart, *HBCUs Trying to Undo Damage Resulting from Federal Parent Plus Loan Revisions*, DIVERSE ISSUES IN HIGHER EDUC., May 2, 2013, <http://diverseeducation.com/article/53056/>; Brock Vergakis, *PLUS Loans: New U.S. Department of Education Policies Hamper Black College Enrollment*, HUFFINGTON POST, Feb. 26, 2013, [http://www.huffingtonpost.com/2013/02/26/plus-loans-new-us-departm\\_n\\_2766191.html](http://www.huffingtonpost.com/2013/02/26/plus-loans-new-us-departm_n_2766191.html); Reginald Stuart, *Loan Change Sends Thousands of Students Home*, DIVERSE ISSUES IN HIGHER EDUCATION, Oct. 11, 2012; see generally Kenneth

The federal PLUS loan program was previously administered in part under the FFEL program where private lenders, including banks and other financial institutions, would fund federally insured student loans.<sup>201</sup> The FFEL PLUS loan program was discontinued for loans issued after June 30, 2010.<sup>202</sup> The U.S. Department of Education is now the PLUS loan originator under the Direct Loan program.<sup>203</sup> However, FFEL PLUS loans issued before the program was discontinued will remain under the administration of private lenders.<sup>204</sup> The FFEL PLUS loan interest rate is, at 8.5%, higher than the

---

Corbin, *Guide to Student Loans: 3 Must-Know Facts About Stafford, Parent PLUS and Private Loans*, USA TODAY, Sept. 2, 2011, <http://www.usatodayeducate.com/staging/index.php/toolbox/guide-to-student-loans-3-must-know-facts-about-stafford-parent-plus-and-private-loans>.

<sup>201</sup> See U.S. Dept. of Educ., Federal Family Education Loan (FFEL) Program, Purpose, FEDERAL STUDENT AID, <http://www2.ed.gov/programs/ffel/index.html>; U.S. Dept. of Educ., Student Loan Borrower Assistance, FEDERAL STUDENT AID, <http://www.studentloanborrowerassistance.org/understand-loans/federal-loans/>; U.S. Dept. of Educ., Subsidized and Unsubsidized Loans, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans/subsidized-unsubsidized>.

<sup>202</sup> See Health Care and Education Reconciliation Act of 2010, Pub. L. 111 – 152, 20 USCA § 1078-2, including the Student Aid and Fiscal Responsibility Act (SAFRA); see generally FinAid, Student Aid and Fiscal Responsibility Act of 2009, <http://www.finaid.org/educators/20090715hr3221.phtml> (“SAFRA switches to 100% Direct Lending starting July 1, 2010, ending the origination of new FFELP loans on that date. All new federal education loans would be made through the Direct Loan program.”); Angela Schmitz, *What Is a Federally Guaranteed Student Loan?*, NOLO, <http://www.nolo.com/legal-encyclopedia/what-is-federally-guaranteed-student-loan.html>.

<sup>203</sup> See U.S. Dept. of Ed., Federal Family Education Loan (FFEL) Program, Purpose, <http://www2.ed.gov/programs/ffel/index.html>; Student Loan Borrower Assistance, Federal Loans, <http://www.studentloanborrowerassistance.org/understand-loans/federal-loans/>. But see U.S. Dept. of Ed., *Ensuring Continued Access to Student Loans Act (ECASLA) Annual Report to Congress*, 2-3 (July 2011), <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/July2011ECASLAREport.pdf> (“Both [the FFEL and Direct Loan programs] are government programs with substantial private sector involvement . . . . Also, in both programs, origination, disbursement, and servicing are performed by private firms – either the lenders themselves or their contractors . . . . As a result of disruptions in the financial markets in early 2008, many FFEL lenders raised concerns . . . . Without proactive Federal intervention, there was serious concern large numbers of students would find their source of Federal student loans disrupted when schools had little time to shift to other lenders or to the Direct Loan program.”).

<sup>204</sup> See U.S. Dept. of Ed., *Ensuring Continued Access to Student Loans Act (ECASLA) Annual Report to Congress*, July 2011, <http://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/July2011ECASLAREport.pdf>; U.S. Dept. of Ed., Repayment Plans, <http://studentaid.ed.gov/repay-loans/understand/plans>; see, e.g., U.S. Dept. of Ed., Loan Consolidation, <http://studentaid.ed.gov/repay-loans/consolidation> (“Although loan forgiveness under this program is available only for loans made and repaid under the Direct Loan Program, loans made under other federal student loan programs may become eligible for forgiveness if they are consolidated into a Direct Consolidation Loan. However, only payments made on the Direct Consolidation Loan will count toward the required 120 monthly payments.”); see generally FinAid, Student Aid and Fiscal Responsibility Act of 2009, <http://www.finaid.org/educators/20090715hr3221.phtml>; Angela Schmitz, *What Is a Federally Guaranteed Student Loan?*, NOLO, <http://www.nolo.com/legal-encyclopedia/what-is-federally-guaranteed-student-loan.html> (“Although schools no longer offer guaranteed student loans, the guaranteed student loan system will be in place for many years to come. That is because millions of borrowers still owe money on FFEL guaranteed loans. The guarantee agencies will continue to pay banks for defaulted FFEL loans and pursue collection on those loans until the last FFEL loan is paid off.”); Answers.USA.gov, Federal Direct Loan Programs and Federal Family Education Loan (FFEL), [http://answers.usa.gov/system/selfservice.controller?CONFIGURATION=1000&PARTITION\\_ID=1&CMD=VIEW\\_ARTICLE&ARTICLE\\_ID=10894](http://answers.usa.gov/system/selfservice.controller?CONFIGURATION=1000&PARTITION_ID=1&CMD=VIEW_ARTICLE&ARTICLE_ID=10894) (“As of July 1, 2010, the Federal Family Education Loan Program (FFEL) no longer makes loans. Students who have previously received a federal student loan from a private lender under the FFEL Program will need to complete a new promissory note to receive loans under the Direct Loan Program.”).

current Direct PLUS Loan fixed interest rate of 6.41%.<sup>205</sup> Also, Public Service Loan Forgiveness is generally only available under the Direct Loan program.<sup>206</sup>

Private student loan lenders that serviced FFEL loans were previously subject to minimal state and federal regulation.<sup>207</sup> The Dodd-Frank Act established the CFPB, in part, to provide oversight to the private student loan industry.<sup>208</sup> Almost half of the complaints that the CFPB received during the initial commentary period regarding private student loans concerned private student loan lender Sallie Mae (also a servicer of federal student loans), thereby identifying the lender for supervision.<sup>209</sup> Uncapped and variable interest rates, unfavorable deferment and forbearance terms, and possible prepayment fees are

---

<sup>205</sup> See U.S. Dept. of Ed., Interest Rates and Fees, <http://studentaid.ed.gov/types/loans/interest-rates> (PLUS loan interest rate was formerly 7.9%); Bipartisan Student Loan Certainty Act; see also Christine Lindstrom, *The Good, the Bad, and the Ugly in the Student-Loan Deal*, CHRON. OF HIGHER EDUCATION, Aug. 8, 2013.

<sup>206</sup> See U.S. Dept. of Educ., Federal Student Aid – Loan Forgiveness for Public Service Employees, March 2012, [www.studentaid.ed.gov/publicservice](http://www.studentaid.ed.gov/publicservice); But see Heather Jarvis, *Parents Beware of PLUS Sized Student Loans*, June 20, 2011, <http://askheatherjarvis.com/blog/parents-beware-of-plus-sized-student-loans> (“Direct Parent PLUS loans are technically eligible for Public Service Loan Forgiveness, but not really. . . . you can’t actually make payments on a Parent PLUS loan that count towards Public Service Loan Forgiveness, unless you pay under the Standard 10-year Repayment plan, which won’t leave anything left to forgive.”).

<sup>207</sup> See Consumer Financial Protection Bureau, Education Loan Examination Procedures, [http://files.consumerfinance.gov/f/201212\\_cfpb\\_educationloanexamprocedures.pdf](http://files.consumerfinance.gov/f/201212_cfpb_educationloanexamprocedures.pdf); see generally Diana Jean Schemo, *Private Loans Deepen a Crisis in Student Debt*, N.Y. TIMES, June 10, 2007; Amet Sachdev, *Rules for Student Loans Get Tighter*, CHICAGO TRIBUNE, Jan. 23, 2008; but see National Consumer Law Center, *Piling It On: The Growth of Proprietary School Loans and the Consequences for Students*, 2011, 2 (noting that private institutional student loans may still evade scrutiny by regulators).

<sup>208</sup> See Dodd-Frank Act, § 1077; see generally Consumer Financial Protection Bureau and the U.S. Dept. of Educ., *Private Student Loans*, pg. 6, Aug. 2012, [http://files.consumerfinance.gov/f/201207\\_cfpb\\_Reports\\_Private-Student-Loans.pdf](http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf); U.S. Dept. of Educ., Consumer Financial Protection Bureau Now Taking Private Student Loan Complaints, March 5, 2012, <http://www.ed.gov/news/press-releases/consumer-financial-protection-bureau-now-taking-private-student-loan-complaints>; CONSUMER FINANCIAL PROTECTION BUREAU, *About Us*, <http://www.consumerfinance.gov/the-bureau/>.

<sup>209</sup> See Holly Petraeus, Statement by CFPB’s Holly Petraeus on DOJ, FDIC Enforcement Actions Against Sallie Mae, CFPB, May 13, 2014, <http://www.consumerfinance.gov/newsroom/statement-by-cfpbs-holly-petraeus-on-doj-fdic-enforcement-actions-against-sallie-mae/> (“[T]he U.S. Department of Justice announced an enforcement action against Sallie Mae (also known as Sallie Mae Bank and Navient Solutions), the largest servicer of federal and private student loans, which was found to be systematically violating the legal rights of U.S. servicemembers. The Federal Deposit Insurance Corporation (FDIC) also reached a settlement with the companies that addresses allegations of student loan servicing misconduct. Sallie Mae is ordered to pay \$96.6 million in restitution and penalties.”); Alan Zibel & Andrew Grossman, *Sallie Mae, Navient Reach Student-Loan Settlement with U.S. Government*, WALL ST. J., May 13, 2014, <http://online.wsj.com/news/articles/SB10001424052702303851804579560053304272542> (“Two of the biggest companies in the student-loan market agreed on Tuesday to pay a combined \$97 million to settle federal charges they overcharged military members and imposed excessive fees for student loans. . . . The Justice Department’s portion of the settlement requires the companies to pay \$60 million in refunds and a \$55,000 civil penalty. The FDIC required \$30 million in refunds and \$6.6 million in penalties.”); Association of Credit and Collection Professionals, CFPB Investigates Sallie Mae, <http://www.acainternational.org/cfpbarticle-cfpb-investigates-sallie-mae-29491.aspx>; Consumer Financial Protection Bureau, *Our Student Loan Complaint System Is Open for Business*, March 5, 2012, <http://www.consumerfinance.gov/blog/our-student-loan-complaint-system-is-open-for-business/>; Catherine New, *Consumer Financial Protection Bureau Finds Student, Mortgage Lenders Have ‘Uncanny Resemblance’*, HUFFINGTON POST, Oct. 16, 2012, [http://www.huffingtonpost.com/2012/10/16/consumer-financial-protection-bureau-private-student-loan\\_n\\_1968232.html](http://www.huffingtonpost.com/2012/10/16/consumer-financial-protection-bureau-private-student-loan_n_1968232.html). See generally Sallie Mae, *Primer on Private Education Loans*, [https://www.salliemae.com/about/news\\_info/primer/default.aspx](https://www.salliemae.com/about/news_info/primer/default.aspx); Libby A. Nelson, *Looking Over Servicers’ Shoulders*, INSIDE HIGHER EDUC., March 15, 2013, <http://www.insidehighered.com/news/2013/03/15/consumer-financial-protection-bureau-look-oversight-loan-servicers>; Danielle Douglas, *Sallie Mae to Split into Two Companies*, WASHINGTON POST, May 29, 2013; John Hechinger and Janet Lorin, *Sallie Mae Split Marks Bet on Much-Abused Private Student Loans*, BLOOMBERG, May 31, 2013.

the private student loan terms under scrutiny by the CFPB.<sup>210</sup> The HEOA also addressed conflicts of interest along with unfair and deceptive educational lending practices that plagued the private student loan industry prior to increased regulation.<sup>211</sup>

#### IV. FINANCIAL AID BEST PRACTICES

Financial aid reform efforts have set forth executive orders and legislation,<sup>212</sup> but these initiatives may not provide sufficient relief for student borrowers and their families.<sup>213</sup> Federal laws and regulations

---

<sup>210</sup> See Zibel & Grossman, *supra* note 209 (“Federal and state scrutiny of the nearly \$1.2 trillion student-loan industry has increased. . . . The Consumer Financial Protection Bureau . . . started overseeing the largest U.S. student-loan servicers in March. That agency has raised concerns about student-loan firms’ treatment of military members as well as servicers that may charge borrowers improper fees and fail to properly process payments.”); Rohit Chopra, *Thousands of Voices on Private Student Loans*, CFPB, June 13, 2012, <http://www.consumerfinance.gov/blog/thousands-of-voices-on-private-student-loans/>. See generally 15 U.S.C. § 1650; Federal Trade Commission, *Student Loans: Avoiding Deceptive Offers*, FTC FACTS FOR CONSUMERS, May 2012; Lynn O’Shaughnessy, *A Hidden Hazard of Private Student Loans*, March 11, 2013; CFPB, *Mid-Year Snapshot of Private Student Loan Complaints*, July 2013.

<sup>211</sup> See Higher Education Opportunity Act of 2008, Title X—Private Student Loan Improvement; Pub. L. No. 110-315, 122 Stat. 3078 (2008); see also Student Loan Sunshine Act, S. 486, 110th Cong. (2007); Editorial, *Needless Student Loan Subsidies*, N.Y. TIMES, April 18, 2007 “[L]awmakers are looking around for ways to root out the kinds of corruption uncovered in recent investigations by New York’s attorney general, Andrew Cuomo. A good start would be to pass the Student Loan Sunshine Act . . . . The Sunshine Act would make it a federal crime for lenders to offer college officials anything of value in exchange for the right to do business at a given school. The new law would require the colleges to explain publicly why they had placed a given lender on the school’s ‘preferred lender’ list and would force the institutions to disclose any special deals that had been made behind the scenes.”; see also COMM. ON EDUC. AND LABOR, THE STUDENT LOAN SUNSHINE ACT: CLEANING UP STUDENT AID (2007), <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/050807SunshineAct.pdf>; Editorial, *Needless Student Loan Subsidies*, N.Y. TIMES, Apr. 18, 2007, [http://www.nytimes.com/2007/04/18/opinion/18weds2.html?\\_r=0](http://www.nytimes.com/2007/04/18/opinion/18weds2.html?_r=0); see generally *Higher Education Opportunity Act – 2008*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/highered/leg/hea08/index.html> (last visited Mar. 7, 2014); see generally NAT’L ASS’N OF COLLEGE AND UNIVERSITY BUS. OFFICERS, *Loan Provisions Permeate Higher Education Opportunity Act*, Sept. 10, 2008, [http://www.nacubo.org/Initiatives/Initiatives\\_News/Loan\\_Provisions\\_Permeate\\_Higher\\_Education\\_Opportunity\\_Act.html](http://www.nacubo.org/Initiatives/Initiatives_News/Loan_Provisions_Permeate_Higher_Education_Opportunity_Act.html) (“The Higher Education Opportunity Act (HEOA) does not make major changes to the substance or operation of the federal loan programs, but does include numerous provisions addressing the controversies and perceived abuses that were the focus of so much attention last year. . . . Many of the provisions stem from the Student Loan Sunshine Act passed by the House last year and are similar to requirements in Department of Education regulations that took effect July 1. Notably, colleges and universities that participate in the federal student loan programs will be required to adopt a code of conduct that meets specific requirements spelled out in the law. And, for the first time, some of the new HEOA provisions address private or alternative education loans, not just federally guaranteed student loans.”).

<sup>212</sup> See *Obama to Issue Order Easing Student Loan Debt Pressures*, REUTERS (June 8, 2014, 2:13 PM) <http://www.reuters.com/article/2014/06/08/us-usa-obama-studentloans-idUSKBN0EJ0QW20140608> (“The president will sign an order directing the secretary of education to ensure that more students who borrowed federal direct loans be allowed to cap their loan payments at 10 percent of their monthly incomes, the official said. Federal law currently allows most students to do this already. The president’s order will extend this ability to students who borrowed before October 2007 or those who have not borrowed since October 2011, the official said. The administration says this action will help up to 5 million more borrowers, although it will not be available until December 2015. . . . Preventing student loan repayment problems fits with that goal because officials say it will help young workers avoid credit blemishes that will hurt them down the road . . . . Because credit ratings are increasingly scrutinized in making employment offers, financing a home, or even opening a bank account, a damaged credit rating has widespread negative consequences . . . .”).

<sup>213</sup> See David P. Smole, *Proposals to Ensure the Availability of Federal Student Loans During an Economic Downturn: A Brief Overview of H.R. 5715 and S. 2815*, CRS REPORT FOR CONGRESS, April 15, 2008 (“Issues concerning federal student loans have been active during the 110<sup>th</sup> Congress. On October 27, 2007, the College Cost Reduction and Access Act of 2007 (CCRAA; P.L. 110-84) was enacted, which made numerous changes to the federal student loan programs. Also in the 110th Congress, the House and the Senate have passed bills, H.R. 4137 and S. 1642, respectively, to amend and extend the HEA. On April 10, 2008, the House Committee on Education and Labor marked up H.R. 5715, the

pertaining to the financial aid industry do not adequately extend the promise of higher education to the masses.<sup>214</sup> The recent Occupy Student Loans movement highlights the need for more effective change in the student loan market.<sup>215</sup> The bureaucratic nature of the federal financial aid system perpetuates the need for reform as students and families struggle to pay for skyrocketing college costs.<sup>216</sup> Despite increased federal oversight of the student loan industry, proactive enforcement is necessary to achieve financial stability.<sup>217</sup> A balance between affordability and accessibility must be weighed in the public and private sectors to realize manageable student loan debt.<sup>218</sup>

Personal accountability certainly plays a role in containing and lowering student loan debt.<sup>219</sup> However, the federal financial aid system should be revised to reward those who take the initiative to improve their employment prospects by attaining an education.<sup>220</sup> The federal student aid program opens the door to higher education, but may shut the window to reasonable repayment.<sup>221</sup> Strategies to revise

---

Ensuring Continued Access to Student Loans Act of 2008. This closely followed the introduction of S. 2815, the Strengthening Student Aid for All Act, in the Senate on April 3, 2008. Both bills would amend the HEA to address the continued availability of federal student loans.”) (citation omitted). *See, e.g.*, Strengthening Student Aid for All Act, Senate Bill 2815, April 3, 2008 (previously proposed legislation would amend the HEA to include a mechanism to apply a negative “expected family contribution” in determining eligibility for need-based aid). *See also* Kevin Carey, *The Federal Parent Rip-Off Loan*, CHRON. OF HIGHER EDUC., June 3, 2013 (“We need basic structural changes in the way such colleges are financed, not a few more years of financial Band-Aids, paid for through the indebtedness of people who can least afford to borrow.”).

<sup>214</sup> *See generally* Kevin Carey, *Higher-Education Reform: A Legacy for Obama?*, CHRON. OF HIGHER EDUC., Jan. 21, 2013; The White House, Higher Education, <http://www.whitehouse.gov/issues/education/higher-education#college-affordability>.

<sup>215</sup> *See generally* Eric Hoover, *Protesters Plan a National ‘Student-Debt Refusal’ Campaign*, CHRON. OF HIGHER EDUC., Nov. 16, 2011; Geraldine Baum, *Student Loans Add to Angst at Occupy Wall Street*, L.A. TIMES, Oct. 25, 2011; Shannon Bond, *Student Debt Gains Occupy’s Attention*, FINANCIAL TIMES, April 25, 2012; Occupy Student Debt Campaign, A Statement from the Occupy Student Debt Campaign, <http://www.occupystudentdebtcampaign.org/click-to-read-our-statement-on-student-debt-reform-initiatives/>; Occupy Student Debt, <http://occupystudentdebt.com/>.

<sup>216</sup> *See generally* Occupy Student Debt Campaign, A Statement from the Occupy Student Debt Campaign, <http://www.occupystudentdebtcampaign.org/click-to-read-our-statement-on-student-debt-reform-initiatives/>.

<sup>217</sup> *See generally* Nick Hillman, Student Loans and Public Accountability, American Association of State Colleges and Universities, July 2007; Occupy Student Debt Campaign, A Statement from the Occupy Student Debt Campaign, <http://www.occupystudentdebtcampaign.org/click-to-read-our-statement-on-student-debt-reform-initiatives/>.

<sup>218</sup> *See* Reid Spagna, *Lenders Mobilize to Help College Kids Manage Student Loans*, CNBC, Aug. 15, 2012, <http://www.cnbc.com/id/48672721> (“Amid an explosion of student-loan debt, private lenders, credit-rating agencies, and nonprofits have begun offering consumer-friendly opportunities for students to take the financial anxiety out of borrowing for college.”); *see generally* White House, Fact Sheet: “Help Americans Manage Student Loan Debt”, Press Release, Oct. 25, 2011, <http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt>; U.S. House of Representatives, Government-Run Student Loans: Ensuring the Direct Loan Program Is Accountable to Students and Taxpayers, Oct. 25, 2011, <http://www.gpo.gov/fdsys/pkg/CHRG-112hhr70771/pdf/CHRG-112hhr70771.pdf>.

<sup>219</sup> *See generally* Loans, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans> (last visited Mar. 16, 2013) (“You should not be afraid to take out federal student loans, but you should be smart about it.”); *see, e.g.*, Honey Smith, *How I Got Deep In Student Loan Debt*, MSN MONEY, Aug. 20, 2012, <http://money.msn.com/saving-money-tips/post.aspx?post=fac31682-562d-4232-866b-ac2b4e6d3706>.

<sup>220</sup> *See* Barack Obama, Remarks by the President on Higher Education, White House, April 24, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-higher-education>; *see generally* Libby A. Nelson, *Occupy Student Loans*, INSIDE HIGHER EDUC., Nov. 15, 2011, <http://www.insidehighered.com/news/2011/11/15/occupy-protests-focusing-increasingly-student-debt>.

<sup>221</sup> *See generally* Libby A. Nelson, *No Way Out of Default*, INSIDE HIGHER EDUC., April 18, 2012, <http://www.insidehighered.com/news/2012/04/18/problems-plague-education-department-debt-management-process>; Saki Knafo, *Occupy Targets Student Debt As National Student Loan Debt Hits \$1 Trillion*, HUFFINGTON POST, April 25, 2012, [http://www.huffingtonpost.com/2012/04/25/occupy-student-debt-occupy-obama-\\_n\\_1453993.html](http://www.huffingtonpost.com/2012/04/25/occupy-student-debt-occupy-obama-_n_1453993.html); Allie Bidwell,

or reform student loan legislation to make education more accessible to a larger sector of the population may contribute to college degree attainment by the lower and middle classes.<sup>222</sup> The federal PLUS student loan program is in need of reform to benefit low and moderate-income borrowers.

### A. PLUS Loan Reform

The PLUS loan program requires a credit check that has increasingly led to more denials.<sup>223</sup> The credit check for the PLUS loan program was described as “moderate” prior to the recent credit crunch.<sup>224</sup> However, PLUS loan applicants now undergo a more stringent credit check.<sup>225</sup> The recent PLUS loan eligibility revisions, which were implemented without consideration of public commentary, had a negative impact on the higher education prospects of those who attend minority serving institutions such as Historically Black Colleges and Universities (HBCUs).<sup>226</sup> The unilateral change in PLUS Loan credit eligibility in 2011 adversely affected colleges that enroll a large demographic of low and moderate income students who disproportionately tend to be minorities, due in part to the racial wealth gap.<sup>227</sup> Both HBCUs and for-profit colleges, institutions with sizeable minority and low-income

*Consumer-Protection Agency Seeks Oversight of Nonbank Student-Loan Servicers*, CHRON. OF HIGHER EDUC., March 14, 2013; D. Bruce Johnstone, Higher Education Accessibility and Financial Viability: The Role of Student Loans, pgs. 1 – 2, 7 – 11; 14 – 17, [http://gse.buffalo.edu/org/inthigheredfinance/files/publications/student\\_loans/\(2005\)\\_higher\\_education\\_accessibility\\_and\\_financial\\_viability\\_the\\_role\\_of\\_student\\_loans.pdf](http://gse.buffalo.edu/org/inthigheredfinance/files/publications/student_loans/(2005)_higher_education_accessibility_and_financial_viability_the_role_of_student_loans.pdf).

<sup>222</sup> See generally Edward P. St. John and Eric H. Asker, REFINANCING THE COLLEGE DREAM: ACCESS, EQUAL OPPORTUNITY, AND JUSTICE FOR, JHU Press 2-4, 21-22 (describing financial aid policies from the Reagan, Bush, and Clinton presidential administrations as reducing grants, increasing loans, and later providing some tax relief, but with the effect of widening the opportunity act among low and middle class students); Joseph E. Stiglitz, *Student Debt and the Crushing of the American Dream*, N.Y. TIMES, May 12, 2013, <http://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream/>.

<sup>223</sup> See Libby A. Nelson, *Cracking Down on PLUS Loans*, INSIDE HIGHER EDUC., Oct. 12, 2012, <http://www.insidehighered.com/news/2012/10/12/standards-tightening-federal-plus-loans>; see generally U.S. Dept. of Ed., Parents, <http://www.direct.ed.gov/parent.html>.

<sup>224</sup> See, e.g., Associated Press, *Obama's Morehouse Visit Shines Spotlight on HBCUs*, May 18, 2013.

<sup>225</sup> See generally Jesse Jackson, *More Youth Priced Out of College*, CHICAGO SUN-TIMES, March 18, 2013; Michelle Hollinger, *More Black and White Students Denied College Loans; Now What?*, DC SPOTLIGHT, <http://www.dcspotlight.com/featured/op-ed-more-black-and-white-students-denied-college-loans-now-what/>.

<sup>226</sup> See Corinne Brown, Testimony on PLUS Loans at Department of Education Hearing, May 21, 2013, [http://corrinebrown.house.gov/index.php?option=com\\_content&view=article&id=741:testimony-on-plus-loans-at-department-of-education-hearing&catid=3:press-releases&Itemid=35](http://corrinebrown.house.gov/index.php?option=com_content&view=article&id=741:testimony-on-plus-loans-at-department-of-education-hearing&catid=3:press-releases&Itemid=35) (credit qualification changes to the PLUS loan program affected over 400,000 students overall, including 28,000 HBCU students resulting in a multi-million dollar loss to HBCUs); Reginald Stuart, *HBCUs Trying to Undo Damage Resulting from Federal Parent PLUS Loans Revisions*, DIVERSE ISSUES IN HIGHER EDUCATION, May 2, 2013; Cyril Josh Barker, *HBCUs Suffer After Changes to PLUS Loan Program*, AMSTERDAM NEWS, March 21, 2013; Lezli Baskerville, *Student Loan Changes Are Crippling HBCUs*, THE ATLANTA VOICE, June 7, 2013, <http://theatlantavoices.com/news/2013/jun/07/student-loan-changes-are-crippling-hbcus/> (“The new PLUS Loan eligibility criteria are applicable to all applicants, but disproportionate percentages of HBCUs and students attending HBCUs were adversely impacted by the regulatory shift because HBCUs and the majority of families they serve have fewer financial resources.”). See generally LaTanya Brown and Daren A. Conrad, *The Foreclosure Crisis, Parent PLUS Loan Approvals, and Minority College Enrollment: Is There A Link?*, 3(1) Am. Int'l J. of Contemp. Res., (2013); Federal Reserve, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit, Aug. 2007; see, e.g., Laura Diamond, *Morehouse College Cuts Spending After Enrollment Drops*, ATLANTA JOURNAL-CONSTITUTION, Oct. 18, 2012, <http://www.ajc.com/news/news/morehouse-college-cuts-spending-after-enrollment-d/nSgt8/>; Adam Rust, *Young Minds, Big Debts: Student Loans at North Carolina's HBCUs*, North Carolina Institute for Minority Economic Development, 2009; U.S. Dept. of Ed., List of Postsecondary Institutions Enrolling Populations with Significant Percentages of Minority Students, <http://www2.ed.gov/about/offices/list/ocr/edlite-minorityinst.html>.

<sup>227</sup> See John Michael Lee, Jr. and Samaad Wes Keys, *Impact of Parent PLUS Loan Changes on Historically Black Colleges and Universities*, Fact Sheet, Office for Access and Success, Association of Public and Land-Grant Universities, Aug. 2013, <http://www.aplu.org/document.doc?id=4746> (“HBCUs lost an estimated \$168 million as a



students, experienced a sharp decline in PLUS loan recipients subsequent to the credit changes in eligibility.<sup>228</sup> The more stringent PLUS Loan eligibility criteria now takes into account student loans and other debt in collections within the previous five years under a new standard.<sup>229</sup> Consequently, PLUS loan rejection rates rose from 28% to 38% in 2012,<sup>230</sup> and 19% fewer recipients were approved for

---

result of the large number of students who were not able to start or continue their college education.”); Jarrett L. Carter, *PLUS Loan Crisis a Blessing in Disguise for National HBCU Agenda*, HUFFINGTON POST (Aug. 21, 2013), [http://www.huffingtonpost.com/jarrett-l-carter/plus-loan-crisis-a-blessi\\_b\\_3782738.html](http://www.huffingtonpost.com/jarrett-l-carter/plus-loan-crisis-a-blessi_b_3782738.html) (“The PLUS Loan meltdown of 2012-14 will go down as one of the great targeted economic assaults on black Americans and black colleges in American history. In the last two years, HBCUs have lost well over \$300 million dollars in lost grants from federal agencies and lost tuition revenues due to eligibility changes in the federal lending program.”). See, e.g., Kevin Carey, *The Federal Parent Rip-Off Loan*, CHRON. OF HIGHER EDUC., June 3, 2013 (“Morehouse College was forced to furlough faculty and staff members. Clark Atlanta University saw its loan-denial rate increase from 25 percent to 65 percent . . . . HBCU leaders have responded with alarm. The president of Stillman College described the policy change as a ‘disaster for HBCUs.’ U.S. Rep. Corrine Brown, a Democrat from Florida and a member of the Congressional Black Caucus, called it ‘devastating.’ The Thurgood Marshall College Fund has threatened to sue the government.”); Thurgood Marshall College Fund, Parent PLUS Loans, <http://www.thurgoodmarshallfund.net/images/stories/site/PPL/PPL.pdf>; see generally Thomas M. Shapiro and Jessica L. Kenty-Drane, *The Racial Wealth Gap*, in AFRICAN AMERICANS IN THE U.S. ECONOMY, 175 – 181 (Cecilia Conrad, Rowman & Littlefield Publishers eds., 2005).

<sup>228</sup> See Rachel Fishman, *The Parent Trap: Parent PLUS Loans and Intergenerational Borrowing*, NEW AMERICA, Jan. 2014, at 5 (“From 2011 to 2013 after the changes to the credit check were put in place, HBCUs experienced a 45 percent drop in Parent PLUS loan recipients, and a 27 percent reduction in PLUS loan disbursements. At for-profits, both PLUS loan borrowers and disbursements declined 54 percent.”); Nick Anderson, Analyst: *More Reforms Needed on Federal Education Loans to Parents*, WASHINGTON POST, Jan. 8, 2014 (“For the past two years, many colleges have scrambled to help students find the money they need to stay in school because the federal government tightened standards for lending to parents. The flux was especially intense for historically black colleges and universities, including Howard and Morgan State universities, which serve a large share of students in financial need.”); John Silvanus Wilson Jr., *Making Plus Loans Add Up for All Americans*, HUFFINGTON POST (Dec. 19, 2013), [http://www.huffingtonpost.com/john-silvanus-wilson-jr/making-plus-loans-add-up-for-all-americans\\_b\\_4474155.html?ncid=edlinkusaolp00000003&ir=Black+Voices](http://www.huffingtonpost.com/john-silvanus-wilson-jr/making-plus-loans-add-up-for-all-americans_b_4474155.html?ncid=edlinkusaolp00000003&ir=Black+Voices) (“Especially during an economic downturn, the rules [pertaining to parent PLUS loan eligibility] should be relaxed in a “performance-sensitive” way so that parents do not have to forgo or postpone higher education for their capable children because of job loss or other negative financial conditions that are likely to be reversed when the economy recovers. With this approach, an individual’s academic performance and employment potential can trump a family’s adverse credit”). See also David J. Deming, et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?* (NBER Working Paper No. 17710, 2011); NPR, *For-Profit Colleges: Targeting People Who Can’t Pay*, May 12, 2011 at 10:23 AM, <http://www.npr.org/2011/05/12/136238528/for-profit-colleges-targeting-people-who-cant-pay>.

<sup>229</sup> See Kevin Carey, *The Federal Parent Rip-Off Loan*, Chronicle of Higher Education, June 3, 2013 (“The parents at the heart of the current controversy are, by definition, people who don’t have enough money to pay for their children’s education out of pocket, can’t get credit in the private market, and have had trouble paying off debts in the past.”); Justin Doubleday, *With Parents Denied Loans, Students Scramble at HBCUs*, CHRON. OF HIGHER EDUC., Oct. 7, 2013 (“Until 2011, applicants were approved for a PLUS loan as long as they were not more than 90 days delinquent on any debt, and did not have any foreclosures, bankruptcies, tax liens, wage garnishments, or student-loan defaults in the past five years. Under the new standards, unpaid debts in collection and student loans written off as unpayable in the previous five years also count against applicants.”).

<sup>230</sup> See Rachel Fishman, *Voices from the Front Lines of the HBCU PLUS Loan Crisis*, Higher Ed Watch, New America Foundation, June 19, 2013, [http://higheredwatch.newamerica.net/blogposts/2013/voices\\_from\\_the\\_front\\_lines\\_of\\_the\\_hbcu\\_plus\\_loan\\_crisis-86339](http://higheredwatch.newamerica.net/blogposts/2013/voices_from_the_front_lines_of_the_hbcu_plus_loan_crisis-86339) (“Many families and higher-education institutions were shocked to find that parents approved for Parent PLUS loans one year were suddenly denied the next. Some sectors, like historically black colleges and universities (HBCUs), were hit harder than others. In response to concerns over the changes, the Education Department added PLUS loan eligibility criteria to a list of potential topics to be considered for regulatory action. As part of this process, the Education Department asked for written comments and held four public hearings to allow individuals to provide testimony.”).

PLUS loans during the 2012–2013 academic year.<sup>231</sup> The decline in PLUS loan approvals for a significant proportion of HBCU enrollees may be attributed to losses in the employment and housing sectors.<sup>232</sup>

“The shift to a more rigid interpretation of creditworthiness occurred as many HBCU student families are finding the post-Great Recession economic recovery elusive. Official African American unemployment hovers near 14%. Many HBCU parents witnessed their wealth decline by 53% (compared with 13% for whites). This coupled with the bursting of the housing bubble, subprime mortgage lending, and the disproportionate numbers of African Americans who lost their homes also wreaked havoc on HBCU/PBI [Predominately Black Institution] parents.”<sup>233</sup>

Accordingly, parents of students attending HBCUs may be more likely to have financial records that fall within the “adverse credit history” category of the PLUS loan eligibility review.<sup>234</sup> Despite the need for

---

<sup>231</sup> See Michael Lucius Lomax, *Revise Student Loan Programs Now to Empower HBCUs*, The Grio, July 12, 2013, (“In our [United Negro College Fund (UNCF)] network of 37 historically black colleges and universities, Parent PLUS Loan approval rates for families with students attending our HBCUs dropped dramatically after ED [United States Department of Education] changed its criteria, from an average approval rate of 45 percent to only 24 percent. Almost 6,000 fewer students at UNCF institutions were approved for PLUS loans in the 2012-2013 school year compared to the previous year – a number equivalent to approximately 10 percent of total enrollment at these institutions.”).

<sup>232</sup> See John Michael Lee, Jr. and Samaad Wes Keys, *Impact of Parent PLUS Loan Changes on Historically Black Colleges and Universities*, Fact Sheet, Office for Access and Success, Association of Public and Land-Grant Universities, Aug. 2013, <http://www.aplu.org/document.doc?id=4746>; see generally Michael Lucius Lomax, *Revise Student Loan Programs Now to Empower HBCUs*, The Grio, July 12, 2013 at 5:07 PM (“The Secretary [of Education, Arne Duncan] points out that children of parents who are refused Parent PLUS loans become eligible for other kinds of loans – but these loans do not fully fund their unmet financial need. But he is holding fast to the policy decision that triggered the debate: to determine Parent PLUS eligibility not based on criteria designed to send the most kids to and through college, but based on the tougher criteria that commercial lenders charge non-education customers. These criteria exclude too many of our parents and students.”); Lezli Baskerville, *Student Loan Changes Are Crippling HBCUs*, Atlanta Voice, June 7, 2013 at 10:22 AM, <http://theatlantavoice.com/news/2013/jun/07/student-loan-changes-are-crippling-hbcus/>.

<sup>233</sup> Lezli Baskerville, *Student Loan Changes Are Crippling HBCUs*, ATLANTA VOICE (June 7, 2013 at 10:22 AM), <http://theatlantavoice.com/news/2013/jun/07/student-loan-changes-are-crippling-hbcus/>; see also Wilford Shamlin III, *Philadelphia Tribune Acknowledges LDF’s Support of HBCU Students*, Oct. 25, 2013, <http://www.naacpldf.org/news/philadelphia-tribune-acknowledges-ldfs-support-hbcu-students> (“The financial impact of revised credit standards could have wider ramifications that reach far beyond Black families. HBCU’s are harvesting grounds for half of the country’s black public school teachers, 80 percent of Black judges and 40 percent of baccalaureate degrees conferred to students in science, technology, engineering, and mathematics (STEM) fields.”).

Under a new policy adopted two years ago, the U.S. Department of Education began denying loan requests for Parent PLUS loans to any applicant who had a negative report on their credit history for the last five years. Parents who have credit lines reported as delinquent or settled for less than the amount owed — charge-off — are automatically denied. The U.S. DOE was criticized for taking that action without regard to its financial impact and then giving affected families little time to make contingency plans.”) (documenting a partnership between the NAACP Legal Defense Fund and the UNCF).

<sup>234</sup> See Nick Anderson, *Tighter Federal Lending Standards Yield Turmoil for Historically Black Colleges*, WASHINGTON POST, June 22, 2013 (“An Education Department action in October 2011 touched off the turmoil over parent loans. At the time, federal officials considered the matter routine. They tightened the screening process for loan applications to ensure that certain kinds of unpaid debts were considered in a review of a parent’s credit record. That made it more likely that some applicants would be deemed to have an ‘adverse credit history’ and therefore ineligible. Acting Deputy Education Secretary Jim Shelton said the action was taken by ‘middle management’ officials in an effort to fix what they saw as ‘a glitch in the system.’ He said that top officials did not review the decision before it was implemented, but that the department stood by it as consistent with laws and regulations.”).

enhanced underwriting standards cited by the Department of Education for the awarding of federal financial aid,<sup>235</sup> the revised credit eligibility criteria may do little to curb PLUS Loan defaults, and may place small colleges and universities in danger of closing in underserved communities.<sup>236</sup> The PLUS Loan debacle may also contribute to problems concerning low student retention and graduation rates that negatively impact institutions with high minority enrollment.<sup>237</sup>

---

The full force of the underwriting shift began to be felt in the summer of 2012, when parents applied for loans for their children in advance of the fall term.”); Derek T. Dingle, *A New Curriculum for HBCUs*, *Black Enterprise*, Sept. 2013 (“The concerns [regarding credit eligibility changes to the PLUS Loan program] were around two basic points: charge-offs and collections. We didn’t change the rules. We brought two programs that were operating differently [and] brought them together to consistently operate the same way.”) (citing Jim Shelton); White House Initiative on Historically Black Colleges and Universities, *Remarks of U.S. Secretary of Education to the National HBCU Week Conference: The Enduring and Evolving Role of HBCUs* (Sept. 26, 2013), <http://www.ed.gov/edblogs/whhbcu/2013/09/30/remarks-of-u-s-secretary-of-education-to-the-national-hbcu-week-conference-the-enduring-and-evolving-role-of-hbcu/> (“[S]ome have said we are choosing not to reverse the policy because we don’t care, and nothing—nothing—could be further from the truth. Our department is required to carry out the law as it was designed to protect parents and taxpayers against unaffordable loans.”).

<sup>235</sup> See *id.*

<sup>236</sup> See Kevin Carey, *The Federal Parent Rip-Off Loan*, *CHRON. OF HIGHER EDUC.*, June 3, 2013 (“In the long run, state and federal governments should together develop a comprehensive rescue-and-investment plan for the nation’s struggling colleges, particularly those with a mission to serve first-generation and minority students. Those institutions have missions and traditions woven deep into the fabric of American learning. They have been left to struggle in the financial wilderness, with some of the most vulnerable being snapped up by for-profit colleges and used for their accreditation status like so many tear-down houses. The government should provide more financial aid, both to students and directly to institutions, for colleges that serve a high percentage of low-income students, in exchange for a commitment to meeting high standards of academic excellence.”); Rachel Fishman, *Voices from the Front Lines of the HBCU PLUS Loan Crisis*, *Higher Ed Watch*, NEW AMERICA FOUNDATION, June 19, 2013, [http://highereducationwatch.newamerica.net/blogposts/2013/voices\\_from\\_the\\_front\\_lines\\_of\\_the\\_hbcu\\_plus\\_loan\\_crisis-86339](http://highereducationwatch.newamerica.net/blogposts/2013/voices_from_the_front_lines_of_the_hbcu_plus_loan_crisis-86339) (“[N]ot only did the PLUS loan change inhibit access to college for low-income students, but it also caused institutions to lose millions of dollars in revenue.”).

<sup>237</sup> See Derek T. Dingle, *A New Curriculum for HBCUs*, *BLACK ENTERPRISE*, Sept. 2013; see generally White House Initiative on Historically Black Colleges and Universities, *Remarks of U.S. Secretary of Education to the National HBCU Week Conference: The Enduring and Evolving Role of HBCUs* (Sept. 26, 2013), <http://www.ed.gov/edblogs/whhbcu/2013/09/30/remarks-of-u-s-secretary-of-education-to-the-national-hbcu-week-conference-the-enduring-and-evolving-role-of-hbcu/> (“I [Arne Duncan] am not satisfied with the way we [U.S. Department of Education] handled the updating and changes to the PLUS loans program. . . . we could have and should have handled the process better. Communications internally and externally was poor, and I apologize for that, and for the real impact it has had. That’s why we’ve announced that we will initiate a new rule-making process on this issue early next year.”); Kevin Carey, *The Federal Parent Rip-Off Loan*, *CHRON. OF HIGHER EDUC.*, June 3, 2013 (“The government saved the housing market, saved the automotive and banking industries, and now has a chance to save the future of the American workforce. A sizable percentage of that workforce will be living and working in black communities, and addressing problems of accessibility for HBCU education directly benefits those communities which need it most.”); John Michael Lee, Jr. and Samaad Wes Keys, *Impact of Parent PLUS Loan Changes on Historically Black Colleges and Universities*, Fact Sheet, ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES (Aug. 2013), <http://www.aplu.org/document.doc?id=4746>. See generally U.S. House of Representatives, Committee on Education and the Workforce, *Keeping College Within Reach: The Role of Federal Student Aid Programs*, HEARING at 2 – 3, April 16, 2013, <http://www.gpo.gov/fdsys/pkg/CHRG-113hhr80339/pdf/CHRG-113hhr80339.pdf>, (“[W]e must also be mindful of the consequences that could come with expanding the federal government’s role in the allocation of financial aid. Federal financial aid programs intended to help low-income Americans pay for college should never be used as bargaining chips to impose federal price controls, nor should we take any action that could limit students’ ability to choose the institution that best suits their needs.”).

Parent PLUS loans immediately enter repayment status upon disbursement.<sup>238</sup> While in-school deferments are permitted for PLUS loans, interest continues to accrue during any deferment of grace period.<sup>239</sup> Families in need could benefit from an interest-free deferment and grace period while enrolled in school, and for a limited time after graduation to provide an opportunity for economic stability before payment is due.<sup>240</sup> Further, the interest rate on PLUS loans is variable, as it is annually adjusted on July 1st.<sup>241</sup> While the PLUS loan rate was set at 6.14% as a result of the Bipartisan Student Loan Certainty Act signed into law August of 2013, it may increase.<sup>242</sup> Perhaps the interest on federal PLUS loans administered under the enhanced Direct Loan program should be fixed to provide a degree of relief for student loan borrowers.<sup>243</sup> A permanent extension of the lower interest rate in effect on PLUS loans disbursed from July 1, 2013 through June 30, 2014 could permit further stabilization for borrowers who are still in financial distress from the prolonged and severe economic downturn.<sup>244</sup>

Parent PLUS loan borrowers are currently ineligible for IBR and ICR alternative repayment plans, although the Student Loan Borrower Bill of Rights proposes their inclusion.<sup>245</sup> Further, any

---

<sup>238</sup> See U.S. Dept. of Educ., PLUS Loans, <http://studentaid.ed.gov/types/loans/plus>; U.S. Dept. of Educ., Parents, <http://www.direct.ed.gov/parentrepay.html>.

<sup>239</sup> See U.S. Dept. of Educ., PLUS Loans, <http://studentaid.ed.gov/types/loans/plus>; U.S. Dept. of Educ., Parents, <http://www.direct.ed.gov/parentrepay.html>; U.S. Dept. of Educ., Deferment and Forbearance, <http://studentaid.ed.gov/repay-loans/deferment-forbearance>.

<sup>240</sup> See generally Student Loan Borrower Assistance, Grace Periods, <http://www.studentloanborrowerassistance.org/repayment/postponing-repayment/grace-periods/>; FinAid, Benefits of Paying the Interest on Student Loans During the In-School and Grace Periods, <http://www.finaid.org/loans/negativeamortization.phtml>.

<sup>241</sup> See U.S. Dept. of Educ., Understand How Interest is Calculated and the Fees Associated with Your Federal Student Loan, Federal Student Aid, <http://studentaid.ed.gov/types/loans/interest-rates>; Mark Kantrowitz, *Interest Rates on the Federal PLUS Loan*, ParentPLUSLoan.com, <http://www.parentplusloan.com/plus-loans/plus-loan-interest-rate.php> (“The new rates for 2013-2014 were retroactive, effective for all loans disbursed on or after July 1, 2013. The interest rates on new loans are still fixed for the life of the loan; however, the each year's new loans will have different fixed rates, based on current market rates. The interest rates on new Federal PLUS loans in subsequent years will change each July 1 based on the yield of the last 10-year Treasury auction in May.”) (referencing the Bipartisan Student Loan Certainty Act of 2013); see also Kevin Carey, *The Federal Parent Rip-Off Loan*, CHRON. OF HIGHER EDUC., June 3, 2013 (“Parent PLUS loans are the worst federal loans out there. They come at a high interest rate, 7.9 percent, which is closer to 9.0 percent after accounting for origination fees. Unlike student loans, they can't be deferred after graduation. Nor can parents use the federal income-based repayment program, which limits loan payments to 10 percent of income and forgives remaining debt after 20 years.”).

<sup>242</sup> See U.S. Dept. of Educ., *supra* note 241; Bipartisan Student Loan Certainty Act, 20 U.S.C. §1087 (2013); U.S. Dept. of Educ., Interest Rate for New Direct Loan, <https://studentaid.ed.gov/About/announcements/interest-rate> (“Congress has passed and the President has signed the Bipartisan Student Loan Certainty Act of 2013, which ties *federal student loan interest* rates to financial markets. Under this Act, interest rates will be determined each June for new loans being made for the upcoming *award year*, which runs from July 1 to the following June 30. Each loan will have a fixed *interest rate* for the life of the loan.”); see generally *Interest Rates for Federal Student Loans*, EDFINANCIAL SERVICES, (“In accordance with Bipartisan Student Loan Certainty Act of 2013, for new loans disbursed on/after July 1, 2013, the method for annually determining the fixed interest rate will be the lesser of a rate based on the high yield of the 10-year Treasury note (“T-Bill”) auctioned at the final auction held prior to the June 1 preceding the July 1 of the year for which the rate will be effective, plus a statutory add-on, or the interest rate cap as listed below, to be adjusted annually each July 1st.”) (the interest rate listed for PLUS loans is “a rate equal to the T-Bill plus 4.60%; or 10.5%”).

<sup>243</sup> See generally U.S. Dept. of Educ., *supra* note 241.

<sup>244</sup> See generally U.S. Dept. of Educ., *supra* note 241 (“The interest rates for federal student loans are determined by federal law. If there are future changes to federal law that affect federal student loan interest rates, we will update this page to reflect those changes. . . . Interest rates on federal student loans are set by Congress.”).

<sup>245</sup> See Student Loan Borrowers’ Bill of Rights Act of 2013, H.R. 3892, 113th Cong. (2014) (bill also proposes student loan bankruptcy, statute of limitation, collections, repayment, default, and cancellation reform); Student Loan Borrower Bill of Rights, S.1803, 113th Cong. (2013–2014) (amends the Truth in Lending Act (TILA) and the HEA); Karen Weise, *Unpacking the Proposed Student Loan Borrower Bill of Rights*, BLOOMBERGBUSINESSWEEK, Dec. 13, 2013 (“[I]t

default on Parent PLUS loans is of consequence to the parent, not the dependent student.<sup>246</sup> Limited discharge is available for Parent PLUS loans, and there are currently no means for loan forgiveness.<sup>247</sup> Further, Parent PLUS loans may be subject to unfavorable treatment in the event of a loan consolidation.<sup>248</sup> Participation in a loan repayment program may ultimately result in cancellation of any remaining debt after an extended period of payments, but such action may result in negative tax implications.<sup>249</sup> The educational debt will still appear on the borrower's credit report while in repayment status, possibly resulting in the denial of additional credit, despite low or no payments due under the plan.<sup>250</sup>

## B. Financial Aid Eligibility

Areas for potential PLUS loan reform include a cap on interest rates and the reduction of fees, especially when considering the profitability of the federal student loan program.<sup>251</sup> Refinance options,

---

directs the CFPB to draft new rules on the topic [of federal student loan servicing] with the goal of minimizing the cost to borrowers. It also says the Department of Education must require servicers to send letters to borrowers about their repayment options, which echoes what the department is already doing.”); *see also* U.S. Dept. of Educ., Income-Based Plan, <http://studentaid.ed.gov/repay-loans/understand/plans/income-based> (IBR eligible loans include Direct PLUS loans made to graduate and professional students, and IBR also applies to Direct Consolidation Loans that do not involve an underlying Parent PLUS loan); Mark Kantrowitz, Can Parent PLUS Loans Get Income-Based Repayment and Loan Forgiveness?, Apr. 8, 2013, <http://www.fastweb.com/financial-aid/articles/3920-can-parent-plus-loans-get-income-based-repayment-and-loan-forgiveness> (“Federal Parent PLUS loans are not eligible for income-based repayment. They are, however, eligible for income-contingent repayment if they are included in a Federal Direct Consolidation Loan and the borrower entered repayment on or after July 1, 2006. This consolidation loan may then qualify for public service loan forgiveness (PSLF).”); Ann Carrns, *A Student Debt Repayment Option for Some Parents*, N.Y. TIMES (April 9, 2013), [http://bucks.blogs.nytimes.com/2013/04/09/a-student-debt-repayment-option-for-some-parents/?\\_php=true&\\_type=blogs&r=0](http://bucks.blogs.nytimes.com/2013/04/09/a-student-debt-repayment-option-for-some-parents/?_php=true&_type=blogs&r=0) (“But, Parent Plus loans can become eligible for the second version — income-contingent repayment — if they are refinanced into a Federal Direct Consolidation Loan. The consolidation loan helps the borrower manage debt by refinancing one or more loans into a new loan, resulting in just one, usually lower, monthly payment and extending payment over a longer period of time. (The interest rate on the new loan is based on an average of the rates on the loans that are consolidated, rounded up to the nearest one eighth of a percent.)”).

<sup>246</sup> *See* Jensen & Marrs, *supra* note 10, at 60; Dana Wilkinson, *Stuck with Parent Plus Loans: The Same Discharge Problems, Only More So*, BANKRUPTCY LAW NETWORK, <http://www.bankruptcylawnetwork.com/stuck-with-parent-plus-loans-the-same-discharge-problems-only-more-so/>.

<sup>247</sup> Jensen and Marrs, *supra* note 10, at 60-61 (“Certain discharge options exist for Parent PLUS loans, but there is no provision for loan forgiveness. Discharge will be granted in the case of the death, but not the disability, of the student for whom the parent borrowed the loan, or for cases when a school closes before the student could complete their program of study. Loans certified fraudulently or through the crime of identity theft, the school's failure to make a required return of loan funds to the lender, or, in rare cases, bankruptcy may also be discharged.”); *see also* Kevin Carey, *The Federal Parent Rip-Off Loan*, CHRON. OF HIGHER EDUC., June 3, 2013 (“Like all college loans, Parent PLUS debt is all but undischageable in bankruptcy, putting parents' retirement savings and Social Security benefits at risk of seizure in cases of default.”).

<sup>248</sup> *See* Heather Jarvis, *How the College Cost Reduction and Access Act of 2007 Can Benefit You: Public Service Loan Forgiveness and Income-Based Repayment*, 42 CLEARINGHOUSE REV. 454 (2009).

<sup>249</sup> *See* Internal Revenue Service, Publication 970: Tax Benefits for Education (2012); Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later*, N.Y. TIMES, Dec. 15, 2012 at B1; Martha Neil, *'Tax Time Bomb' Awaits Student Loan Debtors in Forgiveness Programs*, ABA JOURNAL (Dec. 17, 2012, 1:57 PM), [www.abajournal.com/news/article/tax\\_time\\_bomb\\_awaits\\_student\\_loan\\_debtors\\_in\\_forgiveness\\_programs/](http://www.abajournal.com/news/article/tax_time_bomb_awaits_student_loan_debtors_in_forgiveness_programs/); Kelly Phillips Erb, *Americans Replace Student Loan Bills with Tax Bills*, FORBES (Dec. 22, 2012).

<sup>250</sup> *See generally In re Robinson*, 416 B.R. 275, 282 (Bankr. E.D. Va. 2009).

<sup>251</sup> *See* Allie Bidwell, *Proposed Student-Loan Reforms Set Activists and Lawmakers at Odds*, CHRON. OF HIGHER EDUC., April 12, 2013; *see generally* Zach Carter and Joy Resmovits, *Student Loan Reform Fight Broader for Obama than Interest Rate Debate*, HUFFINGTON POST, April 25, 2012; *see also* Congressional Budget Office, CBO MAY 2013 BASELINE PROJECTIONS FOR THE STUDENT LOAN PROGRAM, <http://www.cbo.gov/sites/default/files/cbofiles/attachments/>

such as those described in the Federal Student Loan Refinancing Act<sup>252</sup> and the Bank on Students Loan Fairness Act,<sup>253</sup> may serve to ease the financial burden on borrowers experiencing economic hardship.<sup>254</sup> The loan origination fees that are part of every federal student loan could be eliminated or greatly reduced to enhance college affordability.<sup>255</sup> A 1% fee may have been built in as a federal default fee without regard to the repayment history of individual borrowers.<sup>256</sup> For parent PLUS loans, there is a fee that is deducted from each loan disbursement.<sup>257</sup> A fee reduction, or perhaps even a reinstatement of the interest rebate that was eliminated for PLUS loans disbursed as of July 1, 2014, should be considered.<sup>258</sup> Federal funds could potentially be reallocated to support such initiatives.<sup>259</sup>

Education lending is an income-producing endeavor for the federal government. Profit is made on the spread between the government's borrowing rate, presently around 1%, and the subsidized lending rate, currently at 3.4% for the lowest rate Subsidized Stafford loan and increasing with other types of loans. This is in addition to the origination fee of 1%. The Department of Education anticipates that federal subsidized student loan

---

44198\_StudentLoanPrograms.pdf; Ruth Tam, *Warren: Profits from Student Loans Are 'Obscene'*, WASHINGTON POST, July 17, 2013; Josh Mitchell, *Does the Government Profit from Student Loans?*, WALL STREET JOURNAL (Feb. 15, 2013), <http://blogs.wsj.com/economics/2013/02/15/does-the-government-profit-from-student-loans/>.

<sup>252</sup> Federal Student Loan Refinancing Act, S. 1066, 113th Cong. (2013) (this proposed legislation would automatically change higher interest rate FFELP and Direct Loans to a fixed 4% rate).

<sup>253</sup> Bank on Students Loan Fairness Act, S. 897, 113th Cong. (2013) (a bill to stabilize the interest rate on federally subsidized student loans to offer the same rate of interest as the loans provided to banks through the Federal Reserve discount window).

<sup>254</sup> See Anne Johnson & Tobin Van Ostern, *It's Our Interest: The Need to Reduce Student Loan Interest Rates*, CENTER FOR AMERICAN PROGRESS, Feb. 13, 2013 ("A federally backed refinancing and loan-modification program would reduce the interest rates paid by borrowers, provide new options and protections to borrowers in the private-lending sector, and stimulate the economy. It would also provide direct relief to the tens of millions of current borrowers, engaging them in the effort to improve our higher-education system . . . . Many types of loans should be refinanced, including FFEL loans, Direct loans, private student loans, and loans such as Stafford or PLUS loans.").

<sup>255</sup> See Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171(2003); William Leith, *Origination Fee and Up-Front Interest Rebate Reductions for Direct Subsidized Loans and Direct Unsubsidized Loans*, Feb. 4, 2010, <http://www.ifap.ed.gov/eannouncements/020410OrgFeeUpFrontIRRDL.html> ("The Direct PLUS Loan origination fee is not changing and will remain at 4.0 percent for Direct PLUS Loans made to both parent borrowers and graduate/professional student borrowers. In addition, the up-front interest rebate amount is not changing and will remain at 1.5 percent for all Direct PLUS Loans.").

<sup>256</sup> See Jensen & Marrs, *supra* note 10, at 52 (finding that FFEL PLUS loans had an origination fee of 3.0% with a required 1% default fee, while Direct PLUS loan origination fees amount to 4.0% with no default fee) ("Unlike the Stafford loan origination fee, the PLUS loan origination fee is not scheduled to be phased out or reduced in the coming years.") (citing to the U.S. Dep't of Educ.); see generally Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 339 (2013).

<sup>257</sup> See JAN MARIE COMBS, FINANCIAL AID SENSE: MAKING SENSE OUT OF FINANCIAL AID AND THE COLLEGE FINANCING PROCESS, 31 (2012); U.S. Dep't of Educ., *Student Loans Overview: Fiscal Year 2014 Budget Proposal*, <http://www2.ed.gov/about/overview/budget/budget14/justifications/s-loansoverview.pdf>, at S-3 ("Direct Loan borrowers are charged an origination fee. Stafford and Unsubsidized Stafford Loan borrowers are charged an origination fee equal to 1 percent of principal. PLUS borrowers are charged a 4 percent origination fee. Under the special rules of the sequestration, origination fees for Stafford and Unsubsidized Stafford Loans are 1.051 percent, and PLUS Loan origination fees are 4.204 percent.").

<sup>258</sup> See generally Budget Control Act of 2011, 112 Pub. L. No. 25, 125 STAT. 240 (previously borrowers could obtain an up-front interest rebate under the Direct Loan program).

<sup>259</sup> See generally Barack Obama, *Remarks by the President on Higher Education*, April 24, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-higher-education>; WHITE HOUSE, HELP AMERICANS MANAGE STUDENT LOAN DEBT, Oct. 25, 2011, <http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt>.

activity (including new loans and consolidation of existing loans) will generate \$38.9 billion in revenue for the government in 2012, and approximately \$36.8 billion in 2013. The federal government expects to earn 20.08% on each dollar of loans originated in 2013.<sup>260</sup>

### C. Bankruptcy Protection

Student loans, including PLUS Loans, are practically non-dischargeable in bankruptcy proceedings.<sup>261</sup> The Bankruptcy Reform Act of 1994 amended the Bankruptcy Code to protect bankruptcy petitioners from being denied federal student aid solely on the declaration of bankruptcy or the filing of bankruptcy.<sup>262</sup> However, this prohibition does not prevent the government from denying an application for a federal PLUS loan due to an adverse credit history that results from bankruptcy.<sup>263</sup> Such denial does not violate the United States Bankruptcy Code, but perhaps it should.<sup>264</sup>

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made it more difficult to discharge both public and private student loans.<sup>265</sup> Absent a showing of undue hardship as articulated

---

<sup>260</sup> Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, WORKS.BEPRESS.COM, 2012 (citations omitted).

<sup>261</sup> See *id.*; Marian Wang et al., *The Parent Loan Trap*, CHRON. OF HIGHER EDUC., Oct. 4, 2012; see generally Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501 (1999–2000); Eric Pianin, *Student Loans Seen as Potential 'Next Debt Bomb' for U.S. Economy*, WASH. POST, March 10, 2012; see, e.g., EDUC. CREDIT MGMT. CORP., *Bankruptcy and Student Loans*, <http://www.ecmc.org/details/bankruptcyStudentLoans.html>. But see *In re Hedlund*, No. 12–35258 (9th Cir. 2013), <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/22/12-35258%20web%20-%20corrected.pdf>; Lance Lochner & Alexander Monge-Naranjo, *Education and Default Incentives with Government Student Loan Programs*, NEBR Working Paper, at 28, 2004; Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 496 (2012) (This article purposely refrains from analyzing the process and procedure for evaluating student loan debt before the bankruptcy court, but rather considers bankruptcy as one of several areas of reform as it relates to obtaining bankruptcy protection while maintaining student loans); Kathleen Pender, *Student Loans' Long-Term Impact*, SAN FRANCISCO GATE, May 27, 2013, <http://www.sfgate.com/business/networth/article/Student-loans-long-term-impact-4548870.php> (“Although the appeals court [in *Hedlund*] ruled in the borrower's favor, discharging all but \$32,000 of more than \$85,000 he owed one student-loan creditor, it took him 10 years and two trips through Bankruptcy Court and the Ninth Circuit.”);

<sup>262</sup> See Bankruptcy Reform Act of 1994, 11 U.S.C. § 313; 11 U.S.C. § 525(c) (2012); see also *Student Financial Aid Handbook, Student Eligibility*, <http://www.ifap.ed.gov/sfahandbooks/attachments/0102Vol5Ch2Eligibility.pdf>; *FinAid, Bankruptcy and Financial Aid*, <http://www.finaid.org/questions/bankruptcy.phtml>; Mark Kantrowitz, *How Does Bankruptcy Affect Eligibility for Student Financial Aid?*, June 6, 2011, <http://www.fastweb.com/financial-aid/articles/3148-how-does-bankruptcy-affect-eligibility-for-student-financial-aid> (“A previous bankruptcy can affect eligibility for some education loans but it does not affect eligibility for other forms of financial aid.”).

<sup>263</sup> See Higher Education Act of 1965, § 428B, 20 U.S.C. § 1078-2(1965); 20 U.S.C. § 1078-2(a)(1) (2012); 34 C.F.R. § 682.201(c)(2)(ii) (2013); 34 C.F.R. § 685.200(c)(1)(vii)(B). (2013); see also Mark Kantrowitz, *Borrowers with a Recent Bankruptcy are Ineligible for the Federal PLUS Loan*, FASTWEB (Feb. 16, 2012), <http://www.fastweb.com/financial-aid/articles/3451-borrowers-with-a-recent-bankruptcy-are-ineligible-for-the-federal-plus-loan?page=3>.

<sup>264</sup> See generally 11 U.S.C. § 525(c); *In re Taylor*, 263 B.R. 139 (N.D. N 2001); *In re Boylan*, 29 B.R. 924 (Bankr. N.D. Ohio 1983); Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV., 1695 (2012).

<sup>265</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109–8 (2005), 11 U.S.C. § 523(a)(8); see generally Leslie Treff, “Undue Hardship” Under Section 523(a)(8): *Can the Debtor's Student Loans Be Discharged?*, LEXISNEXIS BANKR. LAW BLOG, Oct. 29, 2012, <http://www.lexisnexis.com/legalnewsroom/bankruptcy/b/bankruptcy-law-blog/archive/2012/08/30/quot-undue-hardship-quot-under-section-523-a-8-can-the-debtor-s-student-loans-be-discharged.aspx> (“The debtor's required burden is to show “undue hardship” by the preponderance of the evidence. The burden is rigorous and the hardship must be more than just financial adversity. Once the debtor has made its burden, student loan debt will only be discharged if there is a subsequent finding made by a bankruptcy court, prior to the court's discharge of the debt.”). But see CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS REPORT (2012), available at

in *Brunner*,<sup>266</sup> or the alternative “totality of the circumstances” approach,<sup>267</sup> debtors generally continue to endure the financial strain of student loans after bankruptcy.<sup>268</sup> The *Brunner* standard of undue hardship includes an analysis by the federal bankruptcy court that:

(1) the debtor[s] cannot maintain, based on current income and expenses, a 'minimal' standard of living for [themselves and dependents] if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor[s] have made good faith efforts to repay the loans.<sup>269</sup>

The *Brunner* test effectively precludes debtors from discharging student loans, although some relief may ensue.<sup>270</sup>

---

<http://www.consumerfinance.gov/reports/private-student-loans-report/>; Private Student Loan Bankruptcy Fairness Act of 2011, H.R. 2028, 112th Cong. (2011) (proposing that private student loans should be dischargeable); see also Iuliano, *supra* note 261, at 496.

<sup>266</sup> See *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987); see also 11 U.S.C. § 528(a)(8) (2014).

<sup>267</sup> See *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003); National Consumer Bankruptcy Rights Center, *Hardship Test Supports Discharge of Student Loan Debt*, Sept. 23, 2013, <http://www.ncbrc.org/blog/2013/09/23/hardship-test-supports-discharge-of-student-loan/> (“The Eighth Circuit applies a three-part “totality of the circumstances” test to the question of dischargeability of student loans under which a court must consider 1) the debtor’s past, present, and reasonably reliable future financial resources, 2) the debtor’s reasonable and necessary living expenses, and 3) other relevant facts and circumstances. Under this test, the debtor has the burden of proving undue hardship by a preponderance of the evidence.”).

<sup>268</sup> See 11 U.S.C. § 523(a)(8)(B); *Brunner v. N.Y. State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987); see generally Treff, *supra* note 265 (“The exception to discharge was enacted to save the student loan system and to prevent undeserving debtors from obtaining a discharge of their college debts shortly after graduation. . . . Although Congress did not supply a definition of the phrase “undue hardship,” and courts generally have declined to give the phrase a precise definition, one of two tests is employed to ‘examine each factual situation and decide each case on its own merits.’”).

<sup>269</sup> See *Brunner*, 831 F.2d; see also U.S. DEP’T OF EDUC., *Forgiveness, Cancellation, and Discharge*, <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation>; LEXISNEXIS, *Bankruptcy Commentary*, “Undue Hardship” Under Section 523(a)(8): *Can the Debtor’s Student Loans Be Discharged?*, Aug. 30, 2012, <http://www.lexisnexis.com/community/bankruptcylaw/blogs/bankruptcycommentary/archive/2012/08/30/quot-undue-hardship-quot-under-section-523-a-8-can-the-debtor-s-student-loans-be-discharged.aspx> (“The other test used to determine whether or not a debtor has met its burden, denoted the ‘totality of the circumstances’ test, has been officially adopted by the Eighth Circuit, and, since 2010, has been unofficially accepted by the courts of the First Circuit . . . . No full or partial discharge of student loan debt is available unless all three prongs of the *Brunner* test are met.”); National Consumer Bankruptcy Rights Center, *Hardship Test Supports Discharge of Student Loan Debt*, Sept. 23, 2013, <http://www.ncbrc.org/blog/2013/09/23/hardship-test-supports-discharge-of-student-loan/> (“The Seventh and Ninth Circuits apply the three-part “*Brunner*” test. . .”).

<sup>270</sup> See Kent Anderson, *What Is the Brunner Test for Dischargeability of Student Loans?*, BANKR. LAW NETWORK, <http://www.bankruptcylawnetwork.com/what-is-the-brunner-test-for-dischargeability-of-student-loans/>; John O’Connor, *How Can I Tell If My Student Loan Debt Is Dischargeable in Bankruptcy?*, NAT’L BANKR. FORUM, <http://www.nationalbankruptcyforum.com/bankruptcy-myths/how-can-i-tell-if-my-student-loan-debt-is-dischargeable-in-bankruptcy/> (citing *In re Hornsby*); NAT’L CONSUMER BANKR. RIGHTS CTR., *Some Hope for Student Loan Debtors*, April 19, 2013, <http://www.ncbrc.org/blog/2013/04/19/some-hope-for-student-loan-debtors/> (citing *Kreiger v. ECMC*, No. 12–3592 (7th Cir. April 10, 2013) and *Roth v. ECMC*, No. 11–1233 (B.A.P. 9th Cir. April 16, 2013)); Mark Kantrowitz, *Five Myths about Student Loans*, WASH. POST, Nov. 18, 2011 (“[A]bout 72,000 federal student loan borrowers filed for bankruptcy in 2008, but only 29 succeeded in obtaining a full or partial discharge of their loans. That’s 0.04 percent.”). *But see* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, *American Bankruptcy Law Journal*, vol. 86 (2012) (finding that four out of ten bankruptcy petitioners were successful in discharging their student loans while



In general, parents who acquire PLUS loans on behalf of dependent students are subject to the non-dischargeable student loan provisions of the Bankruptcy Code.<sup>271</sup> Accordingly, distressed PLUS loan borrowers may essentially be penalized in bankruptcy when existing student loans are not discharged, and again when trying to obtain federal financing for education in the future.<sup>272</sup> Consequently, such result may circumvent the purpose of federal bankruptcy laws.<sup>273</sup>

Bankruptcy may be used as a strategy to leverage financial stability, as opposed to an indication of delinquency.<sup>274</sup> Filing for bankruptcy may also be used as a tactic to utilize an automatic stay to delay a home foreclosure or extend protection from aggressive debt collection.<sup>275</sup> Individual bankruptcies are filed, in large part, due to unexpected health and medical issues.<sup>276</sup> Reasons to file for bankruptcy may

---

thousands of debtors who would have been good candidates to obtain some relief never actually tried to discharge their student loans).

<sup>271</sup> See 11 U.S.C. § 525(c) (2012); *In re Taylor*, 263 B.R. 139, 148 (N.D. Ala. 2001); see also 11 U.S.C. § 523(a)(8); *In re Webb*, 151 B.R. 804 (1992); *In re Votruba*, 310 B.R. 698 (2004) (noting a split of authority on whether non-student borrowers are subject to the student loan discharge prohibition under the Bankruptcy Code without a finding of undue hardship).

<sup>272</sup> See generally PARENTPLUSLOAN.COM, *PLUS Loan Forgiveness or Cancellation*, <http://www.parentplusloan.com/repayment/forgiveness.php>; STUDENT LOAN BORROWER ASSISTANCE, *Student Loans & Bankruptcy*, <http://www.studentloanborrowerassistance.org/bankruptcy/>. But see USA FUNDS, *Eligibility for Borrowers in Bankruptcy*, <http://www.usafunds.org/USAFunds%20ResourceLibrary/Bankruptcy.pdf> (“If the loan was not in default when the student (or parent) filed the bankruptcy action, then the bankruptcy action itself has no effect on the borrower’s eligibility for the Stafford, PLUS, or Perkins loan and the school must originate the new loan despite the bankruptcy. The school also must award and disburse other Title IV funds for which the student is eligible. If the loan defaulted prior to the filing of the bankruptcy action, then that default causes the student (or parent) borrower to be ineligible for additional Title IV funds—of any kind, including loan funds—until the default is resolved.”).

<sup>273</sup> See generally U.S. COURTS, *Bankruptcy Basics – Process*, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Process.aspx> (“A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial ‘fresh start’ from burdensome debts . . . . This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.”) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934)).

<sup>274</sup> See generally LI GAN ET AL., *STRATEGIC OR NON-STRATEGIC: THE ROLE OF FINANCIAL BENEFIT IN BANKRUPTCY*, <http://www2.ku.edu/~kuwpaper/2009Papers/201303.pdf>; JOHN MARK WILK, *CHAPTER 13 BANKRUPTCY AND STRATEGIC DEFAULTS*, AVVO, <http://www.avvo.com/legal-guides/ugc/chapter-13-bankruptcy-and-strategic-defaults>. But see MICHELLE J. WHITE, *ECONOMICS OF CORPORATE AND PERSONAL BANKRUPTCY LAW*, <http://weber.ucsd.edu/~miwhite/palgrave-bankruptcy-3.pdf>; Michelle J. White, *What’s Wrong with U.S. Personal Bankruptcy Law and How to Fix It*, 22 REG. 18 (1999). <http://www.cato.org/sites/cato.org/files/serials/files/regulation/1999/10/bankruptcy.pdf>; Online Bankruptcy Blog, *Are Smart Debtors Using Strategic Bankruptcies for Help*, April 26, 2011, <http://onlinebankruptcyblog.com/bankruptcy/smartdebtorsstrategicbankruptcies/>; Federal Trade Commission, *Debt Relief or Bankruptcy?*, Consumer Information, <http://www.consumer.ftc.gov/articles/0084-debt-relief-or-bankruptcy> (“Both types [Chapter 7 and Chapter 13] of [personal] bankruptcy may get rid of unsecured debts and stop foreclosures, repossessions, garnishments and utility shut-offs, and debt collection activities. Both also provide exemptions that allow you to keep certain assets, although exemption amounts vary by state.”).

<sup>275</sup> See Ilyce Glink & Samuel Tamkin, *Is Bankruptcy a Better Option than Strategic Default?*, CHI. TRIB., May 27, 2012; see generally 11 U.S.C. § 362; U.S. COURTS, *Bankruptcy Basics – Glossary*, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Glossary.aspx> (defining an automatic stay as, “An injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed.”); ONLINE BANKR. BLOG, *Are Smart Debtors Using Strategic Bankruptcies for Help*, April 26, 2011, <http://onlinebankruptcyblog.com/bankruptcy/smartdebtorsstrategicbankruptcies/>. But see generally Anthony J. Ciccone, *Automatically Violating the Stay?*, In 5 BANKR. NEWSL., no. 3, 1997; West Virginia Bankruptcy Law Center, *Good Reasons to Delay Filing Bankruptcy Until Now: The Special Timing Advantages of Dealing with Your Student Loans Under Chapter 13*, Feb. 19, 2014, <http://wvbankruptcylawcenter.com/blog/?p=548>.

<sup>276</sup> See David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED., 741–46 (2009); NAT’L PATIENT ADVOC. FOUND., *MEDICAL DEBT, MEDICAL BANKRUPTCY AND THE*

also be attributed to divorce and debt mismanagement.<sup>277</sup> Low and moderate-income individuals may resort to filing for bankruptcy as a last-ditch attempt to improve their overall economic outlook.<sup>278</sup> Legitimate bankruptcy actions should be sustained under the Bankruptcy Code as revisions are considered to address exorbitant student loan debt.<sup>279</sup>

In an effort to promote debtor rehabilitation, the federal student loan program should not penalize citizens who seek to exercise their bankruptcy rights and subsequently enroll themselves or their dependents in college to enhance employment prospects.<sup>280</sup> Proposed legislation, such as the Fairness for Struggling Students Act and the Private Student Loan Bankruptcy Fairness Act, may provide financial relief for over-burdened parents and students.<sup>281</sup> Reasonable forgiveness and responsible lending should

IMPACT ON PATIENTS, (2012); *see generally* LI GAN & TARUN SABARWAL, A SIMPLE TEST OF ADVERSE EVENTS AND STRATEGIC TIMING THEORIES OF CONSUMER BANKRUPTCY, NAT'L BUREAU OF ECON. RES., (2005), [http://www.nber.org/papers/w11763.pdf?new\\_window=1](http://www.nber.org/papers/w11763.pdf?new_window=1).

<sup>277</sup> *See generally* GAN & SABARWAL, *supra* note 274; Susan Johnston, *5 Bankruptcy Myths Debunked*, U.S. NEWS & WORLD REP., May 14, 2012; BANKR. LAW, REASONS TO FILE BANKRUPTCY, <http://www.bankruptcylaw.org/Basics/reasons-file.html>.

<sup>278</sup> *See generally* MARK R. LINDBLAD ET AL., COPING WITH ADVERSITY: PERSONAL BANKRUPTCY DECISIONS OF LOWER-INCOME HOMEOWNERS BEFORE AND AFTER BANKRUPTCY REFORM, CTR. FOR COMMUNITY CAPITAL (2011), <http://www.fdic.gov/news/conferences/linblad.pdf>; NORTHWEST JUSTICE PROJECT, CHANGES IN THE BANKRUPTCY LAW THAT AFFECT LOW-INCOME PEOPLE (2011), <http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/3923C0D7-C8E3-3696-0C02-F70B30863C08/2502810103.pdf>; Ian Domowitz & Robert L. Sartain, *Determinants of the Consumer Bankruptcy Decision*, JOURNAL OF FINANCE, vol. 54, issue 1, pgs. 403 – 420, Feb. 1999; Adam Carasso and Signe-Mary McKernan, *The Balance Sheets of Low-Income Households: What We Know about Their Assets and Liabilities*, Urban Institute, Nov. 2007, <http://aspe.hhs.gov/hsp/07/poorfinances/balance/index.shtml> (correlating race, ethnicity, and education-level with the assessment of wealth across various subsets of the family structures).

<sup>279</sup> *See* Fairness for Struggling Students Act (2013) (treating private student loans similar to other private debt for bankruptcy purposes); Dick Durbin, *As Student Loan Debt Surpasses \$1 Trillion, Senators Introduce Legislation to Address Crisis*, U.S. SENATE, Jan. 23, 2013, <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=adad47a3-9b82-4c46-b971-57bb9dc11044>; Josh Mitchell, *Obama Administration Backs Bankruptcy Option for Some Student Debt*, WALL ST. J., July 20, 2012, <http://online.wsj.com/article/SB10000872396390444097904577537390098445700.html> (“Sallie Mae, the nation's largest private issuer of student loans, said it would back a legislative change that would allow bankruptcy in limited cases.”); *see generally* David Bernstein, *Seven Ways to Provide Student Loan Debt Relief*, NASFAA, Oct. 23, 2012 [http://www.nasfaa.org/advocacy/perspectives/articles/Seven\\_Ways\\_to\\_Provide\\_Student\\_Loan\\_Debt\\_Relief.aspx](http://www.nasfaa.org/advocacy/perspectives/articles/Seven_Ways_to_Provide_Student_Loan_Debt_Relief.aspx) (“Any proposal that makes it easy to discharge government guaranteed student loans in bankruptcy entails some additional cost to the taxpayer. However, it is easy to envision a less stringent student loan discharge rule that does not significantly increase taxpayer costs. Such a rule would rely on objective criteria rather than the subjective “undue hardship” concept. For example, student loan discharge could be limited to individuals with incomes near poverty level, contingent on participation in the IBR program, favor individuals with medical problems, and allow for partial, rather than full, loan cancellation.”).

<sup>280</sup> *See generally* Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587; Elizabeth Warren, *Student Loan Scandal Fallout*, Credit Slips, June 3, 2007 (referring to Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 making for-profit student loans non-dischargeable in bankruptcy); MIKE KONCZAL, TWO STEPS TOWARD TACKLING OUR CURRENT STUDENT LOAN PROBLEMS, Nov. 7, 2011, <http://rortybomb.wordpress.com/2011/11/07/two-steps-towards-tackling-our-current-student-loan-problems/>.

<sup>281</sup> *See* Fairness for Struggling Students Act of 2013, S.114 (“To amend title 11, United States Code, with respect to certain exceptions to discharge in bankruptcy.”); Private Student Loan Bankruptcy Fairness Act of 2013, H.R. 532, 113th Cong. (2013) (“To amend title 11 of the United States Code to modify the dischargeability of debts for certain educational payments and loans.”). *But see* *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 Harv. L. Rev. 597 (2012), at 597 – 98 (remarking on the unviability of the Private Student Loan Bankruptcy Fairness Act); Bill Fay, *‘Fairness for Struggling Students Act’ Is Struggling to be Heard*, DEBT.ORG (March 8, 2013), <http://www.debt.org/2013/03/08/student-loan-bankruptcy/>.

combine to promote accountability and transparency in the student loan industry.<sup>282</sup> Debtors and creditors must reasonably respond to the expanding student loan bubble as a financial aid crisis looms, especially when considering the negative impact that race and ethnicity may have on a bankruptcy filing regarding student loan debt.<sup>283</sup> Latinos, and particularly African Americans, may endure higher obstacles when scaling over the mountain of student loan debt through bankruptcy.<sup>284</sup> Accordingly, considerate reform of the Bankruptcy Code should entail a rigorous assessment of the racial undertones of the disproportionate student loan debt burden across color lines.<sup>285</sup> A more flexible approach to debtor rehabilitation when it comes to student loan repayment may amass a higher yield of repayment in lieu of total discharge in bankruptcy.<sup>286</sup> The impending reauthorization of the HEA presents an opportunity to adequately address the debilitating effects of student loan debt prior to pursuing bankruptcy as a last resort.<sup>287</sup>

---

<sup>282</sup> See generally Ron Lieber, *Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES, Sept. 1, 2012, at A1; Kayla Webley, *Why Can't You Discharge Student Loans in Bankruptcy?*, TIME, Feb. 9, 2012.

<sup>283</sup> See A. Michele Dickerson, *Race Matters in Bankruptcy*, 61 Wash. & Lee L. Rev. 1725 (2004), pgs. 1732 – 1733; see also Kevin H. Morse and Barry Chatz, *Bursting Our Next Bubble: The Expanding Student Loan Debt Crisis*, THOMSON REUTERS, Oct. 5, 2012; see generally Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329; Ron Lieber, *Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES, at A1, Sept. 1, 2012.

<sup>284</sup> See generally A. Michele Dickerson, *Race Matters in Bankruptcy*, 61 Wash. & Lee L. Rev. 1725 (2004), at 1768 – 1771, 1771 (“Because the typical black college student is more likely to come from a lower income household and low-income students are statistically more likely to default on student loans than other students, blacks also appear to have higher student loan default rates. Blacks who attend college tend to receive less money from their parents to pay for their education. Because of this, they find it increasingly difficult to increase their wealth by saving for (then buying) a house even after they graduate from college and get high-income jobs because they need to use their income to repay student loans.”) (citations omitted).

<sup>285</sup> See generally *Id.*; Michele A. Dickerson, “Race Matters in Bankruptcy Reform.” *Mo. L. Rev.* 71 (2006): 919.

Keating, Daniel. “From Fair Driving to Fair Discharging: Racially Disparate Outcomes in Common Consumer Transactions.” *Am. Banker. Inst. L. Rev.* 20 (2012): 701.

<sup>286</sup> See generally Suzanne Martindale, *Degrees of Debt: Stories from Student Loan Borrowers Highlight Urgent Need for Reform*, CONSUMERS UNION OF U.S., INC., Nov. 13, 2013, [http://consumersunion.org/wp-content/uploads/2013/11/Degrees-of-Debt\\_2013.pdf](http://consumersunion.org/wp-content/uploads/2013/11/Degrees-of-Debt_2013.pdf); Michael D. Sabbath, *Student Loans in Chapter 7 and Chapter 13*, <http://sblinc.org/archive/2008/documents/SABBATH%20FINAL%20Michael%20Sabbath's%20SBLI%202008%20Paper%20re%20Student%20Loans.pdf>, pgs. 24 – 27 (discussing the effect of the student loan debtor’s choice to enroll in an income contingent repayment plan on an assessment of good faith in bankruptcy proceedings); Joe Valenti and David A. Bergeron, *How Qualified Student Loans Could Protect Borrowers and Taxpayers*, CENTER FOR AMERICAN PROGRESS (Aug. 20, 2013), <http://www.americanprogress.org/wp-content/uploads/2013/08/QualifiedStudentLoansCC.pdf> (noting that Parent PLUS loan borrowers are, in general, precluded from the income-based repayment programs, therefore promoting the use of “Qualified Student Loans [that] would include loans, both federal and private, that have reasonable repayment conditions such as low interest rates and access to favorable forbearance, deferment, and income-based repayment options.”); David Bernstein, *Seven Ways to Provide Student Loan Debt Relief*, NASFAA (Oct. 23, 2012) [http://www.nasfaa.org/advocacy/perspectives/articles/Seven\\_Ways\\_to\\_Provide\\_Student\\_Loan\\_Debt\\_Relief.aspx](http://www.nasfaa.org/advocacy/perspectives/articles/Seven_Ways_to_Provide_Student_Loan_Debt_Relief.aspx) (“There are two ways debtors can seek student loan debt relief in bankruptcy. First, the debtor could petition the court for a complete or partial discharge of student debt. Second, in a Chapter 13 bankruptcy the debtor could petition the court for a payment plan that favors the repayment of student loans over the repayment of other unsecured loans. Neither remedy is easily obtained.”).

<sup>287</sup> See generally Suzanne Martindale, *Degrees of Debt: Stories from Student Loan Borrowers Highlight Urgent Need for Reform*, CONSUMERS UNION OF U.S., INC. (Nov. 13, 2013), [http://consumersunion.org/wp-content/uploads/2013/11/Degrees-of-Debt\\_2013.pdf](http://consumersunion.org/wp-content/uploads/2013/11/Degrees-of-Debt_2013.pdf), pg. 14 (“Starting in 2014, Congress will begin the process for reauthorizing the Higher Education Act of 1965 (HEA), which sets the framework for federal grant money and student loan programs. The HEA reauthorization process presents the key opportunity to strengthen federal aid programs so that financial aid offers, counseling, repayment plans and forgiveness options are more accessible and transparent.”) (citation omitted).

## V. CONCLUSION

This Article provides insight for the amendment and reauthorization of the Higher Education Act,<sup>288</sup> as the evolving educational debt debate continues.<sup>289</sup> The politicized nature of the student loan industry contributes to the expansion of the wealth gap in this country.<sup>290</sup> Alignment of a more educated workforce with less debt is the goal in providing an outline to address the inequities in student aid.<sup>291</sup> The current student loan policy economically divides the upper and middle classes, often along racial and ethnic lines.<sup>292</sup> Higher education attainment contributes to greater household wealth, and ultimately, to a more prosperous nation.<sup>293</sup> Equitable reform of the financial aid system would provide a more

---

<sup>288</sup> See generally Higher Education Act of 1965, Pub. L. 89–329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

<sup>289</sup> See generally Student Loan Affordability Act, S. 953, 113th Cong. (2013); see also Higher Education Opportunity Act (HEOA), Pub. L. 110–315, 122 Stat. 3078 (2008) (codified in scattered sections of 20 U.S.C.) (reauthorizing the Higher Education Act of 1965, as amended); Mark Compton, *If Congress Doesn't Act, Rates for New Federal Student Loans Will Double*, WHITE HOUSE (May 31, 2013, 1:42 PM), <http://www.whitehouse.gov/blog/2013/05/31/if-congress-doesnt-act-rates-new-federal-student-loans-will-double>; Kelly Field, *Calls Mount for Changing How Interest Rates Are Set on Federal Student Loans*, CHRON. OF HIGHER EDUC. (Apr. 9, 2013), <https://chronicle.com/article/Calls-Mount-for-Changing-How/138451/>.

<sup>290</sup> See Peter J. Reilly, *Note for "Super Wednesday"—Either Party Can Occupy the Student Loan Issue*, FORBES (Mar. 7, 2012, 6:56 AM), <http://www.forbes.com/sites/peterjreilly/2012/03/07/note-for-super-wednesday-either-party-can-occupy-the-student-loan-issue>; see generally KATHLEEN ANN URADNIK ET AL., *College Funding and Debt*, in 1 BATTLEGROUND: GOVERNMENT AND POLITICS 122 (2011); Gary Orfield, *Money, Equity, and College Access*, 62 HARV. EDUC. REV. 337 (1992); see also SIGNE-MARY MCKERNAN ET AL., *Less Than Equal: Racial Disparities in Wealth Accumulation* (2013), available at <http://www.urban.org/UploadedPDF/412802-Less-Than-Equal-Racial-Disparities-in-Wealth-Accumulation.pdf>; THOMAS SHAPIRO ET AL., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide* (2013), available at <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> (homeownership and a college education are driving factors in the growing racial divide in wealth); Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks Hispanics*, PEW RES. CENTER (July 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

<sup>291</sup> See generally ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, *The Rising Price of Inequality: How Inadequate Grant Aid Limits College Access and Persistence* (2010), available at [http://chronicle.com/items/biz/pdf/acsfa\\_rpi.pdf](http://chronicle.com/items/biz/pdf/acsfa_rpi.pdf); Ronald Brownstein, *A Broken Ladder*, NAT'L J., March 9, 2013; Amy Ellen Schwartz, *Costs and Implications*, in *Economic Inequality and Higher Education: Access, Persistence, and Success* 157 (Stacy Dickert-Conlin & Ross Rubenstein eds., 2007).

<sup>292</sup> See generally EDWARD P. ST. JOHN & ERIC H. ASKER, *Refinancing the College Dream: Access, Equal Opportunity, and Justice for Taxpayers* 12 (2003); John Brooks Slaughter, *It's Time to Get Angry About Underserved Students*, CHRON. OF HIGHER EDUC. (Jan. 23, 2009), <http://chronicle.com/article/It-s-Time-to-Get-Angry-About/5837>; JACQUELINE E. KING, *Financing a College Education: How It Works, How It's Changing* 177, 180 (2002); ANTHONY P. CARNEVALE ET AL., *The College Payoff: Education, Occupations, Lifetime Earnings* 12 (2011), available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2011/collegepayoff.pdf> (“For African Americans and Latinos, there are large gaps between earnings when compared to Whites, especially at the lowest levels of education attainment.”).

<sup>293</sup> See *Prepare for College*, FED. STUDENT AID, <http://studentaid.ed.gov/prepare-for-college> (last visited Apr. 26, 2014); Beckie Supiano, *More Young Adults Hold Degrees, a Boost in the Job Market, U.S. Says*, CHRON. OF HIGHER EDUC. (May 24, 2013), <http://chronicle.com/article/More-Young-Adults-Hold/139473/>; see generally U.S. DEP'T OF EDUC., *The Condition of Education 2013*, INSTITUTE OF EDUCATION SCIENCES (2013); PAUL TAYLOR ET AL., *Is College Worth It?: College Presidents, Public Access Value, Quality and Mission of Higher Education* (2011). But see Scott Carlson, *How to Assess the Real Payoff of a College Degree*, CHRON. OF HIGHER EDUC. (Apr. 22, 2013), <http://chronicle.com/article/Is-ROI-the-Right-Way-to-Judge/138665/>; ANTHONY P. CARNEVALE ET AL., *The College Payoff: Education, Occupations, Lifetime Earnings* 2 (2011), available at <http://cew.georgetown.edu/collegepayoff> (“Women earn less at all degree levels, even when they work as much as men. On average, women who work full-time, full-year earn 25 percent less than men, even at similar education levels. At all

sustainable student debt structure.<sup>294</sup> Innovation in the student loan market is recommended to move towards economic justice.<sup>295</sup>

Several areas of law and society may benefit from student loan reform including consumer protection, bankruptcy, and creditor rights.<sup>296</sup> The proactive movement to revise the lending process for student loan borrowers may establish a more level playing field to ultimately build wealth in minority communities through education.<sup>297</sup> Educational achievement is a factor in building and passing on wealth to future generations, especially in minority and low-income households.<sup>298</sup> A college degree may provide families with stability and upward mobility to climb the ladder of success.<sup>299</sup> Accordingly, the federal government should continue to support higher education and revise the financial aid system in taking steps to lower student debt.<sup>300</sup>

Devastating student debt and the impending student loan bubble threaten the very thread of our economic and moral fiber. Easing the mounting student loan debt may serve to restore hope in an educated generation to compete within the global economy.<sup>301</sup> Our collective future relies upon the

---

levels of educational attainment, African Americans and Latinos earn less than Whites. For example, African Americans and Latinos with Master's degrees have lifetime earnings lower than Whites with Bachelor's degrees.”)

<sup>294</sup> See generally Arne Duncan, Making the Financial Aid System Sustainable: Remarks of the U.S. Secretary of Education to the 2013 FSA Training Conference for Financial Aid Professionals, Dec. 4, 2013, <http://www.ed.gov/news/speeches/making-financial-aid-system-sustainable> (“Simply put, our current system of financial aid is unsustainable.”).

<sup>295</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, STUDENT LOANS: FEDERAL WEB-BASED TOOL ON PRIVATE LOANS WOULD POSE IMPLEMENTATION CHALLENGES AND MAY BE UNNECESSARY (2010), available at <http://www.gao.gov/assets/320/310215.pdf>; Duncan, *supra* note 294.

<sup>296</sup> See generally Karen Cordry, *Student Loan Issues Come to the Fore*, NAT'L ASS'N OF ATT'YS GEN., <http://www.naag.org/student-loan-issues-come-to-the-fore.php> (last visited Apr. 26, 2014); *The Argument*, STUDENTLOANJUSTICE.ORG, <http://www.studentloanjustice.org/argument.htm>. (last visited Apr. 26, 2014).

<sup>297</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 295; Thomas Shapiro, et al, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ON ASSETS AND SOC. POL., Feb. 2013; Beth Tarasawa & Michael Dahlin, *For Whom the Pell Tolls: How Financial Aid Policies Widen the Opportunity Gap*, Northwest Evaluation Ass'n, 2013.

<sup>298</sup> See generally DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 8 (1999) (“While legal equality of opportunity might have been established and some income gains made, institutionalized racism persisted nonetheless, and the scars of centuries of overt repression remained.”); Bárbara J. Robles, *Exploring the Wealth Returns to Latino Higher Educational Attainment: Estimates of Work-Life Earnings Profiles*, J. OF HISP. HIGHER EDUC., Jan. 2009, at 5; Maury Gittleman and Edward N. Wolff, Racial Wealth Disparities: Is the Gap Closing?, Working Paper No. 311, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.172.4220&rep=rep1&type=pdf>.

<sup>299</sup> See generally SHAPIRO ET AL., *supra* note 297; PEW CHARITABLE TRUSTS, HOW MUCH PROTECTION DOES A COLLEGE DEGREE AFFORD? THE IMPACT OF THE RECESSION ON RECENT COLLEGE GRADUATES (2013), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2013/Pew\\_college\\_grads\\_recession\\_report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/Pew_college_grads_recession_report.pdf); William Elliott & Melinda Lewis, *Student Loans Are Widening the Wealth Gap: Time to Focus on Equity, Assets and Education Initiative* (2013); Caroline M. Hoxby & Christopher Avery, The Mission “One-Offs”: The Hidden Supply of High-Achieving, Low Income Students, Nat'l Bureau of Econ. Research, Working Paper No. 18586, Dec. 2012; Megan Woolhouse, *Wealth Gap Limits Equality of Education*, BOS. GLOBE, July 5, 2013.

<sup>300</sup> See generally Uradnik, *supra* note 290, at 128 (noting that despite presidential and congressional efforts towards student loan reform, the cost savings from such actions has yet to translate into further funding for higher education); Kantrowitz, *supra* note 8, at 16 (noting the congressional role in increasing federal grant and loan limits that remained stagnant for a number of years despite the government's stake in ensuring college access. Such increase in aggregate loan limits is necessary because students are reaching the limits faster due to the rising cost of higher education while increasingly becoming ineligible or unable to take out PLUS loans).

<sup>301</sup> See generally Cunningham & Kienzl, *supra* note 157; Josh Freedman, *Risky Business: Why Student Loans Are the Worst Way to Fund College*, FORBES (Feb. 10, 2014, 9:00 AM), <http://www.forbes.com/sites/joshfreedman/2014/02/10/>

availability of federal student loans to build an educated and highly skilled workforce as a means to boost the American economy.<sup>302</sup> Equitable student loan reform may particularly serve vulnerable populations, including non-traditional students, by promoting independence and economic prosperity.<sup>303</sup> College graduates on average earn more money and contribute more income to federal and state taxes.<sup>304</sup> Those same tax dollars could be put to work in paying it forward for higher education.<sup>305</sup> An increase in federally-mandated student loan disclosures, regulatory oversight and supervision may establish the means to narrow the wealth gap in presenting the 99%<sup>306</sup> with an opportunity to attain the same American Dream as the top 1%.<sup>307</sup> The reauthorization of the Higher Education Act provides an opportunity to realize reasonable student loan debt reform, especially through amendment of the adverse

---

risky-business-why-student-loans-are-the-worst-way-to-fund-college/.

<sup>302</sup> See generally Price, *supra* note 54, at 6; The White House, *Higher Education*, <http://www.whitehouse.gov/issues/education/higher-education> (“In higher education, the U.S. has been outpaced internationally. In 1990, the U.S. ranked first in the world in four-year degree attainment among 25-34 year olds; today, the U.S. ranks 12th. We also suffer from a college attainment gap, as high school graduates from the wealthiest families in our nation are almost certain to continue on to higher education, while just over half of our high school graduates in the poorest quarter of families attend college. And while more than half of college students graduate within six years, the completion rate for low-income students is around 25 percent.”).

<sup>303</sup> See William Elliott & Terri Friedline, “*You Pay Your Share, We’ll Pay Our Share*”: *The College Cost Burden and the Role of Race, Income, and College Assets*, 33 ECON. OF EDUC. REV. 134 (2012); see generally INSTITUTE FOR HIGHER EDUCATION POLICY ET AL., *STUDENT LOAN DEBT: PROBLEMS & PROSPECTS*, at 103, 106, 111–112 (1998); Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. OF HIGHER EDUC., 407 (2009) (noting the problems faced by undocumented immigrants concerning the application and regulation of financial aid); GANDARA, *supra* note 11, at 56 (“Low-income, first-generation, and minority youth today face many barriers to college access, including inadequate academic preparation, insufficient information about college and the student aid process, rising tuition, and shortfalls in student aid, especially grant aid.”).

<sup>304</sup> See SANDRA BAUM ET AL., *EDUCATION PAYS 2010: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY*, COLLEGE BOARD 11 (2010), [http://advocacy.collegeboard.org/sites/default/files/Education\\_Pays\\_2010.pdf](http://advocacy.collegeboard.org/sites/default/files/Education_Pays_2010.pdf); UNIV. OF WASH., *WHAT IS A COLLEGE EDUCATION WORTH . . . FOR THE CITIZENS, COMMUNITY, EMPLOYERS, STATE AND STUDENTS*, available at [http://www.washington.edu/externalaffairs/files/2012/10/value\\_of\\_education.pdf](http://www.washington.edu/externalaffairs/files/2012/10/value_of_education.pdf).

<sup>305</sup> See generally MIKE KONCZAL, *Could We Redirect Tax Subsidies to Pay for Free College?*, NEXT NEW DEAL (Dec. 20, 2011), [http://www.nextnewdeal.net/rortybomb/could-we-redirect-tax-subsidies-pay-free-college?utm\\_source=Daily+Digest&utm\\_campaign=1aca816a25-DD\\_5\\_10\\_135\\_10\\_2013&utm\\_medium=email&utm\\_term=0\\_e4428ba350-1aca816a25-10716385](http://www.nextnewdeal.net/rortybomb/could-we-redirect-tax-subsidies-pay-free-college?utm_source=Daily+Digest&utm_campaign=1aca816a25-DD_5_10_135_10_2013&utm_medium=email&utm_term=0_e4428ba350-1aca816a25-10716385); CHRISTOPHER M. MULLIN & KENT PHILLIPE, *COMMUNITY COLLEGE CONTRIBUTIONS*, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES (2013), available at [http://www.aacc.nche.edu/Publications/Briefs/Documents/2013PB\\_01.pdf](http://www.aacc.nche.edu/Publications/Briefs/Documents/2013PB_01.pdf).

<sup>306</sup> See Ezra Klein, *Who Are the 99 Percent?*, WASH. POST (Oct. 4, 2011) (describing the Occupy Wall Street movement to include protest against college debt); see generally CONG. BUDGET OFFICE, *TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007* (2011), available at <http://cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf> (“CBO finds that, between 1979 and 2007, income grew by: 275 percent for the top 1 percent of households, 65 percent for the next 19 percent, just under 40 percent for the next 60 percent, and 18 percent for the bottom 20 percent.”).

<sup>307</sup> See generally Justin R. La Mort, *Generation Debt and the American Dream: The Need for Student Loan Reform*, 4 HARV. L. & POL’Y REV. (2010); Mitchell F. Crusto, *Obama’s Moral Capitalism: Resuscitating the American Dream*, 63 U. MIAMI L. REV. 1011 (2008–2009); see also Klein, *supra* note 306 (describing the Occupy Wall Street movement to include protests against college debt); CONG. BUDGET OFFICE, *supra* note 306; Joseph E. Stiglitz, *A Tax System Stacked Against the 99 Percent*, N.Y. TIMES (Apr. 14, 2013), [http://opinionator.blogs.nytimes.com/2013/04/14/a-tax-system-stacked-against-the-99-percent/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2013/04/14/a-tax-system-stacked-against-the-99-percent/?_php=true&_type=blogs&_r=0) (“Most of the Western world has experienced an increase in inequality in recent decades, though not as much as the United States has.”).

credit barrier for graduate and parent PLUS loans.<sup>308</sup> Our economic and social well-being ultimately depend on it.<sup>309</sup>

---

<sup>308</sup> See Nelson, *supra* note 85, <http://www.insidehighered.com/news/2013/04/17/2-hearings-congress-takes-first-steps-toward-rewriting-higher-education-act> (“The Higher Education Act, last rewritten in 2008, expires at the end of this calendar year. No one knows when Congress will actually finish renewing it or how the deep partisan divide that pervades Capitol Hill will complicate what is already a lengthy process. Last time around, it took five years to renew the act after it expired.”); Press Release, H.R. Educ. & the Workforce Comm., Preparing for Higher Education Act Reauthorization, Subcommittee Explores the Role of Federal Student Aid, (Apr. 16, 2013), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=329232> (“[M]embers and higher education experts discussed the upcoming reauthorization of the *Higher Education Act*, and explored the question of whether the federal government should maintain its traditional focus on improving access to higher education, or move toward a system that ties federal aid to student outcomes, job placement, or graduation rates.”).

<sup>309</sup> See WHITE HOUSE, ENSURING THAT STUDENT LOANS ARE AFFORDABLE, *available at* <http://www.whitehouse.gov/sites/default/files/100326-ibr-fact-sheet.pdf> (highlighting benefits for student loan lenders enrolling in college for 2014 or later under the Health Care and Education Reconciliation Act); *see generally* CONSUMER FIN. PROT. BUREAU, STUDENT LOAN AFFORDABILITY: ANALYSIS OF PUBLIC INPUT ON IMPACT AND SOLUTIONS (2013), *available at* [http://files.consumerfinance.gov/f/201305\\_cfpb\\_rfi-report\\_student-loans.pdf](http://files.consumerfinance.gov/f/201305_cfpb_rfi-report_student-loans.pdf); David A. Bergeron & Tobin Van Ostern, *A Comprehensive Analysis of the Student-Loan Interest-Rate Changes that Are Being Considered by Congress*, CENTER FOR AM. PROGRESS (June 27, 2013) (“An advanced degree provides individuals with a clear path to the middle class, a higher likelihood of meaningful and gainful employment, and lifelong financial and personal benefits. College education also provides for a skilled workforce that is crucial to rebuilding the entire American economy.”).

